



Criminalization of corruption in the conduct of international business transactions in international criminal legislation

Criminalización de la corrupción en la realización de transacciones comerciales internacionales en la legislación penal internacional

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Received: 19/05/2018 • Approved: 03/07/2018

Contents

- [1. Introduction](#)
 - [2. Methodology](#)
 - [3. Findings](#)
 - [4. Discussion](#)
 - [5. Conclusion](#)
- [References](#)

ABSTRACT:

The main objective of this paper is to analyze the issues of improvement of the Russian criminal legislation in connection with the accession of the Russian Federation to the OECD Convention on Combating Bribery of Foreign Public Officials in the conduct of international business transactions adopted in 1997. The method of achievement of this objective is justified by the fact that under the conditions of the worldwide slump, the formation of a coordinated criminal policy of the OECD member countries aimed at counteracting transnational corruption at international scale plays an important role, in particular, the bribery of foreign public officials when implementing business transactions. Russia's ratification of this Convention and other Conventions in the sphere of counteracting corruption creates favorable prerequisites for the further improvement of the provisions of the Criminal Code of the Russian Federation on liability for bribery, as well as other corruption offences. That said, the analysis of the current criminal legislation shows that it does not fully meet the international standards for the

RESUMEN:

El objetivo principal de este documento es analizar las cuestiones de mejora de la legislación penal rusa en relación con la adhesión de la Federación de Rusia a la Convención de la OCDE sobre la lucha contra el soborno de funcionarios públicos extranjeros en la realización de transacciones comerciales internacionales adoptada en 1997. El método para lograr este objetivo se justifica por el hecho de que, en las condiciones de la crisis mundial, la formación de una política criminal coordinada de los países miembros de la OCDE dirigida a contrarrestar la corrupción transnacional a escala internacional desempeña un papel importante, en particular, el soborno de funcionarios públicos extranjeros en la implementación de transacciones comerciales. La ratificación por Rusia de este Convenio y otros convenios en el ámbito de la lucha contra la corrupción crea requisitos previos favorables para seguir mejorando las disposiciones del Código Penal de la Federación de Rusia sobre responsabilidad por soborno, así como otros delitos de corrupción. Dicho esto, el análisis de la legislación penal actual muestra

criminalization of corruption. Based on a comparative analysis of these standards, a conclusion on the need to improve the provisions of the Criminal Code of the Russian Federation, which are focused on anti-corruption, is substantiated.

Keywords: Corruption, bribery, giving bribe, acceptance of bribe, bribery of foreign public officials, conduct of international business transactions, corrupt payment, counteracting corruption.

que no cumple con los estándares internacionales para la criminalización de la corrupción. Sobre la base de un análisis comparativo de estas normas, se confirma una conclusión sobre la necesidad de mejorar las disposiciones del Código Penal de la Federación de Rusia, que se centran en la lucha contra la corrupción.

Palabras clave: corrupción, soborno, soborno, aceptación de soborno, soborno de funcionarios públicos extranjeros, realización de transacciones comerciales internacionales, pago corrupto, lucha contra la corrupción.

1. Introduction

One of the main trends in modern crime is its globalization. This is also fully valid for corruption as one of the forms of manifestation of criminality. Corruption has begun to increasingly grow in recent decades, which makes it extremely dangerous for the global community. Various researchers acknowledge that corruption is of international nature, including with regard to the so-called domestic (internal) corruption (Gravina, 2015).

Virtually every state is included in the system of international cooperation and differentiation of labor in various sectors and spheres of production. Corruption not only negatively affects the national economy of the state, but also reduces its investment attractiveness for the foreign investors. This results in the deepening of the economic contradictions between developed countries and the so-called "third-world" countries. The adverse impact of corruption affects the social and economic situation throughout the world. The financial crisis that broke out in Russia in August 1998 can be mentioned as an instance of the adverse impact of international corruption on the economic development of the country. (Analytical Gazette of the Federation Council of the Federal Assembly of the Russian Federation, 1999).

