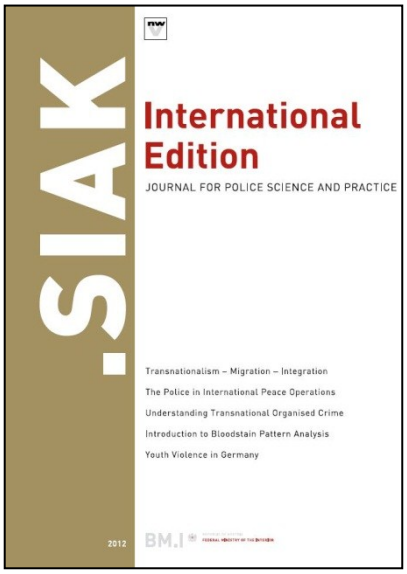
.SIAK REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF THE INTERIOR
SICHERHEITSAKADEMIE

.SIAK-Journal – Journal for Police Science and Practice



Koblizek, Albert (2015):

Compliance at the Austrian Federal Ministry of the Interior and Public Service Law

SIAK-Journal − Journal for Police Science and Practice (International Edition Vol. 5), 56-67.

doi: 10.7396/IE_2015_E

Please cite this articel as follows:

Koblizek, Albert (2015). Compliance at the Austrian Federal Ministry of the Interior and Public Service Law, SIAK-Journal − Journal for Police Science and Practice (International Edition Vol. 5), 56-67, Online: http://dx.doi.org/10.7396/IE_2015_E.

published online: 7/2015

Compliance at the Austrian Federal Ministry of the Interior and Public Service Law

ALBERT KOBLIZEK,
Deputy head of department I/1 at the Austrian Federal Ministry of the Interior.

Compliance is becoming a strategic instrument of the Austrian Federal Ministry of the Interior as a body responsible for law and order. It serves to prevent and combat corruption and other undesirable forms of behaviour within the ministry's own ranks. In the discussion to date on the introduction of compliance in order to combat corruption in public administration, there has been a very strong emphasis on criminal legislation, owing to the various amendments to the Criminal Code in the past few years, and most recently the amendments to the Criminal Code that came into force on 1 January 2013 as a result of the Act of 2012 on Amendment of the Criminal Law on Corruption. Academic research into the organisational implementation of compliance tends to focus on business management in the private sector. The organisation of compliance structures at some companies is now of considerable scope. This paper will show that, when implementing compliance (which involves raising awareness and guidance) in public administration, which is governed by public service law, it is possible to rely on existing regulations and organisational units, rather than focusing on the creation of new regulations and organisational units.

Compliance, long an unfamiliar world in the public sector, has gained in significance in this field too in recent years. There are numerous definitions of the term "compliance", but essentially it involves adhering to rules. In terms of companies or comparable organisations, a compliance system sets out how managers and all other staff of the company should conduct themselves in accordance with the law and the company's principles, and also defines measures to ensure adherence with those rules.[1] Compliance plays a significant role in the future strategy of the Austrian Federal Ministry of the Interior for 2014 (INNEN.SICHER 2014). In INNEN.SICHER 2014 the strategy of the Ministry of the Interior is determined, inter alia, by an internal framework consisting of "core values, the mission statement and the associated instruments (code of conduct, compliance system and management principles)"[2].

The significance of compliance in this strategy follows from the responsibility of the Ministry of the Interior for law and order. Given its purview over law and order, the ministry needs to set an example and is also judged by those it serves, i.e. the law-and-order-seeking public "according to how much attention is paid to prevention and combating of corruption

and other undesirable forms of behaviour within its own ranks"[3].

Compliance comprises a set of rules with which companies aim to ensure the avoidance of violations by means of suitable organisational measures. The implementation of compliance has been and is fostered at the Ministry of the Interior by measures such as the creation of a code of conduct for all employees of the ministry, and organisationally by amending the division of tasks as of 1 June 2013 to take account of compliance.

