LINGERING ENFORCEMENT OF BRIBERY PROVISIONS: OFFER, PROMISE, AND REQUESTING

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Abstract. In accordance with the international standards set in the UN and Council of Europe's relevant instruments, Azerbaijan criminalized all the elements of the bribery offence, both active and passive forms, in a two-step statutory reform in 2006 and 2011. Some countries of the region also followed the same course of reforms [1]. But there remain countries that have not included all the elements in the description of the offence of the bribery [2]. The European review mechanism saw the first set of countries to the full-scale implementation, marking their progress in the country reports. 12 years on, in the case of Azerbaijan, and various terms for other countries, the situation with the enforcement of offer, promise and solicitation remains uncertain. It is exactly uncertain, as the current practice can demonstrate neither adequate implementation nor lack of it. The law enforcement and judicial bodies certainly show the signs of understanding of the issue, to a certain degree, but hesitance to give it a green light. This research aims to shed light on the real situation with the enforcement of these provisions, as well as deep into the underlying problems. The issue appears to be in the process of introduction, conflict with existing doctrines and lack of confidence in the success of prosecutions. Putting it in figurative forms, is there a matter of sloppy inception, doctrinal reef or an insecure footbridge? The analysis of statutes and practice, as well as the opinion provided by the specialists in the area, show that it is a mixture of all. While the countries adopted the relevant patterns in their legislation, they simply incorporated the provisions as they are without realizing the underlying context and building the necessary infrastructure.
Keywords: corruption, anti-corruption policy, international standards, bribery, criminalization, law enforcement, corrupted behaviour
Аңдатпа. БҰҰ мен Еуропа Кеңесінің тиісті құжаттарында белгіленген халықаралық стандарттарға сәйкес Әзірбайжан парақорлықтың барлық элементтері бойынша 2006 және 2011 жылдары заңнамалық өзгерістер жолымен белсенді және пассивті парақорлық үшін қылмыстық жауапкершілік белгіледі. Өңірдегі кейбір елдер де бұл реформа үрдісін қолға алды. Бірақ, парақорлық сипаттамасында барлық элементтерді қамтымаған елдер де бар. Еуропалық шолу тетігі аталған элементтердің ел баяндамаларындағы прогресті атап өтіп, толық орындалуын қадағалады. 12 жылдан кейін, Әзірбайжанда және басқа елдерде ұсыныстар, уәде беру және паранының талабы бойынша ережелерді қолдану жағдайы белгісіз болып қалуда. Қолданыстағы практика оның тиісті түрде орындалуын немесе оның жоқтығын көрсете алмайды. Құқық қорғау және сот органдары белгілі бір дәрежеде мәселені түсіну белгілерін көрсетуде, бірақ осы практикаға әрі қарай дамытуға бел бумауда. Бұл зерттеу нақты жағдайды осы ережелерге сәйкестендіруге, сондай-ақ терең мәселелерді зерделеуге бағытталған. Мәселе қолданыстағы доктриналарға қайшы келетіндіктен, қылмыстық құдалаудың табысы туралы ешқандай сенімділік жоқ. Заңнамалық актілер мен тәжірибені, сондай-ақ осы саладағы мамандар ұсынған пікірлерді талдау қалыптасқан жағдайдың барлық осы себептердің қоспасы болып табылатынын көрсетеді. Елдер өз заңнамаларында тиісті өзгерістерді қабылдағанымен, олар жай ғана контекстті түсінбестен және қажетті инфрақұрылымды құра отырып, ережелерді ғана енгізді.
Тірек сөздер: сыбайлас жемқорлық, сыбайлас жемқорлыққа қарсы саясат, халықаралық стандарттар, парақорлық, қылмыстандыру, құқық қолдану, сыбайлас жемқорлық мінез-құлқы.
Аннотация. В соответствии с международными стандартами, установленными в соответствующих документах ООН и Совета Европы, Азербайджан установил уголовную ответственность по всем элементам взяточничества, как за активное, так и пассивное взяточничество, путём законодательных изменений в 2006 и 2011 годах. Некоторые страны региона также следуют тем же курсом. Но остаются страны, которые не включили все элементы в описание преступления взяточничества. Европейский механизм обзора проследил за тем, чтобы указанные элементы были полностью выполнены, отметив прогресс в страновых докладах. Спустя 12 лет, в случае Азербайджана и других странах, ситуация с применением положений по предложению, обещанию и требованию взятки остается неопределенной. Нынешняя практика не может продемонстрировать ни адекватную реализацию, ни ее отсутствие. Правоохранительные и судебные органы, в определенной степени, демонстрируют признаки понимания проблемы, но не решаются дать зеленый свет данной практике. Это исследование направлено на то, чтобы пролить свет на реальную ситуацию с соблюдением этих положений, а также изучить глубинные проблемы. Похоже, что проблема находится в процессе внедрения нормативных положений, противоречии существующим доктринам и неуверенности в успехе судебного преследования. Если выразить это в образной форме, то есть вопрос неважного старта, доктринального рифа или небезопасного пешеходного моста? Анализ законодательных актов и практики, а также мнения, представленные специалистами в этой области, показывают, что сложившаяся ситуация является смесью всех этих причин. Хотя страны приняли соответствующие изменения в своем законодательстве, они просто включили положения в том виде, в каком они отражены в международных инструментах, без должного понимания основного контекста и создания необходимой инфраструктуры.
Ключевые слова: коррупция, антикоррупционная политика, международные стандарты, взяточничество, криминализация, правоприменение, коррупционное поведение.

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The context

According to Article 15 of the United Nation Convention against Corruption, the promise, offering or giving to or solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties shall be criminalized as an offence of bribery [3] (UNODC 2006) . Similarly, Criminal Law Convention on Corruption of the Council of Europe requires incrimination of the bribery as the promising, offering or giving by any person or request or receipt by any of its public officials, directly or indirectly, of any undue advantage to any of its public officials, for public official himself or herself or for anyone else, so that the latter act or refrain from acting in the exercise of his or her functions. (Council of Europe, 1999)

Three international mechanisms reviewed the legislation of Azerbaijan regarding the matter of implementing the obligations arising out the membership of the country in the United Nations Convention against Corruption [4] and Criminal Law Convention on Corruption[5] of the Council of Europe. Executive summary of the Country Report (UNCAC IRG, 2012) states that the Azerbaijani legislation is compatible with the United Nations Convention against Corruption with regard to these elements. GRECO looked at the matter first in 2010 within the Third Round of Evaluation dedicated to the themes of incriminations provided for in the Criminal Law Convention on Corruption (ETS 173), its Additional Protocol (ETS 191) and Guiding Principle 2 (GPC 2) (CoE Commmitee of Ministers , 1997) and transparency of Party Funding with reference to the Recommendation of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Rec (2003) 4). The Report concluded that the country has dealt with some fundamental lacunae in its criminal legislation, specifically through to explicitly criminalising the offer and the promise of an advantage as well as the acceptance of an offer or promise. (CoE GRECO, 2012). The Istanbul Action Plan of the Anti-Corruption Network for Eastern Europe and Central Asia Organisation for Economic Co-Operation and Development has also acknowledged the compliance of the legislation in its report under the third Round of Monitoring. (OECD ACN IAP, 2013) However, the international organisations also expressed their cautious interest about the practical implementation. In particular, the OECD mechanism mentioned ‘Practical application of the law in regard to these newly introduced offences however appearing to be a challenge’.

Implications

In order to understand the problems of lingering in the enforcement of the new provisions, it is worth first looking at the situation in the countries where these elements have not been incorporated into the definitions of passive and active bribery. The example of Kyrgyzstan is used as an example and the findings are congruent for countries with similar approaches, such as Kazakhstan. The request for a bribe is mentioned in the legislation of Kyrgyzstan only in the meaning of extortion, while the mere request of a bribe and the acceptance of an offer or promise is not mentioned at all. Offering and promising are missing too. Sections 27 and 28 PC 1997 in conjunction with the bribery provisions cover preparation of a crime or an attempt. According to the Kyrgyz Criminal Legislation, if no concrete action is taken in view of the transfer of the bribe, it may not constitute attempted bribery. That is not sufficient though because not all the scenarios of corrupt behaviour can be covered by the definition of attempted bribery. The provisions on preparation and attempt do not cover in an unambiguous manner the offer, promise, request and acceptance of an offer or promise. And this will let the perpetrators out of hook. If the perpetrator did not voluntarily abandon the performance of actions, his behaviour would not entail criminal liability. So, if the person first made the offer or promise and then retrieved it, he could not be prosecuted. That these elements are qualified in conjunction with to the provisions of attempt or preparation, i.e. as attempted bribery, also has its bearing on the sanctioning. Preparation and attempt for the commission of an offence entails lesser punishment. To make it worse, preparation for the offenses of little or average gravity, such as bribery offences without aggravating circumstances shall not be prosecuted. This is in drastic contradiction with the requirements of the international instruments. According to the international standards, corruption offences are to be considered completed once any of the above-mentioned unilateral acts is carried out by the bribe-giver or the bribe-taker. The offer and the promise, the request and the acceptance of an offer or promise, which are key components of the bribery offences established under the Criminal Law Convention against Corruption of the Council of Europe, need to be explicitly criminalised in order to clearly stigmatise such acts, submit them to the same rules as the giving and receiving of a bribe and avoid loopholes in the legal framework. (Council of Europe, 1999)

Statutory Development and Policy Deficiencies

Azerbaijan moved to comply with the abovementioned provisions in a two-step reform, mainly incorporating the conventional provisions directly into the Penal Code 2000. However, the approach applied in this reform had some warring strings to it. The changes were initiated through the ‘legislative initiative’ of the Executive power, ie the power to submit Bills to the Parliament, and consequent adoption in Parliament into the law. The expedient nature of the process did not allow capitalizing on the introduction of a new piece of legislation and subsequently giving it sufficient

impetus for effective implementation. The experience of the adoption did not manifest itself in the application of extraordinary procedures. The bill was passed as a necessity to conform to the international standards.

Like the other countries of the region, Azerbaijan inherited the statutory provisions incriminating bribery, specifically from the Soviet Penal Code 1961 of the Azerbaijani Soviet Socialist Republic, with some amendments introduced soon after the restoration of independence in 1991. