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Comparative analysis of the signs of a commercial bribery provided by the Criminal Code of Kazakhstan, Kyrgyzstan and Uzbekistan

This article is devoted to a comparative analysis of the criminal law of the Republic of Kazakhstan and some countries of the «Commonwealth of Independent States», which have precedents for the introduction of criminal liability for persons performing managerial functions in a commercial or another non-profit organization. The legislation of the CIS countries has many common features with Kazakhstani criminal legislation providing for liability for commercial bribery. This concerns both the codification of the analyzed legislation and the proximity of the structure of the Criminal Codes, their division into parts, and in some cases into sections, chapters and articles, as well as the historical conditionality of commercial bribery. In chapter 34 of the criminal code of the Republic of Kyrgyzstan, «Crimes against the interests of service in commercial and other organizations», in article 237 establishes the responsibility for commercial bribery. Similar criminal provisions which criminalize commercial bribery, stipulated in the criminal code of the Republic of Uzbekistan, Chapter XIII.1 «Crimes related to obstruction, unlawful interference in business activities, and other crimes infringing on the rights and legitimate interests of economic entities» in article 192.9. The General characteristic of the experience of other countries in the fight against bribery by criminal law measures is of undoubted scientific value. Also the analysis of the criminal legislation of other modern countries on the qualification of crimes committed through commercial bribery, it is advisable to carry out by making their proposals to change a number of provisions. As a result of writing this article, we came to the conclusion of the introduction to the disposition of part 1 and 3 of Art. 237 of the criminal code of the Republic of Kyrgyzstan and Art. 192.9 the criminal code of the Republic of Uzbekistan of the phrases «for general protection or connivance in the service». In our opinion, the current absence of this phrase narrows the scope of the criminal law in relation to commercial bribery, and in this regard is currently a gap in the criminal legislation of the Republic of Kyrgyzstan and the Republic of Uzbekistan.

Keywords: commercial bribery, commercial and other organizations, general protection in the service, connivance in the service, illegality, official position.

Introduction

Commercial bribery, which is provided for in article 253 of the criminal code of the Republic of Kazakhstan is an illegal transfer to a person performing managerial functions in a commercial or another organization of money, securities, other property, as well as illegal provision of services of a property nature to him for the use of his official position, as well as for general protection or connivance in the service in the interests of a person engaged in bribery.

Commercial bribery infringes on the interests of the service of commercial and other non-profit organizations. In a broad sense, interest may be understood as the pursuit of success. In this case, it should be emphasized that success can be achieved both legally and illegally, and the benefit of a commercial or non-profit organization may be contrary to the interests of society or the state as a whole. Based on this, we see that the interests of commercial or non-profit organizations are subject to criminal law protection. In part 1

art. 35 of the Civil code of the Republic of Kazakhstan establishes a provision according to which commercial organizations, with the exception of state enterprises, may have civil rights and bear civil obligations necessary for the implementation of any activities not prohibited by legislative acts or constituent documents. Therefore, the crime provided for in article 253 of the criminal code violates the established procedure for carrying out official activities in this organization. On this basis, the interests of the service in commercial and other organizations should be understood as the regulatory established procedure for performance in these organizations.

Methods and Materials

The methodological basis of this study is the dialectical method as the basis for the knowledge of social and criminological phenomena of reality in their development. Considering the interdisciplinary nature of the problem being studied, the article also used private scientific research methods (formal-logical, comparative and legal, statistical, historical and legal methods of scientific knowledge).

Historical and legal research was based on working directly with the texts of laws and consisted in the analysis of the specifics of the regulation of corpus delicti in the regulatory acts in force in Kazakhstan.

The statistical method used revealed the existing relationships between changes in legislation and the state of investigative judicial practice.

Other sources of information were also used that contain criminological and forensic information (the Unified Automated Information and Analytical System of the Judiciary of the Republic of Kazakhstan, the Judicial Study Service, the Taldau Forum).