A grave threat to world economic and political stability and the law order is carried by transnational corruption, which, in particular, is related to the activities of economic entities abroad. The scale of financial implications of transnational corruption is enormous. According to the figures of the US State Department presented at the Second World Forum on combating corruption held in The Hague in 2001, at least 200 billion US dollars were spent on bribery of public officials in the past 7 years in the conclusion of about 400 international contracts. Even more impressive figures were obtained in the study of the problem of corruption in the United Kingdom (1997) – the amount of bribes paid annually throughout the world is about 80 billion dollars a year. That having been said, the majority of corruptionists are organizations and enterprises that carry out their activities in developing countries. Bribery is widespread in the conclusion of contracts for the delivery of weapons (Batushenko, 1997). The relationship of international corruption with the legalization of criminal proceeds and with transnational organized crime should be taken into account as well.

The mentioned circumstances determine the need for criminalization of various forms of corruption at international scale which have transnational character, and for taking complex measures aimed at counteracting corruption in foreign relations. During the past two decades, most of developed countries have conducted coordinated criminal policy in the sphere of counteracting all kinds of corruption in the conduct of transnational business transactions. In this regard, it seems important to generalize the legislative experience in combating this form of corruption and identifying the prospects of its utilization in criminal legislation of the Russian Federation.

2. Methodology

The issues of criminalization of corruption in foreign relations are usually investigated haphazardly in the literature. At the best case, the levels of international anti-corruption rule-making are identified, or researchers confine themselves to the chronology of international conventions and agreements in this field (Shvedova, 2015). In our opinion, it is necessary to have a scientifically grounded historical periodization of legislation in the

sphere of counteracting corruption at international scale. Moreover, this periodization should be based not only on the time frame that limits a given period, including the relevant agreements (formal criterion), but also the special aspects of the basis of the criminalization of corruption that define the pattern of corrupt behavior (tangible criterion).

When investigating the historical perspective of criminalization of corruption at international scale, it must be borne in mind that it was not until the late 1970s that the global community recognized the need for international cooperation in combating corruption and defined its essence as a transnational phenomenon in the late 1980s. This fact is of substantial significance in view of the fact that understanding the need for improvement of legislation in combating corruption came with its definition as an exactly international phenomena in most states.

The initial stage is associated with the criminalization of corruption with the "international element" in certain countries and its influence on the lawmaking of the international organization in this sphere (Vasilyeva, 2012). At this stage, international community develops and enacts international documents on counteracting corruption mainly at the domestic level. However, some of them mention one of the varieties of international corruption – bribe on the part of one state given to the representative of another state in the course of international relations. The first country which implemented the criminalization of international corruption (in the form of international bribery in business transactions) was the United States which adopted the Foreign Corrupt Practices Act of 1977. This law prescribes punishment for bribery in the conclusion of international contracts abroad by the representatives of American companies, and for corrupt practices of foreign public officials. Having adopted the 1977 Act, the United States demanded criminalization of this act by other OECD member countries referring to the fact that American companies are at a disadvantage in concluding international contracts. As a result, only Sweden and Norway of all the OECD member countries took the same measures with respect to corrupt practices in international relations. By contrast, most of the countries, including the United Kingdom, France, Germany and Japan, stated that they cannot take such measures (Lukashek, 2001). However, the spread of corruption in individual countries and its globalization aroused grave concern in the UN as early as in the late 80's. The Resolution of the VIII UN Congress held in 1990 in Havana, "Corruption in the sphere of state administration", emphasized that "the problem of corruption in public administration is general in nature, and although they exert a particular influence on the developed economies, this influence is felt all over the world. " Thus, it can be stated that under the influence of the common practice of bribery of public officials in international commercial relations in the late 1980s and awareness of the hazard of this phenomenon to economic and political stability, upon experience of counteracting international corruption gained by particular countries, social prerequisites for the criminalization of this act at international scale have been created.

