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TRADING OF INFLUENCE — BRIBERY AND FRAUD

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In the paper the author gives attention to a special kind of bribery, the purpose of which is assignment of the briber for the service position in the government. Analyzing the legislation, it has been concluded about necessity to criminalize trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173)

Keywords: trading in influence, corruptions, bribery, fraud, sale of a position (portfolio).

Corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.

According to the Federal Law No. 273-FZ of December 25, 2008 "On Combating Corruption", corruption is represented by acts such as abuse of office, bribery, abuse of authority, commercial bribery or other unlawful applying by person of his official position, which will be contrary to the legitimate interests of society and the country in order to obtain benefits in the form of money, valuables, other property or services of a property origin, other property rights for themselves or for other person; or some illegal providing such benefit to the person by other individuals; or the commission of these acts on behalf of or in the interests of a legal entity.

Certainly, bribery is the most widespread and dangerous among corruption crimes. In certain cases, the purpose of a bribe-taker is wrongful assignment of the briber for the certain official position or a post of public service (hereinafter — a public office), in other words — the sale of a position (portfolio).

In the new history of Russia there are dozens of criminal cases with convictions of convicts convicted of obtaining (or demanding) money for assistance in appointing certain positions in government from municipal levels up to federal ones.

For example, the former head of the Northwest Territorial Administration of the Federal Fishing Agency, M. had forced the subordinated employees to resign from their posts of the territorial departments heads, and M. has sold their vacant posts. For bribes, he appointed to these places people, who had no experience in fish protection. As a bribe, M. illegally obtained 26 million rubles. M. was detained in May 2011 during a special operation. He has decided to "sell" the post of head of the fish protection service in the Novgorod region for 5 million rubles.

Ex-deputy of the State Duma, Sh. in the summer of 2011 wanted to get illegally 7.5 million euros from persons who would want to become a deputy of the Russian Federation State Duma. By the court of Sh. was found guilty of committing a crime under Part 3 of Art. 30, Part 4 of Art. 159 of the Criminal Code of the Russian Federation, i.e., in an attempt on fraud, Sh. did not have such opportunities, he did not intend

to act in the interests of the victim, and he wanted to appropriate the money, which he had obtained.

In this example, a person, who has a public position, intentionally promised to another person for a fee the use of his or her opportunities to get the public office illegally by the mentioned person.

The actions of the guilty official are not qualified as damage to the state interests, but as an attempt to steal someone else's property by deception.

This approach not only does not meet the objectives of the Criminal Code of the Russian Federation, but also does not meet the requirements of international norms, as will be indicated below.

The existence of such a phenomenon is a threat to the national security of the state. It encroaches on the foundations of state power, discredits the activities of state and municipal bodies and institutions, hampers healthy professional competition, poisons the citizens' sense of justice, and also generates further committing other equally serious corruption crimes, since, having received a treasured post for an impressive amount, the official starts not only to work out the enclosed, but also to be enriched by corruption.

Besides, due to mutual benefits, such acts are highly latent crimes, and information about the features of appointing a person to a position puts him in constant dependence on informed persons. Thus, this type of bribery, possessing all the signs of classical bribery, has a number of features that make it possible to separate it into a separate group.

It should be noted that the sale of posts — is not the result of a modern society, is not the result of market relations.

In ancient China, at the time of the legists, until the fall of the empire, there was a list of posts on which a price list was posted for their purchase.

In the Roman Empire period, the term *ambitus* (from the Latin “*ambire*”) meant the acquisition of posts through bribery and bribes of Roman senators or emperor advisors. [1]

In France, the practice of selling public office (*paulette*) appeared as early as the beginning of the 16th century in Louis XII's period, but in its final form was formed at the beginning of the 17th century in Henry IV's period, when this system became all-embracing, lifelong and hereditary, and existed up to 1789 [2].

In England of XVI–XVII centuries, also there were cases of purchase of court positions (purchase), which, however, occurred rarely and became the main secular news [3].

The Act of the year 1809 (currently in force in the UK on the sale of posts) provides for liability for corruption in the form of sale, purchase, transactions for the purpose of obtaining a position, including employment [4].

In Russia, in 1274 the Vladimir Cathedral strongly condemned *Simonia* (selling church posts), confirming the appointment of punishment in the form of deprivation of dignity both for those, who bought the church office, and for the seller, who sold it [5].

In other sources of the criminal law of Russia, including the Criminal Code of the Russian Federation, bribery, the purpose of which is the misappropriation of a bribe-taker to a public office, as a special type of crime (an separate crime) is not considered.

Furthermore, one of the necessary areas of the criminal policy of combating corruption is the criminalization of actual socially dangerous acts, including the introduction of qualified offenses, taking into account special signs, which increase their harmfulness, or the introduction of a new special offense.

The Criminal Code of the Russian Federation establishes criminal liability for the commission of certain corrupt acts (laws 290, 291, 291.1, etc.) with a view to providing criminal legal support for of combating corruption and in the interests of fulfilling international obligations.

One of such international obligations is the Criminal Law Convention on Corruption (Strasbourg, 27.I.1999) (hereinafter referred to as the Convention), which provides for a wider range of corruption offenses.

Article 37 of the Convention provides that any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, reserve its right not to establish as a criminal offence under its domestic law, in part or in whole, the conduct referred to in Articles 4, 6 to 8, 10 and 12 or the passive bribery offences defined in Article 5.

Federal law of July 25, 2006. No. 125-FZ The Russian Federation ratified the Criminal Law Convention on Corruption (ETS 173) without any reservations, which entered into force in the Russian Federation on 11.11.2007.

According to Article 12 of the Convention «Trading in influence» Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

As noted in the Evaluation Report on Criminalization in the Russian Federation adopted by GRECO at the 54th Plenary Meeting (Strasbourg, March 20–23, 2012), trading in influence is not criminalized as a separate offense. According to the authorities, the bribery provisions under Articles 290/291 CC or several other provisions such as Article 291-1 CC (intermediation in bribery), Article 159 CC (fraud), Article 201 CC (abuse of powers) or Article 285 CC (abuse of office) may be applied, depending on the circumstances. However, the GET notes that all of the offences referred to by the authorities are narrower in scope than Article 12 of the Convention, which addresses trading in influence irrespective of «whether or not the influence is exerted or whether or not the supposed influence leads to the intended result» and irrespective of whether or not the influence peddler him/herself is a public official. By contrast, the aforementioned bribery provisions only apply to situations where the influence peddler him/herself is a public official, intermediation in bribery also presupposes the commission of a bribery offence (namely the transfer of a — substantial — bribe to an official), fraud requires a deceptive element and abuse of powers/abuse of office require the substantial violation of the rights and lawful interests of individuals or organisations, or the legally protected interests of the society or the state. The GET considers that the above-mentioned provisions cover some but not all of the relevant cases. It cannot see,

for example, under which provisions a person — who is not a public official — would be liable for receiving an advantage for his or her own benefit in return for exerting influence on a public official. Moreover, in the view of the GET, the above-mentioned types of offences have little to do with trading in influence and clearly miss several specific and crucial elements⁵¹ contained in Article 12 of the Convention. Consequently, the GET recommends to criminalise trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) [6].

In the above example, with regard to the former deputy of the State Duma, Sh., The convict was punished for criminal misappropriation of other people's money, but not for encroachment on public relations in the sphere of state power, interests of the state service.

It follows from this practice that a person who promised in exchange for remuneration to use his or her opportunities for gaining an advantage in deciding on the appointment of a person will be liable for the full amount only if he is an official and within the scope of his powers includes the adoption of Decisions for which he is rewarded.

Otherwise, the actions of the perpetrators are qualified under Art. 159 of the Criminal Code, that is, as fraud. The question arises: "How to qualify the actions of a person who, on the basis of his official authority, cannot decide on the appointment of a person to a certain position, but at the same time because of his official position, relations with other officials, etc., has the opportunity Influence the solution of this issue.

In accordance with the current legislation, a person will be liable under Article 159 of the Criminal Code of the Russian Federation, that is, for theft or attempted theft of other people's money. And he will not be held responsible for criminal assault on public relations in the field of placement in public offices. It seems that this does not comply with the principles of criminal responsibility.

The qualification of bribery as fraud is contrary to the requirements of the criminal law theory and the principles of criminal law, significantly reduces the possible amount of punishment, and also excludes particularly large fines established specifically to combat corruption crimes and the possibility of using confiscation of property obtained as a result of the crime.

In order to minimize the dangerous consequences of the phenomenon under consideration, the joint efforts of scientists, legislators, bodies conducting operational search activities, preliminary investigation, courts are needed.

It is necessary to pursue, as a matter of priority, a criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation and preventive measures. An effective fight against corruption requires increased, rapid and well-functioning international co-operation in criminal matters.

In the Russian criminal law, amendments and additions should be made to establish criminal liability for infringements on public positions in relation to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any public official in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result

Such changes in the legislation will significantly enhance the state's ability to fight corruption, contribute to the achievement of the goals of criminal punishment and the achievement of the objectives of the criminal legislation of the Russian Federation.

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ТОРГОВЛЯ ВЛИЯНИЕМ — ВЗЯТОЧНИЧЕСТВО И МОШЕННИЧЕСТВО

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В статье автор обращает внимание на особый вид взяточничества, целью которого является назначение взяткодателя на определенную должность в органах государственной власти. Анализируя законодательство, автор приходит к выводу о необходимости криминализировать злоупотребление влиянием в корыстных целях в соответствии со статьей 12 Конвенции об уголовной ответственности за коррупцию (ETS 173).

Ключевые слова: уголовное право, криминализация, злоупотребление влиянием; торговля влиянием; корысть; коррупция; взяточничество; мошенничество; продажа должности.