Discussion

Since January 01, 2019, a new criminal code has been introduced in the Republic of Kyrgyzstan, according to which the article «Commercial bribery» has undergone a number of changes. So before the adoption of the new code in the disposition of part 1 and 3 of article 224 of the criminal code of the Republic of Kyrgyzstan, the legislator noted only commercial organizations. For some reason, non-profit organizations were not listed in commercial bribery. It followed that the transfer or receipt of illegal remuneration in non-profit organizations could not be qualified as commercial bribery. In our opinion, this is nonsense. The position of the legislator of the Republic of Kyrgyzstan on this issue was not quite clear, since the transfer or receipt of illegal remuneration in a non-profit organization remained outside the scope of the criminal law, that is, these organizations were not subject to criminal law protection, which seems to us not quite true. Comparative analysis of the disposition of part 1 and 3 of article 237 of the criminal code of the Republic of Kyrgyzstan «Commercial bribery» (introduced with effect from January 01, 2019) showed that the legislature introduced the words with the following content *«or another»* the organizations where «other» is meant a word «non-profit organization». In our opinion, this is quite logical and appropriate.

The objective party of commercial bribery, provided for by part 1 of article 253 of the criminal code of the Republic of Kazakhstan, is the illegal transfer to a person performing managerial functions in a commercial or another non-profit organization, money, securities, another property, as well as the provision of property services for the use of his official position in the interests of a person engaged in bribery. Based on the definition of the objective side of the crime, fixed in part 1 art. 253 of the criminal code of the Republic of Kazakhstan, it should be concluded that this crime is formal in its design, since the legislator did not indicate the occurrence of any consequences as a mandatory feature.

The disposition of the considered norm is formulated by the legislator in the form of a description of two alternative actions: the transfer of money, securities, other property or the provision of property services.

On the basis of the etymology of the word «*transfer»*, the latter should be understood as the handing over or giving in possession of any object to any person [1; 432], that is, the transfer in the context of the crime under consideration means the actions of a person aimed at the transfer of property from that person to another.

The provision of any services means to benefit someone [1; 729]. The provision of services of a property nature should be understood as actions to provide property benefits free of charge (repair of a car, provision of construction materials, payment of debt, etc.) [2; 574]. Illegal provision of services of a property nature is any legally assessable property in accordance with the law gratuitous satisfaction of the needs of a person that does not bring profit, benefits or other advantages to a commercial or another organization in which the bribed person performs managerial functions [3; 32].

However, it should be taken into account that the service can be provided only with the consent of the person to accept this service. Thus, the independent actions of the person providing the service are limited to creating an opportunity for the recipient to actually use this service free of charge.

The form of consent bribed to qualify this crime does not matter. This may be a direct consent to use the offered remuneration or services, as well as the so-called «default consent», that is, the absence of a direct refusal to use these services.

According to the form of the act, the *transfer* of money, securities, another property can be manifested only in the form of action, and the *provision of services* in the form of action (which occurs most often), and in the form of inaction. It should be noted that for the qualification does not matter the method of transfer of the subject of bribery. This can be either a single action or multiple, that is, committed in several stages.

Commercial corruption will be available, when:

1) as subject matter material assets (money, securities, other property) or services of property character act;

2) money, securities, another property or services of property character are provided to the persons who are carrying out administrative functions in commercial and other organizations;

3) they are passed for the certain action (inactivity) in favour of giving which is maybe accomplished only in communication with service position of the manager;

4) actions of the person giving and the person accepting illegal compensation, emuneration are interdependent, interrelated [4; 574].

For described above act the legislator names a mandatory condition of approach of the criminal liability illegality of transfer of money, securities, another property or rendering of services of property character. It is one of the most complicated questions with reference to commercial corruption. The matter is that for civil servants there is a direct interdiction, on reception of any foreign material compensation by them in connection with a post or performance of job responsibilities. Exception is made with «usual gifts», in conformity from item 509 of the Civil code of the Republic Kazakhstan. For the persons who are carrying out administrative functions in commercial or another organization, similar statutory acts of the general character do not exist.

When deciding on the illegality of the transfer of remuneration to a person performing managerial functions in a commercial or another organization, special attention should be paid to cases of violation of the procedure for the implementation of the right of the Manager to receive property or use the services of a property nature. The situation indicated by us follows from the fact that some categories of managers on the basis of legislation and constituent documents of the organization can use certain services of a property nature (receive a percentage of profits, receive ownership of housing at the expense of the organization, etc.). Based on this, it is permissible cases where the property rights of the Manager are implemented in violation of the procedural rules of acceptance of remuneration or use of services in connection with his official position and the promise to carry out in favor of the person providing the remuneration or services, in violation of these rules, certain actions (inaction). The described situation can be expressed in the form of obtaining housing out of turn, a preferential loan, payment of shares to the detriment of the interests of other shareholders, etc.