3. Findings

Taking into account the tendencies of international corruption and realizing the threat to its national interests, as well as the complexity of identifying corrupt practices in the conduct of international business transactions, developed countries came to understanding of the need for international cooperation in combating corruption. This resulted in the development and adoption of a number of international documents both at the global and regional levels.

An important role in the formation of the international anti-corruption policy at this stage was played by initiatives of the UN-associated international organizations, particularly but not exclusively the Organization for Economic Cooperation and Development, on preventing bribery of foreign public officials in the conclusion of the international commercial contracts. As just noted, these measures were largely taken under the influence of American legislation on the corrupt practices abroad. In the early 90s the OECD member countries came to understanding of the need for adequate criminalization of corrupt practices of their companies abroad. This resulted in the adoption of the Recommendations on Counteracting Bribery of Foreign Public Officials in the Conduct of International Business Transactions by the OECD Council in 1996. These recommendations were revised and supplemented in May

1997. The revised Recommendations of 1997 specify and define the measures taken by the countries that signed the Convention in the field of record-keeping of public procurement, as well as criminalization of bribery of foreign public officials. The revised Recommendations also call the attention of the countries that signed this Convention to the need of the immediate implementation of the provisions of the 1996 Recommendations on deductibility of bribes paid to foreign public officials out of the total amount of tax revenue, urging the countries to institute an appropriate ban on deduction of bribes from the total amount of taxable income.

4. Discussion

Pursuant to these Recommendations, the Convention on Combating Bribery of Foreign Public Officials in the implementation of international business transactions (hereinafter referred to as the OECD Convention) was drawn up, and was adopted on November 21, 1997. This international treaty was signed in December 1997 by 28 OECD member countries and by 5 countries which were not included in this organization at that time. These states undertook to take and implement legislative measures aimed at recognizing the bribery of foreign public officials in the conduct of international business transactions as an offence. The OECD Convention contains a sufficiently extensive and specific interpretation of bribery, sets forth the norms and criteria for the execution and implementation of relevant laws, and includes certain mechanisms for mutual judicial assistance.

Pursuant to Article 1 of this Convention, bribery of foreign public officials is treated as a "deliberate offer, promise or granting of any unfair pecuniary or other preferences to a foreign public official by any person directly or indirectly, to such public official or third party so that this public official carried out an action or omission in the performance of his/her official duties for the acceptance or preservation of a commercial or other unfair preference in connection with the conduct of an international business transaction" (Paragraph 1). At the same time, all parties are obliged to take appropriate measures in order to recognize participation in this crime, including aiding, abetting and solicitation, as well as a certain sanctioning of the bribery of a foreign public official, as a criminal offence. "Attempt to bribe or conspiracy to bribe any foreign public official is a criminal offence to the same extent as the attempt to bribe or conspiracy to bribe a public official of this Party" (Paragraph 2).

Thus, only one form of corruption is mentioned in the OECD Convention – "active bribery", which in the national criminal legislation means an offence referred to as "giving bribe" (Article 291 of the Criminal Code of the Russian Federation). The liability for "passive bribery", which shall be understood as the acceptance of bribe by a public official, is determined in accordance with the internal law of a Party (Article 290 of the Criminal Code of the Russian Federation).

The analysis of Article 1 of the OECD Convention has allowed us to single out the following anti-corruption criminalization standards of the act under consideration, which must comply with the national law of member countries of the Convention:

- bribe means any unfair preference and (or) other preference granted to a foreign public official. It should be noted that the term "other improper advantages" refers to those preferences for which the company did not have any clearly defined and vested rights, for example, a license to operate an enterprise that does not comply with the requirements of the current legislation (Commentary on the OECD Convention);

- (1) a deliberate promise, (2) offer, or (3) granting of a particular unfair preference to a foreign public official by any person (directly or indirectly) shall be treated as particular offences. In this case, these actions may be committed either through an intermediary or addressed directly to a public, while the benefits are provided to a foreign public official or to a third party;