Establishing awareness of the issue is of particular importance for the implementation of compliance, i.e. all the relevant precautions, to ensure the lawful conduct of staff. Indeed, experiences in public administration to date show that, owing to the increasing volume of regulations, compliance with the legal norms is increasingly difficult in the various subareas, since recognition of the correct conduct requires (more) time and effort. There is also an increasingly extensive supply of information, which varies in relevance. It is therefore crucial that the individual public servants are familiar with the norms applicable to them and become aware that they should question their own conduct in their official capacity or in connection with their official capacity according to the relevant norms.

Without such awareness, there is a risk that public servants will commit violations from habit, without giving it much thought, despite not having criminal intent. Such failings are designed to be remedied by the guidance provided by the compliance officer. In line with the preventive idea of compliance, particular emphasis should be placed on awareness of and compliance with the duties set out in Sections 43 et seqq. of the Act on Public Service of 1979 (Public Service Act) for public servants and Sections 5 et seqq. of the Act on Contractual Public Servants of 1948 (Contractual Public Servants Act), which serve compliance with the other legislation, in particular provisions designed to combat corruption, especially as it enables the organisation to spare itself many subsequent problems as a result.

That focus is partly obscured in the debate by the fact that the discussion to date on corruption (by acceptance of advantages) in administration and the combating of corruption in public administration is very strongly determined by criminal law, in particular the Act of 2012 on Amendment of the Criminal Law on Corruption and the amendments to the Criminal Code that came into force on 1 January 2013 as a result. Pursuant to the Criminal Code, the acceptance of advantages for acts in violation of duties (Section 304 of the Criminal Code) or in accordance with duties (Section 305 of the Criminal Code), and of acceptance of advantages with intent of allowing official activities to be influenced (Section 306 of the Criminal Code), inter alia, are culpable. Certain advantages listed in section 305 (4) of the Criminal Code can, however, be accepted, without such acceptance being culpable pursuant to Sections 305 and 306 of the Criminal Code.

While the focus on the Criminal Code is highly important, it falls short in public administration. A significant compliance instrument is neglected and the advantage that public administration has when implementing compliance is overlooked.

Precise enforcement of public service law lends itself to the avoidance of corrupt conduct (and is therefore of relevance to compliance). Close observation of its provisions removes difficult demarcation problems with regard to criminal law, because

the conduct is already prohibited under public service law. Reference should also be made here to the disciplinary (for public servants) and labour law (for contractual public servants[4]) sanctioning of violations.

ACCEPTANCE OF ADVANTAGES AND PUBLIC SERVICE LAW

The above-mentioned function of public service law is well illustrated by the key public service regulation in Section 43 of the Public Service Act (and Section 5 (1) of the Contractual Public Servants Act for contractual public servants), which reads:

"Section 43 (1) Public servants are obliged to perform their official duties in compliance with the applicable laws faithfully, conscientiously, dedicatedly, and impartially, using the available means at their own discretion.

(2) Public servants must make sure in all their conduct that the public retains confidence in the professional performance of their official duties.

(3) Public servants must support and inform the parties concerned in the framework of their official duties insofar as it is reconcilable with the interests of the public service and the requirement for impartial administration."

In discussions in connection with compliance and prevention of corruption, reference is repeatedly made to Section 59 of the Public Service Act, especially in connection with Section 305 (4) 1) of the Criminal Code[5], though in many cases reference to Section 43 (2) of the Public Service Act would make more sense in terms of public service law or is even imperative.

