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# SOME ISSUES OF THE CRIMINALIZATION OF TRADING IN INFLUENCE

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## Abstract

**Purpose.** The aim of this research is to reveal some issues of the criminalization of trading in influence.

**Design/methodology/approach.** This analysis is based both on theoretical and empirical methods.

**Findings.** Preliminary results of this research reveal the tendency to include all elements of active and passive trading in influence, provided in the Article 12 of the Council of Europe Criminal Law Convention on Corruption (hereinafter – the Convention), into the definition, established in the national criminal law. Therefore, for example, there are a lot of terms, also superfluous terms, in the definition of active and passive trading in influence in the Criminal Code of the Republic of Lithuania. However, the usage of superfluous words in definition could really complicate the proper application of the criminal law.

In the case of pretended and not real influence, the protected interest of both trading in influence and fraud is important to distinct these crimes. However, the pretended and not real influence is the feature of trading in influence in Lithuania because the legislator pursued the implementation of all recommendations of the Group of States against Corruption (hereinafter – GRECO).

**Research limitations/implications**. First of all, this research reveals the concept of trading in influence as a principal offence established in the Convention. This analysis is limited to the text of the Convention and GRECO's recommendations. Secondly, it tries to provide an answer to the question what is the line between two offences – fraud and trading in influence. Other issues related to the criminalization of trading in influence have not been included in this research.

**Practical implications**. The results of this research may be useful in further research on trading in influence, also, this study would be relevant to the scholars and practitioners (judges, prosecutors, pre-trial investigation officers).

**Originality/Value**. The criminalization of corruption-related offences is a key topic for discussions. So far, in Lithuania the majority of legal studies have been concentrated on bribery, sanctions for corruption offences. In absolute majority of scientific articles on corruption offences the implementation of the Article 12 of the Convention is only mentioned, but not thoroughly analyzed.

Scientists from foreign countries analyzed their national regulation of trading in influence and compared with international standards as well as the regulation of some other countries.

**Keywords:** Criminal Law Convention on Corruption, trading in influence, alleged influence, fraud.

**Research type:** research paper.

**JEL classification:** K14, K42.

## Introduction

The phenomenon of corruption has been known since the oldest time. Nevertheless, the international attention to corruption has been paid only since 1990s (*see more*: Philipp, 2009; Kaiafa-Gbandi, 2010). The Convention was adopted in 1999 and came into force in 2002.[1] One aim of this Convention is to ensure coordinated criminalization of corrupt acts such as active and

[1]Council of Europe Criminal Law Convention on Corruption (ETS No. 173), available at <https://rm.coe.int/168007f3f5>.

passive bribery in the public and private sectors, trading in influence, money-laundering of proceeds from corruption offences and accounting offences connected with corruption offences. According to Explanatory report (1999), the Convention not only introduces a commonly agreed definition of bribery but also defines other forms of corrupt behavior, such as trading in influence (Article 12). Legal scholars have drawn attention to the broader definition of corruption offences. Kaiafa-Gbandi (2010, p. 146) noted that the Convention ended the era of identifying corruption only as bribery. Also, Stessens (2001, p. 900) mentioned that the definition of corruption has been substantially broadened, so as to include conduct that had not been previously criminalized.

Trading in influence is defined in Article 12 of the Convention: '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[2] 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.' Briefly, trading in influence could be described as a corrupt trilateral relationship where a person having influence on some authorities uses or promises to use his or her influence in exchange for an undue advantage from someone seeking this influence (*see* Philipp, 2009). So, both a person having influence and a person seeking this influence should be punishable.

During the period of the adoption of the Convention[3] it was stated that the offence of trading in influence would be relatively new to *some* Member States (Explanatory report, 1999). Some countries have hesitated to establish trading in influence as a separate criminal offence. This hesitation has been proved by reservations made in line with Article 37 of the Convention. Firstly, 28 (from 50) Member States made reservations to the Convention and the Additional Protocol to the Convention[4]. In general, these reservations related to jurisdiction, judicial cooperation and criminalization of narrow circle of subjects, some offences, indeed, these offences are trading in influence and bribery in private sector. Until now 17 Member States have renewed their

[2] Article 2 – Active bribery of domestic public officials; Article 4 – Bribery of members of domestic public assemblies; Article 5 – Bribery of foreign public officials; Article 6 – Bribery of members of foreign public assemblies; Article 9 – Bribery of officials of international organizations; Article 10 – Bribery of members of international parliamentary assemblies; Article 11 – Bribery of judges and officials of international courts.

[3] Lithuania has been a Member State of the Convention since 2002.

[4] This Protocol extends the scope of the Convention and requires Member States to establish the active and passive bribery of domestic and foreign arbitrators and jurors as criminal offences. Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191), available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008370e>.

reservations. Noteworthy, almost half of these Member States (8) have reserved the right not to establish as a criminal offence, in part or in whole, the conduct of trading in influence.[5]

It should be mentioned that even those countries which have not made reservations have some struggles to criminalize trading in influence. This is proved by the monitoring process of GRECO[6] which has shown that the requirement to establish trading in influence as a criminal offence is challenging (*see* Rau, 2011). GRECO recommended Member States, except 4 states (Albania, Croatia, Malta[7] and Serbia), to criminalize trading in influence in line with the Convention. According to this, some of Member States changed their law and accepted recommendations regarding trading in influence. Nevertheless, not all recommendations were welcome favorably by Member States.[8]

This article aims to analyze some theoretical and practical issues of the implementation of the requirement of Article 12 of the Convention to criminalize trading in influence. The first part of this article introduces the concept of trading in influence as a principal offence. The second part provides an answer to the question what is the line between two offences – fraud and trading in influence.

The criminalization of corruption-related offences is a key topic for discussions. So far, the majority of legal studies have been concentrated on bribery (Pakštaitis, 2004), sanctions for corruption offences (Daukšaitė and Kavoliūnaitė-Ragauskienė, 2015) in the Lithuanian legal science. Trading in influence has been very little examined in Lithuania. Some aspects of this topic have not been analyzed extensively by Abramavičius and Švedas (2015), Pakštaitis (2) (2004), Čaikovski (2005). Also, in absolute majority of scientific articles the implementation of the aforementioned requirement of Article 12 of the Convention is only mentioned, but not thoroughly analyzed. Scientists from foreign countries (Hollán (2011), Philipp (2009), Slingerland (2011)) analyzed the national regulation and compared with some other countries.

This analysis is based on both theoretical (logical-analytical, comparative, systematic) and empirical methods (analysis of the evaluation and compliance reports published by the GRECO[9]).

[5] Reservations and Declarations for Treaty No.173 - Criminal Law Convention on Corruption, available at < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/declarations?p_auth=9bhQtsAT>.

[6] In 1999 the Council of Europe established GRECO which monitors the implementation of the Convention standards, cooperates with Member States, evaluates both the Member States' regulation and case-law, addresses recommendations to each country and assesses the measures taken by them to implement these recommendations (*see more* Welcome to the GRECO website – Council of Europe).

[7] It should be mentioned that, regarding the question of trading in influence, GRECO only paid attention to penalties for trading in influence. The definition of trading in influence established in Malta's criminal law was accepted by GRECO.

[8] The Third Evaluation Round of GRECO, *inter alia*, focused on incriminations. The ninth part of the Questionnaire on the incriminations provided for in the Criminal Law Convention on Corruption (ETS 173), its Additional Protocol (ETS 191) and Guiding Principle 2 (GPC 2) (2007) was about trading in influence.

[9] All these reports could be found here: Third Evaluation Round [interactive] [accessed 2019-05-30]. <https://www.coe.int/en/web/greco/evaluations/round-3>.

## 1. The Concept of Trading in Influence as a Principal Offence

As it is mentioned in introduction, Article 12 of the Convention requires Member States to criminalize both active and passive trading in influence. The Member States could choose the way how to implement requirements of the Convention into their national criminal law. So, the implementation could depend on the current regulation of Member States. The entirety of applicable criminal norms, which are in force, could have already properly implemented the international standards. Furthermore, it should not be forgotten that the interpretation of law could also help to ensure the successful implementation of international standards. (*See more* Švedas, 2014).

However, in Author's opinion, the choices of implementation of international requirements are limited because of the strict position provided by GRECO. GRECO, monitoring countries' compliance with the Convention standards, in general requires that the definition of trading in influence would be similar, almost identical, to the definition provided in the Convention.

Words, expressions and elements used in the national criminal law should be similar or identical to those that are used in the Convention. It is proved by expressions used by GRECO. For example, in the Evaluation Report on Luxembourg (Incriminations (ETS 173 and 191, GPC 2) (Theme I), 2008), GRECO stated that "in the absence of any national case-law, it would be preferable for the offence to be defined more carefully with regard to these aspects". Similar expressions could be seen in the Evaluation Report on Georgia (Incriminations (ETS 173 and 191, GPC 2) (Theme I), 2011): "despite obvious efforts to closely follow the wording of the Convention".

As it is mentioned, the case-law could also confirm that all elements of the Convention are implemented in the national criminal law. However, the analysis of evaluation and compliance reports confirms that, if there are no cases regarding trading in influence, it is difficult to prove that one or another element, established in the Convention, is covered by the national law (*see* Compliance Report on Spain (Incriminations (ETS 173 and 191, GPC 2)/Transparency of Party Funding, 2011): "no case has been cited to demonstrate <…>"). In author's opinion, this strict GRECO's position, on its own, makes some difficulties. The analysis reveals that during the period of evaluations the majority of countries did not provide court decisions regarding trading in influence. Thus, there was no evidence that support countries' opinions. It complicates the vision of the regulation other than conventional. Many Member States have changed the national criminal laws to transfer all elements of the Article 12 of the Convention into one definition of the national criminal law. Nevertheless, not all states seek to amend their national regulations. Some countries still have had reservations and rejected the strict GRECO's position (*see more about reasons for reservations* Slingerland, 2011).

In Author's opinion, this strict view has raised issues of the application and interpretation of law in practice. Moreover, it should not be forgotten that legislation shall be guided by the expediency (a draft legal act must be drawn up and the legal act adopted only where the objectives pursued cannot be achieved by other means) and systematicity (legal provisions must be consistent with each other, legal acts of lower legal validity may not contradict with the legal acts of higher legal validity, the implementing legal acts of a law must be drawn up and adopted so that they enter into force together with the law or separate provisions thereof which are implemented by these legal acts) principles[10]. This means that, first of all, current regulation should be evaluated and only then if the international standards are not implemented at all, it should be changed. Otherwise, amendments could create unclear boundaries between several criminal acts, the usage of superfluous words in descriptions and other issues.

However, as it is mentioned, the majority of states, including Lithuania, accepted the GRECO's position to criminalize trading in influence in line with Article 12 of the Convention. These countries chose the similar vocabulary to define trading in influence to the Convention. Taking about Lithuania, it should be mentioned that until amendments of the CC, which came into force in 2011[11], Article 226 of the CC criminalized the bribery of an intermediary. This article established that:

"1. Any person who, by using his social position, office, powers, family relations, acquaintances or any other kind of possible influence on a state or municipal institution or agency, an international public organization, their servant or a person of equivalent status, in exchange for a bribe promises to exert influence on an appropriate institution, agency or organization, a public servant or a person of equivalent status so that they accordingly act or refrain from acting legally or illegally, <...>.

2. Any person who commits the act specified in paragraph 1 of this Article in exchange for a bribe of minor value commits a misdemeanour, <...>.

3. Any legal person shall also be held liable for the acts specified in this Article".

This offence called *the bribery of an intermediary* as a principal offence was criminalized since the new CC came into force on 1 May 2003. Before this change, the perception that the receipt of advantages for the usage of improper influence should be punishable had been in the national criminal law. Some behavior regarding trading in influence had been qualified as bribery

[10] Law on Legislative Framework of the Republic of Lithuania. *Official Gazette.* 2012, No. 110-5564.

[11] Lietuvos Respublikos baudžiamojo kodekso 7, 42, 67, 68, 74, $123^1$, 125, 126, 134, 142, 144, 176, 177, 204, 205, 210, 211, 213, 220, 223, 225, 226, 227, 228, $228^1$, 229, 230, $253^1$, 255, 257, 263, 268, 278, 281, 297, $308^1$ straipsnių pakeitimo ir papildymo, Kodekso papildymo $68^1$, $68^2$ straipsniais ir 44, 45 straipsnių pripažinimo netekusiais galios įstatymas (Law Amending and Supplementing Articles 7, 42, 67, 68, 74, $123^1$, 125, 126, 134, 142, 144, 176, 177, 204, 205, 210, 211, 213, 220, 223, 225, 226, 227, 228, $228^1$, 229, 230, $253^1$, 255, 257, 263, 268, 278, 281, 297, $308^1$ of the Criminal Code of the Republic of Lithuania, Supplementing the Code with Articles $68^1$, $68^2$ and Invalidating Articles 44, 45 thereof). *Official Gazette.* 2011, No. 81-3959.

offences. The aforementioned regulation presented a new approach to corruption offences (*see more:* Pakštaitis (2), 2004; Mickevičiūtė, 2018).

This regulation of Article 226 of the CC was criticized by GRECO experts (Evaluation Report on Lithuania on Incriminations (ETS 173 and 191, GPC 2) (Theme I), 2009). One of the aspects, that GRECO paid atention, was the form of criminalization of trading in influence because active trading in influence was not criminalized as a principal offence. Thus, GRECO addressed the recommendation to incriminate trading in influence in line with Article 12 of the Corruption. Lithuania adopted all recommendations, including this, and changed the CC. First, the title of Article 226 has been changed from "The Bribery of an Intermediary" to "Trading in Influence". Second, active and passive trading in influence have been criminalized. Third, the different forms of passive trading in influence have been specified. Fourth, the alleged influence, the indirect commission of the offence and the concept of third-party beneficiaries have been directly introduced in Article 226 of the CC. Fifth, the definition of a bribe covering any form of benefit, whether material or immaterial, tangible or intangible has been provided in the CC.

Changes have been evaluated differently. On the one hand, GRECO has evaluated it favorably. According to GRECO, legal changes have shown remarkable progress because all the recommendations issued in the Evaluation Report have been implemented (Second Compliance Report on Lithuania on Incriminations (ETS 173 and 191, GPC 2)/Transparency of Party Funding, 2013). On the other hand, scientists have shown other attitude towards some aforementioned amendments. Fedosiukas (2014, p. 1085) questioned the way how international standards were implemented because now the definition of active trading in influence consists of seventy-four words (Article 226 (1)) and the definition of passive trading in influence consists of eighty-one words (Article 226 (2)). It is related to the efforts to define trading in influence in the wording of the Convention. However, even lawyers could struggle with this definition. Moreover, some words, used in the definitions of active and passive trading in influence, are superfluous in the CC.

For example, the Criminal Code of the Czech Republic provided criminal liability for both active and passive trading in influence in the same article.[12] It should be mentioned that the common and abstract words to describe this crime are used in the criminal law of the Czech Republic. The definitions of terms and explanations how to interpret and apply this norm are

[12] Section 333 – Trading in influence: (1) Whoever requests, accepts a promise or accepts a bribe for exerting his/her influence or by means of someone else on the execution of the authority of a public official or for having done so, shall be sentenced to imprisonment for up to three years. (2) Whoever shall provide, offer, or promise a bribe to another person for the reason given in paragraph (1), shall be sentenced to imprisonment for up to two years (*see* Third Interim Compliance Report on the Czech Republic on Incriminations (ETS 173 and 191, GPC 2)/Transparency of Party Funding", Third Evaluation Round, Strasbourg, 2014).

provided in an article "Common Provisions"[13]. It helps to use less terms (words) describing offences.

Finally, the view that active or passive trading in influence is covered by bribery or active trading in influence is punishable as aiding or inciting passive trading in influence is rejected by GRECO. Therefore, the majority of countries made amendments, including Lithuania. Therefore, current trading in influence is separated from bribery. In the author's opinion, it is easy to distinct trading in influence from bribery, abuse of functions and other crimes in criminal laws but in practice these crimes are closely related and the distinction is more difficult. The elements of these offences usually overlap, particularly, if the scope of "the exercise of the public official's duties" is extremely broad (Phillip, 2009, p. 52-53).

## 2. How the Alleged Influence should be Qualified – Fraud or Trading in Influence?

How to qualify the situation when a person lies about his or her influence on officials seeking money or other benefit from another person? It is difficult to answer this question because here the line between fraud and trading in influece crimes is thin.

The following expressions – "asserts or confirms that he or she is able to exert an improper influence" and "the supposed influence" are used by the Convention. So, the Convention does not reveal the precise content of the influence. On the other hand, the Explanatory report (1999) describes it widely. There are used the following words to describe influence: "real or supposed", "real or pretended" and "real or alleged". Moreover, GRECO has noted that it is not necessary that influence would be real. So, it could be stated that all cases regarding the pretended influence should be qualified as trading in influence. But it is not a simple question to answer. There is no consensus in doctrine and the opinion of countries is different about the alleged influence. In Author's opinion, there are reasonable doubts about GRECO's position.

Hollán (2011, p. 238-239) pointed out that the assertation of influence is enough to incriminate trading in influence, the Convention does not require real influence and factual connection between influence-peddler and the public official. Not only real influence could be covered by the definition of trading influence. Hollán's opinion (2011, p. 239) is that the answer depends on the notion of protected interest. He noted that by criminalizing the assertation of real influence, it is protected only the decision-making process of public officials. According to this scientist, "if the confidence in the impartiality of public administration is to be secured, the alleged exertion of influence (in exchange of undue advantage) shall be criminalized". So, in this case the deceit element should also be qualified as trading in influence.

[13] Criminal Code of the Czech Republic, available at <https://www.legislationline.org/download/id/6370/file/Czech%20Republic_CC_2009_am2011_en.pdf>.

Philipp (2009, p. 53-54) presented the quite different view. She agreed that the answer depends on the protected interest. However, in her opinion, "if the ability to influence a public authority in reality never existed, there could not be a threat to the object of legal protection. The assertation of fictive influence constitutes an offence of fraud rather than of corruption as the only legal interest which could be negatively affected is the private property of the person giving the bribe" (Philipp, 2009, p. 53-54).

As it is mentioned in the first part of this article, Lithuania made amendments related to the concept of illegal influence. Until 5 July 2011 amendments, if the person does not really have the social position to influence another person, but only claims or confirms that she or he is capable to do so, this was understood more like fraud offences (*see more*: Pakštaitis (2) 2004; Mickevičiūtė, 2019). However, GRECO stressed that here trading in influence is misunderstood in Lithuania (Evaluation Report on Lithuania on Incriminations (ETS 173 and 191, GPC 2) (Theme I), 2009). This position was a reason for amendments. So, according to the definition of trading in influence the influence might be real or not, it does not really matter.

Some countries have not amended their regulation regarding trading in influence and fraud distinction. For example, the authorities of the Czech Republic did not change their position. They stressed "that in such a case, the active party acts in factual error and therefore she or he is punishable only with respect to provisions on attempting to trading in influence. On the other hand, they said that the passive party in these instances is considered to have committed fraud or attempted fraud." (Compliance Report on the Czech Republic on Incriminations (ETS 173 and 191, GPC 2)/Transparency of Party Funding, 2013).

## 3. Conclusions

This research reveals the tendency to include all elements of active and passive trading in influence, provided in Article 12 of the Convention, into the definition, established in the national criminal law. Therefore, for example, there are a lot of terms in the definition of active and passive trading in influence in the Criminal Code of the Republic of Lithuania. However, the usage of superfluous words in definition could really complicate the proper application of the criminal law.

In the case of pretended and not real influence (alleged influence), the protected interest of both trading in influence and fraud is important to distinct these crimes. However, in Lithuania the alleged influence is the feature of trading in influence because the legislator pursued the implementation of all GRECO's recommendations.

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