- a basis (goal) of the bribery of a foreign public official is the preservation or granting of commercial and (or) other wrongful preference in connection with the conduct of an international business transaction. Some authors are of opinion that the sphere of international business transactions goes beyond conclusion of contracts, and extends to

procurement of certain permits in the sphere of regulation of various kinds of activities, benefits or preferences in the spheres of taxation, customs treatment, judicial procedures, and courses of law (Kashirkina, 2013). At the same time, liability arises irrespective of whether a particular company or organization is a more qualified bidder or whether it would be an acquirer of these business preferences regardless of the situation (Commentary on the OECD Convention);

- the subject of bribery is any person, while its receiver is a foreign public official. For the purposes of this Convention, the following persons are classified as foreign public officials: 1) any person holding an appointed or elective office in any branch of power of a foreign country; 2) any person who exercises public functions for a foreign country, including for a state enterprise or a state agency; 3) any public official or representative of an international governmental organization.

Russian Federation acceded to this Convention in February 2012 (Federal Law 2012). Formerly Federal Law No. 97-FZ dated May 4, 2011 introduced significant amendments in the Criminal Code of the Russian Federation aimed at counteracting corruption (Federal Law 2011). An important anti-corruption innovation in the Criminal Code of the Russian Federation is the admission of fact of acceptance of bribe by a foreign public official and an official of a public international organization (Article 290), as well as criminalization of giving bribe in this Part and mediation in bribery with regard to these entities (the Criminal Code of the Russian Federation, 1996). However, a comparative analysis of these provisions of the Criminal Code of the Russian Federation shows that they do not yet fully meet the international criminalization standards which can be found in the OECD Convention.

5. Conclusion

In general, while we positively assess the main provisions of the OECD Convention with regard to the criminalization of corruption in the conduct of international business transactions, it is necessary to note certain issues that arise both in the process of implementing international legal norms into the national criminal legislation and in the process of labeling of corrupt practices in a real sense.

First of all, this problem of creating a common legal framework of member countries of the OECD Convention in terms of balance of the basic conceptual ideas and regulatory prescriptions of the Convention with the guiding principles and provisions of internal legislation of member countries, on the one hand, and the balance of the scope and the limits of criminalization (penalization) of corrupt practices in criminal legislation of particular countries on the other hand. For example, this problem concerns the criminalization of corrupt practices of legal entities. Pursuant to Article 2 of the Convention, each party to this relationship, in accordance with its legal principles and obligations, implements the necessary measures which stipulate the liability of legal entities for the bribery of a foreign public official. It should be noted however that Article 3 of the Convention contains a reservation that if criminal liability cannot be applied to legal entities in accordance with the legal framework of any Party, then such Party shall implement the application of a proportionate and efficient non-criminal sanction exercising restraining effect on the bribery of foreign public officials, including financial sanctions. It is often stated that the Russian Federation cannot implement this regulation of the Convention in the internal criminal legislation (Budaragina, 2015) for a variety of reasons. In accordance with this Federal Law dated December 25, 2008, corruption offences of legal entities are subject to administrative liability (Article 19.28 of the Administrative Offences Code of the Russian Federation). As a result, Russian Federation cannot fully utilize the anti-corruption mechanism of the Convention to protect its interests from the corrupt influence of foreign legal entities that are criminally liable according to their internal legislation (United States, France, Germany, Italy, etc.) (Artemov, 2014).

In another plane of correlation between the internal legislation of member countries of the Convention there is a problem of developing corpus delicti of corruption offenses and their punishability (given a relatively equal approach of states to the criminalization of the same act). Corpus delicti may differ not only in the number of mandatory and optional (qualifying)

attributes, but also have various limits of criminalization practices in various elements of corpus delicti. This primarily concerns the target of crimes provided for by Article 204, 290, 291 and 2911 of the Criminal Code of the Russian Federation. According to the Russian criminal legislation, only be benefits which are pecuniary in nature, including money, securities, other property or the granting of other property rights, or illegal provision of services of pecuniary nature, can be treated as bribe or corrupt payment. While according to the OECD Convention, a bribe means any unfair preference that has both tangible and intangible (i.e., not having a monetary value) expression.