Giving the impression of corruption in itself qualifies as a violation of duty according to the ruling of the Austrian Supreme Administrative Court of 28/07/2000, no. 97/09/0109[6], pursuant to Sections 43 (1) and (2) of the Public Service Act of 1979 "since the incorruptibility of a public servant is one of the prerequisites for proper performance of official duties (cf. also the Supreme Administrative Court's rulings of 18 October 1989, no. 89/09/0017, and of 21 February 1991, no. 90/09/0191, as well as Kucsko-Stadlmayer [1996] 126). A public servant who accepts advantages (or cash) for official acts severely damages their reputation and the reputation of the office and its staff, and jeopardises the confidence of the public in its reliability and professional public service, since he/she gives rise to the suspicion of being open to bribery to perform official acts and not basing his/her public service on professional considerations, but on advantages that have been promised, provided or demanded by the public servant. The disinterested performance of official duties with no regard to personal advantage is a cornerstone of public service."

Section 43 (2) of the Public Service Act is violated not only if the advantage is connected to a specific official matter. The receipt of an advantage of pecuniary value from a third party with whom a public servant has official dealings was judged not negligible by the Supreme Administrative Court (Ruling of 04.09.1990, no. 90/09/0043)[7] under disciplinary law, with the following reasoning: "It does not depend on whether the company representative wished to 'influence' the public servant in favour of the company or merely create a 'favourable climate'. The public servant must avoid even giving the impression of being receptive to the acceptance of personal advantages within the context of their duties. He/she must avoid all conduct that could create an impression of partiality or self-interest."

It was further reasoned that giving rise to the suspicion of not basing public service work on professional considerations,

but on advantages that have been promised, provided or demanded by the public servant cannot be accepted in the interest of functional, purposeful and professional administration.[8]

Strict rules are also applied to the handling of advantages that have already been accepted after they come to light. In a case decided by the Supreme Administrative Court (ruling of 05/11/2010, no. 2009/09/0078[9]) a violation of duty was assumed because the deputy ward nurse of a socio-medical center took receipt during a team meeting of an envelope containing EUR 200 in notes placed on the table by one of the employees, who had accepted the money from relatives of persons in care accommodation in connection with her duties. Two days later, the deputy ward nurse passed the money received to a department assistant for the joint breakfast kitty.

The Supreme Administrative Court[10] confirmed that a violation of duty had occurred and explained that the public servant has, by taking receipt of the sum of the money and "transferring it to the joint breakfast kitty, and thereby also to herself, in awareness of the existence of an impermissible acceptance of a gift, given the impression of a corruptible body of public servants, not only to her employer, but also the general public as the current or potential recipient of the public service, and therefore behaved in a way that constituted an offence." Whether the public became aware or not of the conduct of the public servant is not of legal relevance according to the Supreme Administrative Court.

Sections 59 (1) and (2) of the Public Service Act referred to above read as follows under the heading "Acceptance of gifts"[11]:

"Section 59 (1) Public servants are prohibited in view of their official capacity from demanding, accepting or accepting a promise of a gift, another pecuniary advantage or any other advantage for themselves or for a third party.

(2) Customary tokens of a low value do not qualify as gifts pursuant to paragraph 1."

Section 59 of the Public Service Act draws on the previous provision in Section 35 of the Public Service Regulations of 1914. The formally strict provision of Section 35 of the Public Service Regulations provided that public servants, aside from contributions received from a higher-level authority, may not accept any gifts in the form of money or of pecuniary value offered to him/her or his relatives in view of his/her public service or gain other advantages under any pretext.

While the purely formal textual watering down of the strict provision of Section 35 of the Public Service Regulations by means of Section 59 (2) of the Public Service Act may seem odd from today's perspective, it cannot be concluded that Section 59 (2) of the public Service Act represents a significant relaxation of the law. First, conduct in relation to an official matter was already regulated by Section 21 of the Public Service Regulations on general official duties, which on this point (with the exception of the resulting case law on protection of professional standing) was included in Section 43 of the Public Service Act and was also maintained by case law. Second, in the context of it drawing on Section 35 of the Public Service Regulations[12], Section 59 of the Public Service Act is aimed at regulation of gifts based on official capacity, but not of gifts in relation to a specific official matter[13]. The exception set out in Section 59 (2) of the Public Service Act was only created to prevent an excessively narrow interpretation (as seen at the time).[14] The relaxations of the law set out in Section 59 (2) of the Public Service Act were only designed to exclude trivial

matters, without modifying the previously hard line regarding Section 21 of the Public Services Regulation and Section 43 of the Public Service Act.

In the context of the case law on Section 43 (2) of the Public Service Act, however, it can be assumed that even minor advantages pursuant to Section 59 (2) of the Public Service Act are covered by Section 43 of the Public Service Act if they are received in connection with specific official matters. An exception pursuant to Section 59 (2) of the Public Service Act in the scope of Section 43 (2) of the Public Service Act will in many cases not apply since customariness cannot generally be assumed in the case of gifts for official matters in state administration (both in the case of Sections 59 and 43 of the Public Service Act). Customariness presumes legal permissibility in addition to the factual component. Simply because maladministration has become customary does not mean that the practice of maladministration can provide grounds for customariness pursuant to Section 59 (2) of the Public Service Act[15].

The criminal law amendments of recent years have therefore barely changed the scope of the Public Service Act and the Contractual Public Servants Act in terms of content. However, awareness, which, though always present, was apparently dormant in recent years, is now being increased. Not only Section 43 of the Public Service Act, but also the other provisions of Sections 44 to 61 of the Public Service Act clarify conduct in many cases and can serve as a standard of conduct.

Against that background, debate about whether the exception from culpability pursuant to Section 305 (4) of the Criminal Code applies or not is in most cases superfluous. According to that provision, the following are not considered undue advantages:

1. Advantages whose acceptance is permitted by law or which are provided in the context of events where there is an officially or professionally justified interest in participation,

2. Advantages for public benefit purposes (Section 35 of the Austrian Fiscal Code), on whose use the office holder or arbiter does not have any decisive influence, and

3. in the absence of permission pursuant to 1), customary tokens of low value, unless the offence is committed on a commercial basis.

Given the case law on Section 43 (2) of the Public Service Act, it can be assumed that minor advantages do not come under 1), if they are received in connection with a specific official matter. The exception set out in Section 59 (2) of the Public Service Act that is mentioned in the report of the Justice Committee only applies to cases where an advantage is received with respect to official capacity, but not in connection with a specific official matter.

Section 59 (2) of the Public Service Act is therefore of no significance to the cases set out in Section 305 of the Criminal Code. It only comes into effect with regard to Section 306 of the Criminal Code. However, it does not automatically imply the criminal responsibility of the public servant concerned pursuant to Section 305 of the Criminal Code, since the rule set out in Section 305 (4) 3) of the Criminal Code still applies to him/her. There is therefore no undue advantage pursuant to the Criminal Code, which means the public servant is not culpable pursuant to Section 305 (1) or (3) of the Criminal Code. The case law of the Supreme Administrative Court on public service law concerning Section 59 of the Public Service Act does not need to be applied to Section 305 (4) 3) of the Criminal Code; instead judgement of 3)

can take place purely according to criminal law criteria, which can differ from those of the Public Service Act. A tip (gratuity) can be customary pursuant to the Criminal Code, but not pursuant to the Public Service Act.[16]

A distinction between criminal law and public service and disciplinary law both seems dogmatically necessary and is to be supported in terms of compliance. Not everything that is prohibited under disciplinary law needs to be sanctioned under criminal law, i.e. not all misconduct under public service law and disciplinary law should also be sanctioned under criminal law. The changes to criminal law on corruption do not provide any reason for a new (and less strict) interpretation of the previous public service law provisions.

That approach also serves better compliance implementation. Compliance guidelines in public administration need to be geared to official duties owing to the principle of compulsory prosecution. Since compliance with official duties pursuant to the Public Service Act rules out criminal conduct of the public servant, it is possible to dispense with extensive discussion of criminal law as a whole in the event of compliance with official duties. In view of the underlying principle of formulating compliance guidelines as clearly and concisely as possible[17] and not making the regulation of exceptions the subject of such guidelines, Section 59 (2) of the Public Service Act, for example, should not be a core topic of compliance guidelines or of compliance for that matter.

ADVANTAGES FOR THE LEGAL ENTITY AND PUBLIC SERVICE LAW

Compliance with official duties is also critical to the judgement of complex circumstances, where advantages for the legal entity are received, but the receipt of the advantages comprises part of official activities or the public servants were even tasked with such activities. Activities as part of PR work in the broadest sense, protocol, event management or similar tasks are just as relevant here as events as an employer.

Questions arise in particular concerning judgement of the acceptance of sponsorship by public servants for events hosted by the given authority, e.g. of externally sponsored Christmas or office parties or official authority events or the participation of public servants in marketing events in the broadest sense.

Ultimately judgment according to norms of public service law is decisive here. Legal violations that are committed by public servants, including contractual public servants, pursuant to the Criminal Code, including contractual public servants, when performing an official duty, may be seen as justified and at any rate not as culpable[18], since ultimately it is a case of the performance of official duties, in particular Section 43 (1) of the Public Service Act. In short, the question is whether the activity is solely performed in accordance with duties based on a legally permissible instruction (Section 44 of the Public Service Act) or authorisation based on the assigned tasks (Section 36 of the Public Service Act) as included in the job description for an assessed job (e.g. Section 137 of the Public Service Act). The precise definition of official duties is therefore key. It should be noted that the employer may define these freely within the bounds of its statutory regulations, which vary in narrowness, especially in the field of private sector administration.

Sponsoring in public administration, the scope of representational duties, and matters of marketing, image management and adver-

tising are not regulated or are insufficiently regulated. I will not go into the question of whether statutory regulation of such fields would make sense in further detail here.

In such cases a decision can only be based on the general principles of public administration. Until a relevant legal framework is created, decisions have to be made by the public servant in each given case. If the public servant is in doubt, he/she must consult his/her professional superior (where applicable, seeking the recommendation of a compliance officer), and make a reasoned decision with the involvement of the administrative superior in case of a difference in opinion between the administrative superior and the professional superior.

Ultimately every measure requires an implicit or explicit assignment or performance at the public servant's allowed discretion. That implies that the reasons for particular conduct can be verified. It follows from the implicit or explicit assignment (Section 44 of the Public Service Act) or performance according to the public servant's allowed discretion (Section 43 (1) of the Public Service Act), that an official duty is performed.

The complexity of the compliance-relevant judgement also follows from that. Particular attention should therefore be paid to the activity of the superior, who may only issue an assignment within the bounds of his/her official duties (otherwise he/she will be sanctioned under disciplinary law, labour law or, where applicable, criminal law). It needs to be checked in such cases therefore whether the acceptance in whatever form (acceptance of sponsoring[19], the product, participation in the event) is in line with the principles of the code of conduct from the point of view of administration. As long as a suitable and legally permissible service is provided in exchange, owing to the absence of an advantage, the recipient and the person giving the relevant instructions, where applicable, are not in violation of the criminal provisions (Sections 304 to 306 of the Criminal Code).[20]

Discussion on the exception of advantages whose acceptance is permitted by law "which are provided in the context of events where there is officially or professionally justified interest in participation" is not relevant to compliance in the scope of public service law. If participation takes place in the official interest, it happens either through an (implicit or explicit) assignment or at the public servant's own discretion pursuant to Section 43 (1) of the Public Service Act[21]. If there is no reason for participation pursuant to Section 44 of the Public Service Act (assignment) or it cannot be justified pursuant to Section 43 (1) of the Public Service Act, only Section 59 (2) of the Public Service Act remains applicable to the case of an advantage accepted in the context of an event to which the public servant was invited on the grounds of his/her official position. Owing to the narrow scope of Section 59 (2) of the Public Service Act, which only excludes customary tokens of a low value, most advantages at an event will not be covered.