In addition, it should be noted that the form of transfer of property itself does not affect the recognition of its illegal.

In an open form, bribery is given directly or openly to the Manager «from hand to hand» or through an intermediary. In veiled form the subjects of bribery, trying to give his actions legitimacy externally (play cards, to lend without return, to organize «leisure» etc.). At the same time, both parties are aware that the provided service of a material nature is illegal, since it is actually a payment for the relevant services provided to the Manager of a commercial or another non-profit organization [5].

Remuneration may not be recognized as illegal if it is provided for by the terms of a legal employment contract or civil law contract and is payment for actually performed useful work or service.

Remuneration may not be recognized as illegal if it is provided for by the terms of a legal labor contract or a civil law contract and is payment for the actual useful work or service.

Bribery will be only when the reward is transferred for the commission of a specific action (or inaction), which a person with managerial functions could perform using his official position. Actions can be varied: the provision of concessional or unsecured loans, the transfer of secrets of the company to a competing organization, promotion, extraordinary provision of apartments, etc.

It is very important to note that art. 253 of the Criminal Code of the Republic of Kazakhstan speaks of bribery. This means that the recipient is bribed, i.e. transfer or at least promise reward before committing them to appropriate official actions. Consequently, the subsequent (after the commission of actions) and the transfer of remuneration that has not been previously agreed upon is not considered a «bribe» at all.

Illegal activity is made with those acts which are directly forbidden or inadmissible within the limits of realization of administrative activity in commercial or another organization. It is necessary to accept as those: for example, delivery of a trade secret, granting of the credit at absence of a guarantee of its return, the conclusion of obviously unprofitable contract, etc.

Use of service position is understood as realization or excess of the powers contrary to interests of service and to please to the person who is carrying out corruption [2; 574].

In the legal literature, the question of another variant of the behavior of the bribed remained unresolved, when the actions (inaction) of a person performing managerial functions carried out in favor of the bribed person are not included in the official powers of the person, but the latter, by virtue of its position, can contribute to such actions (inaction). This refers to influencing another Manager, using the authority of the post in the organization, in order to encourage him to make decisions and implement them in favor of the bribing (in the absence of collusion between managers for commercial bribery).

Analysis of the norms of Chapter 9 of the criminal code «Criminal offenses against the interests of service in commercial and other organizations» indicates a broad understanding of the legislator «official position». In this Chapter, the legislator uses two terms: «official powers» (articles 250, 251, 252 of the criminal code) and «official position» (articles 253 of the criminal code). Obviously, their content cannot be the same. It follows from the above that the term «official position» is wider than «official authority» and, accordingly, the official position should be referred to:

a) the possibility of actions (inaction), which are included in the official powers of the Manager;

b) the possibility of facilitating such actions (inaction) due to official position [6; 76].

From the legislative formulation of the transfer of the subject of commercial bribery, it can be concluded that the actions of the Manager are directly related to the receipt of material remuneration or services of a property nature. That is the essence of the crime. Therefore, the behavior of a person performing managerial functions in a commercial or another non-profit organization should always be conditioned by bribery. The receipt of a non-predetermined reward (gift) after the Commission of his actions as a result of his position cannot be regarded as commercial bribery. In such a situation, actions (inaction) in the service are committed without the calculation of remuneration and its receipt is not related to the use of his official position.

To sum up, it must be emphasized once again that the transfer of remuneration in the case of commercial bribery always implies that the act is subject to certain conduct by the person performing managerial functions. By conditionality we mean both the existence of a preliminary verbal, liberal or conclusive agreement, an agreement between the subjects of bribery (objective conditionality), and in the absence of such an agreement, a subjective calculation of future remuneration (subjective conditionality). Otherwise, the actions (inaction) of a person performing managerial functions in a commercial or another organization do not constitute a crime under part 1 of article 253 of the criminal code.

An important issue for the qualification of commercial bribery is the question of attributing to illegal actions or inaction of the Manager for General patronage or connivance in the service.

Based on the literal interpretation of part 1 and 3 of art. 253 of the criminal code, it should be concluded that the general protection and connivance in the service are included in the illegal activities of the Manager. Accordingly, bribery of a person for these acts forms part of commercial bribery.

In the legal literature it is proposed to qualify this situation as abuse of power [7; 16].

To the total patronage of the service can be attributed, in particular, actions related to undeserved incentives, extraordinary unjustified promotion in office, the Commission of other acts not caused by necessity.