Even greater differences can be identified in the sphere of activities which in the OECD Convention and Articles 290, 291 and 204 of the Criminal Code of the Russian Federation are recognized as bribery: active bribery, according to the Convention, constitute a promise, an offer or a granting of any unfair preferences to a foreign public official; and pursuant to Part 1 of Article 204 and Article 291 of the Criminal Code of the Russian Federation – it is only illegal provision (transfer). In Russian criminal law, an offer or a promise of bribe in certain circumstances, can only be considered as preparation for a crime. Thus, the Decree of the Plenum of the Supreme Court of the Russian Federation No. 24 dated 09.07.2013 states that offer or promise of transfer of illegal gratification for committing or not committing certain actions in office should be considered as the deliberate arrangement of appropriate conditions for the commission of certain offenses in the sphere of corruption in cases where the person's stated intention to transfer a potential bribe or an object of corrupt payment was aimed at bringing it to the attention of others for the purpose of transferring property holdings to them, as well as if an agreement was reached between these entities (P. 14). From this explanation of the Plenum it follows that an offer and a promise of illegal gratification should be treated as the deliberate arrangement of conditions for the commission of a corruption offence, which makes it possible to treat these actions as preparation for the commission of an offence. Hence, the preparation for giving bribe to a foreign public official, which is not classified as a grave offense provided for by (Part 1 and Part 2 of Article 291 of the Criminal Code of the Russian Federation), is not a criminal offense, which is in contradiction to Article 1 of the OECD Convention. According to the OECD Convention, a promise or an offer of unfair preference to a foreign public official forms a completed offence.

In addition, the OECD Convention gives a rather broad definition of the subject of passive bribery: in particular, pursuant to the provision of this Convention, it can be any person which exercises public functions for a foreign country, including for a state-owned enterprise, institution or agency. This provision has been implemented in criminal legislation of a wide range of member countries of the Convention. Pursuant to the Criminal Code of the Russian Federation, only a person who performs the relevant managerial functions in the relevant government agencies and institutions, commercial or other organizations, can be the subject of acceptance of corrupt payment or bribe (Articles 204 and 290 of the Criminal Code of the Russian Federation).

Concluding the consideration of the issue of criminalization of corruption in international criminal legislation, we can state that thanks to the cooperation of states, international documents have been enacted that are unparalleled in terms of their scale and practical relevance, contain the legal basis for a global prevention of corruption. However, our analysis allows us to identify a certain difference between the criminal legislation of the Russian Federation and the standards of the OECD Convention, which is unacceptable under the conditions of a unified global counteracting corruption. It requires significant amendments to the Criminal Code of the Russian Federation, in respect to, in particular:

- a) recognition of other wrongful preference, including of intangible nature as bribery and (or) acceptance of bribe (corrupt payment);
- b) expansion of the sphere of activities in corpus delicti of bribery and corrupt payment (Articles 204, 2041, 290, 291, 2911 Criminal Code of the Russian Federation) due to criminalization of "ideal" forms of bribery set out in the Conventions - promise and offer of a bribe, as well as their acceptance by a public official;
- c) expansion of the concept of a public official as a subject of corruption offences by

recognizing the civil and municipal officers other than public officials as the subjects of corruption offences;

d) introduction of criminal liability of legal entities into the national legislation of an institute

In the end, we would like to say thank you to all those scholars who dealt with the issue of criminalization of corruption in the conduct of international business transactions, whose papers we made reference to when writing this article.

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Revista ESPACIOS. ISSN 0798 1015
Vol. 39 (Nº 44) Year 2018

[Index]

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