THE "TONE AT AND FROM THE TOP" PRINCIPLE AND PUBLIC SERVICE LAW

In addition to disseminating the norms to be applied by means of a compliance system, an effective compliance system requires above all that the principle of "tone at and from the top" is adhered to.[22] Just as compliance measures are only partially effective if the various public servants get lost in the flood of norms and supply of irrelevant information, it is key to effectiveness that public servants do not get the im-

pression that the rules are apparently not enforced by direct or indirect superiors, including the highest leadership level.

The principle of "tone at and from the top" is already provided for in public service and disciplinary law, especially by Section 45 (1) of the Public Service Law, which obliges superiors to ensure that their colleagues perform their official duties in compliance with the law, and in an expedient and cost-effective manner. It expressly states that the superior needs to guide his/her colleagues, provide them with instructions if necessary and rectify any errors or cases of maladministration that occur. An error means unlawful, inexpedient or non-cost-effective conduct, while maladministration means any form of incorrect administration.[23]

The duty of the superior to set an example can also be inferred from Section 45 of the Public Service Act. In its ruling dated 21/03/1991, no. 91/09/0002, the Supreme Administrative Court stressed that superiors, owing to their duty to set an example, need to demonstrate particular commitment and quality, and stated that particular tasks arise from their superior position such as oversight (monitoring and instruction) and care for their subordinates. As the Supreme Administrative Court expressly explains (with relevance to compliance as understood today), "Incorrect conduct of superiors can undermine respect and confidence in relations with colleagues and subordinates. In addition to supervising and giving instruction, superiors also need to set an example".

ORGANISATION OF COMPLIANCE AND PUBLIC SERVICE LAW

The strong degree of regulation of the conduct of staff is important, as set out above. Few additional normative regulations are required for compliance, since the relevant content is already largely laid down.

The survey results of a study on the organisational structure to date at the Ministry of the Interior, according to which many of the compliance functions are already covered in the line organisation, and on the organisational need for implementation at the Ministry, were as follows[24]:

"Given that many functions of compliance are already present within the line organisation, it should be assumed that in this case significantly lower 'set-up costs' should be budgeted for than in the case of new implementation. If the line organisation is defined as the holder of (all) executive compliance functions, taking into account the tasks currently performed, based on the stakeholder analysis performed at the Ministry of the Interior it should be concluded that around 95 % of all compliance areas are already covered in the line organisation. These follow, for example, from the higher-level legal framework, assignments of duties or procedural rules, administrative reform measures and similar. The creation and updating of the compliance programme and other (new) central tasks to be performed should therefore be in the order of magnitude of around 5 %."

Given the close connection with public service law and in view of the considerable part played by guidance within compliance, organisationally it made sense for the Ministry of the Interior to assign the compliance officer to the HR department. As of 1 June 2013, section I/1/a in the HR department of the Austrian Federal Ministry of the Interior is tasked with "performance of the duties of the compliance officer".

Already existing responsibilities for compliance-relevant fields in other organisational units were not affected.

In view of the adopted term of chief compliance officer (CCO) and the term "compliance", which is used in Austrian legal language in other legal fields (cf. Section 18 of the Securities Supervision Act), the chief compliance officer (CCO) at the Ministry of the Interior designates the person who performs the following tasks:

- raise awareness about proper conduct at the Ministry of the Interior, i.e. compliance with the full set of laws, in particular the criminal provisions on corruption and the public service provisions (above all the Code of Conduct of the Ministry of the Interior),
- provide clarification concerning legal conditions and values in the above field,
- provide guidance concerning the above field,
- ensure that the decision makers are in the position to conduct themselves in compliance with the rules,
- make recommendations concerning the above field.

The compliance officer is therefore responsible for providing clarification guidance and recommendations in the above field for the whole government department. In order to ensure performance of the tasks across the government department, individual officers are appointed at the given subordinate authorities, and are responsible for performing internal tasks for the given authority, coordinated by the CCO.

Since compliance serves to raise the awareness of public servants, they have been provided with access to relevant information through a range of communications media, and relevant measures have already been taken to provide access via the intranet of the Ministry of the Interior.

In order to put the heads and other staff of subordinate authorities and offices in the position to conduct themselves in compliance with the rules and to increase certainty as to how to act, compliance officers have already been appointed at every authority. Compliance is to be organised in a decentralised way in order to better satisfy the given circumstances and requirements.

[1] *Cf. Friedl/Kindl et al (2012) 7.*

[2] *Austrian Federal Ministry of the Interior (2013) 13.*

[3] *Ibid. 15.*

[4] *Termination or in severe cases dismissal. One criticism that should be made is that for contractual public servants a gradation of the sanctions according to severity is only possible to a limited degree. From a compliance perspective, it would therefore be worth considering whether contractual disciplinary law (to be created) for cases that are not so severe as to provide grounds for termination in the Contractual Public Servants Act would be suitable to allow for punishment of minor infringements, without needing to end the employment relationship (together with the associated risk that the Labour Court rules that the termination of the employment relationship is null).*

[5] *Marek/Jerabek (2013) Sections 304 to 306, Rz 43a; further, the Austrian Federal Ministry of Justice (2012) 38.*

[6] *The further reasoning in the text comes from the ruling. The public servant from the Land Surveyor's office demanded a cash payment of ATS 1,000 from the party concerned for the provision of a layout plan.*

[7] *Regarding Section 21 of the Public Services Regulation, which in the case concerned applied within the public service law of Upper Austria and had already been included in Section 43 of the BDG on the federal level.*

[8] *Supreme Administrative Court 04/09/1990, no. 90/09/0043. The public servant, who was tasked in an official capacity with procuring materials (including office equipment) for the federal state of Upper Austria, accepted an advantage of pecuniary value in the form of a table.*

[9] *Section 18 (2) of the Service Regulations of 1994, as amended by the Vienna Law Gazette no. 37/2003, which corresponds in content to Section 43 (2) of the Public Service Act, reads as follows: "(2) Public servants should conduct themselves in a polite and helpful manner towards superiors, colleagues and clients. They must avoid doing anything either in their official capacity or outside their official capacity that could undermine respect and confidence in their position."*

[10] *On the further reasoning, cf. Supreme Administrative Court 05/11/2010, no. 2009/09/0078.*

[11] *Paragraphs 3 to 5 deal with the question of courtesy gifts, which is not addressed in this paper, and read as follows:*

"(3) Courtesy gifts are items that a public servant is given by states, public bodies or established institutions based on merit or for courtesy reasons.

(4) Public servants may accept courtesy gifts, but they must inform the authority thereof immediately. The authority must register the courtesy gift as a federal asset. Courtesy gifts received should be sold. The proceeds should be collected and used for welfare purposes for the benefit of the public servants or other charitable purposes. The detailed rules should be issued by regulation within each government department.

(5) Courtesy gifts of little or only symbolic value may be given to the public servant for personal use."

[12] *The criminal law provisions should be unaffected by Section 35 of the Public Service Regulations (cf. Hackl [1970] Section 35 with reference to the report of the State Employees' Committee of the House of Representatives dated 2 May 1912).*

[13] *Cf. Kucsko-Stadlmayer (1986) 369, according to whom the legislator intended for Section 59 of the Public Service Act to prevent public servants being influenced even at a preliminary stage.*

[14] *Cf. Kucsko-Stadlmayer (1986) 370, with reference to the commentary in supplement 11 to the stenographic transcripts of the National Council, 15th legislative period, 90, and the circular of the Federal Chancellery on Section 35 of the Public Service Regulations. Interestingly, the approach of Section 59 (2) of the*

Public Service Act was not taken in Section 59 of the Legal Services Act (now Act on the Service of Judges and Prosecutors).

15 *This restriction follows from a constitutional interpretation. The issue of the constitutionality of this provision, to which Kucsko-Stadlmayer (2010) 376, refers, is thereby largely defused. It follows that the strict standard should also be applied to the cases of invitations to dinners, social events and other events that are also mentioned by Kucsko-Stadlmayer. This seems evident given that it draws on the strict regulation of the Public Services Regulation of 1914 and is even imperative from a compliance point of view.*

16 *Cf. the thoughts of Marek/Jerabek (2013) Sections 304 to 306, Rz 43d, which are critical of the application of the case law of the Supreme Administrative Court to the Criminal Code. That is certainly correct, but with the proviso that it does not have any effect on the interpretation of the Public Service Act.*

17 *Schwarzbartl/Pyrcek (2013) 38.*

18 *Cf. Kucsko-Stadlmayer (2010) 31, with reference to criminal law literature. The phrasing of Section 305 (4) 1) of the Criminal Code does not affect that principle. The phrase "advantages, whose acceptance is legally permissible" is liable to cause confusion, since it can only refer to advantages outside the official duties set out in the Public Service Act, hence only a sub-area of the principle of justification on the grounds of performance of official duty is regulated in phrasing disguised as a special provision, which may give the impression that the lawful performance of other service duties could entail a sanction pursuant to the Criminal Code, because it does not come under the wording of Section 305 (4) 1).*

19 *Marek/Jerabek (2013) Sections 304 to 306, Rz 20 focus on the likelihood to influence.*

20 *For a comprehensive account of event sponsoring, cf. Reindl-Krauskopf (2012); in more detail Birklbauer (2013) 223 et seqq., according to whom participation in a "marketing event for customers, who receive objective advertising value, because e.g. information is (also) given about products", also lacks an "advantage".*

21 *The public servant naturally bears the full risk of an error in judgement in this case. The question of classification under salary law is distinct from participation on the basis of an assignment or at the public servant's own discretion and must not be confused with those. Section 16 (7) of the Salary Act of 1956 provides in such cases that participation at receptions and social events, even when officially necessary, does not justify a claim for either time off in lieu or a claim to remuneration for overtime.*

22 *Cf. inter alia Schwarzbartl/Pyrcek (2013) 29.*

23 *Kucsko-Stadlmayer (2010) 246.*

24 *On the following, cf. Willi (2012) 163.*

Sources of information

Birklbauer, Die Anwendbarkeit der Korruptionsbestimmungen auf Ärzte, Recht der Medizin (2013).

Bundesministerium für Inneres (Ed.), INNEN.SICHER 2014 (2013).

Bundesministerium für Justiz (Ed.), Korruptionsstrafrecht Neu, Fibel zum Korruptionsstrafrechtsänderungsgesetz (2012).

Friedl/Kindl et al, Compliance in Public Affairs (2012).

Hackl, Die Dienstpragmatik (1970).

Kucsko-Stadlmayer, Das Disziplinarrecht der Beamten (1986).

Kucsko-Stadlmayer, Das Disziplinarrecht der Beamten (1996).

Kucsko-Stadlmayer, Das Disziplinarrecht der Beamten (2010).

Marek/Jerabek, Korruption und Amtsmissbrauch (2013).

Reindl-Krauskopf, Verwaltungssponsoring aus strafrechtlicher Sicht, in Bundesministerium für Inneres, Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung (Ed.), Lobbying & Sponsoring (2012) 9 et seqq.

Schwarzbartl/Pyrcek, Compliance-Management, Ein Praxisleitfaden zur erfolgreichen Umsetzung (2013).

Willi, Die Implementierung von Compliance-Systemen im öffentlichen Dienst, Master-Arbeit FH Wiener Neustadt (2012).