To connivance in the service should be attributed, for example, failure to take measures for omissions or violations in official activities, non-response to his misconduct.

In item 5 of the resolution of Plenum of the Supreme court of the Russian Federation «About judicial practice on cases of bribery and about other corruption crimes» it is explained: «the General protection on service can be shown, in particular, in unreasonable appointment of the subordinate, including in violation of the established order, to higher position, in inclusion of its lists of the persons represented to incentive payments. Connivance in the service includes, for example, the consent of the official of the Supervisory authority not to apply the measures of responsibility included in its powers in case of detection of the violation

committed by the bribe-giver». It follows that patronage and connivance in the service are nothing but the Commission or non-performance of specific acts, which are certainly illegal.

When receiving a bribe for general protection or connivance in the service, the bribe-giver does not specify the special actions of a person authorized to perform state functions or an equivalent person, but the participants in the crime realize that the transfer of a bribe is aimed at satisfying the interests of the bribe-giver or the persons represented by him. This is ultimately expressed (or with a certain degree of probability can be expressed) in certain actions (inaction) of the subject of the crime.

This type of bribery is typical for the systematic transfer of bribes from subordinates or controlled by the person authorized to perform public functions or equated to him or her person or official, employees, as the bribe-taker solves issues affecting the interests of the bribe-giver.

Conclusions

Summing up, receiving a bribe for protection or connivance in the service will take place under the following conditions: 1) the bribe recipient must retain the possibility of committing or failing to perform actions (inaction) in favor of the bribe-giver; 2) this possibility must arise from the relationship of control or subordination between these persons; 3) both persons must be aware of the meaning of the transferred remuneration (remuneration is transferred as a bribe for the relevant behavior of the person authorized to perform public functions, or an equivalent person) [8; 216].

Illegal patronage or connivance in the service, as official phenomena are negative and, accordingly, cause harm to the interests of the official activities of commercial or another organizations. These acts are committed in connection with management activities and are caused by commercial bribery. Thus, we see that with General patronage or connivance in the service, there are all signs that commercial bribery has been criminalized.

Having considered the questions posed, we came to the following conclusion that analysis of the disposition of part 1 and 3 of article 237 of the criminal code of the Republic of Kyrgyzstan and article 192.9 of the criminal code of the Republic of Uzbekistan indicates that the commercial bribery legislators do not provide for the features considered by us, namely «general protection or connivance in the service». At the same time, we believe that this circumstance somewhat narrows the scope of the criminal law in relation to commercial bribery, and in this regard is currently a gap in the criminal legislation of the Republic of Kyrgyzstan and the Republic of Uzbekistan.

Thus, the foregoing allows us to assert that this issue should be resolved by law, by introducing into the disposition of part 1 and 3 of article 237 of the criminal code of the Republic of Kyrgyzstan and article 192.9 of the criminal code of the Republic of Uzbekistan the phrase «for general protection or connivance in the service».

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А.Б. Маймақова, Б.А. Аманжолова, А.В. Кудрявцева

Қазақстан, Қырғызстан және Өзбекстан қылмыстық заңнамасында қарастырылған коммерциялық параға сатып алу белгілеріне салыстырмалы талдау

Мақала Қазақстан Республикасының және Тәуелсіз Мемлекеттер Достастығының кейбір елдерінде коммерциялық немесе өзге де коммерциялық емес ұйымдарында басқару қызметін атқаратын адамдар үшін қылмыстық жауапкершілікті жүргізуде үлгі боларлық оқиғалары бар қылмыстық заңнама нормаларына салыстырмалы талдау жасауға арналған. Коммерциялық параға сатып алуды жасағаны үшін жауаптылықты көздейтін ТМД елдері заңнамасының жалпы сипаттары Қазақстанның қылмыстық заңнамасында ұқсастық көп. Бұл кодификациялау, талданатын заңнамаға да және Қылмыстық кодекстер құрылымының жақындығына, оларды бөліктерге, ал жекелеген жағдайларда бөлімдерге, тараулар мен мақалаларға бөлуге, сондай-ақ коммерциялық параға сатып алуды жасаудың тарихи шарттылығына да қатысты болады. Қырғыз Республикасы ҚК-нің «Коммерциялық және өзге де ұйымдарда мемлекеттік қызмет мүдделеріне қарсы қылмыстар» 34-тарауының 237-бабында коммерциялық параға сатып алу жасағаны үшін жауапкершілік бекітілген. Коммерциялық параға сатып алуды жасағаны үшін жауапкершілікті көздейтін осындай қылмыстық-құқықтық норма, Өзбекстан Республикасы ҚК-нің «Кәсіпкерлік қызметке заңсыз араласумен кедергі жасауға байланысты қылмыс және шаруашылық жүргізуші субъектілердің құқықтары мен заңды мүдделеріне қолсұғатын басқа да қылмыстар» XIII.1-тарауының 192.9-бабында қарастырылған. Басқа елдердің параға сатып алумен күресу сипатындағы қылмыстық-құқықтық шаралары тәжірибесінің жалпы сипаттамасы ғылыми құндылық тудыратыны күмәнсіз. Сондай-ақ коммерциялық параға сатып алу жолымен жасалатын қылмысты қазіргі заманғы елдердің қылмыстық заңнамасын саралау мәселелері бойынша бірқатар ережелерін өзгерту жөнінде өз ұсыныстарын енгізу арқылы жүзеге асырған орынды болады. Осы мақаланы жазу нәтижесінде Қырғыз Республикасы ҚК-нің 237-бабының 1- және 3-бөлімдеріне және Өзбекстан Республикасы ҚК-нің 192.9-бабындағы «Қызмет бойынша жалпы жақтаушылық немесе салғырттық үшін» сөз тіркестеріне диспозиция енгізу қажет екендігі туралы қорытындыға келдік. Біздің ойымызша, қазіргі уақытта осы сөз тіркестерінің болмауы, коммерциялық параға сатып алуға қолданылатын қылмыстық заңның қолданылу аясын тарылтады және бүгінгі күні Қырғыз Республикасы мен Өзбекстан Республикасының осыған байланысты қылмыстық заңнамасындағы олқылық болып табылады.

Кілт сөздер: коммерциялық параға сатып алу, коммерциялық және өзге де коммерциялық емес ұйымдар, қызмет бойынша жалпы жақтаушылық, қызмет бойынша салғырттық, заңсыздық, қызмет бабы.

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Сравнительный анализ признаков состава коммерческого подкупа по уголовному законодательству Казахстана, Кыргызстана и Узбекистана

Статья посвящена сравнительному анализу норм уголовного законодательства Республики Казахстан и некоторых стран Содружества Независимых Государств, имеющих прецеденты введения уголовной ответственности для лиц, выполняющих управленческие функции в коммерческой или иной некоммерческой организации. Законодательство стран СНГ имеет много общих черт с казахстанским уголовным законодательством, предусматривающим ответственность за коммерческий подкуп. Это касается как кодификации анализируемого законодательства и близости структуры уголовных кодексов, деления их на части, а в отдельных случаях на разделы, главы и статьи, так и исторической обусловленности коммерческого подкупа. В главе 34 УК Кыргызской Республики «Преступления против интересов службы в коммерческих и иных организациях» в статье 237 закреплена ответственность за совершение коммерческого подкупа. Аналогичная уголовно-правовая норма, предусматривающая ответственность за коммерческий подкуп, предусмотрена в УК Республики Узбекистан в главе XIII.1 «Преступления, связанные с воспрепятствованием, незаконным вмешательством в предпринимательскую деятельность, и другие преступления, посягающие на права и законные интересы хозяйствующих субъектов» в статье 192.9. Несомненную научную ценность вызывает общая характеристика опыта борьбы других стран с подкупом мерами уголовно-правового характера. А также анализ уголовного законодательства других современных стран по вопросам квалификации преступления, совершаемого посредством коммерческого подкупа, целесообразно осуществлять путем внесения своих предложений по изменению ряда положений. В результате написания данной статьи мы пришли к выводу о введении в диспозицию чч. 1 и 3 ст. 237 УК Кыргызской Республики и ст. 192.9 УК Республики Узбекистан словосочетания «за общее покровительство или попустительство по службе». По нашему мнению, отсутствие в настоящее время данного словосочетания сужает сферу действия

уголовного закона применительно к коммерческому подкупу, и в этой связи является на сегодняшний день пробелом в уголовном законодательстве Кыргызской Республики и Республики Узбекистан.

Ключевые слова: коммерческий подкуп, коммерческие и иные организации, общее покровительство по службе, попустительство по службе, незаконность, служебное положение.

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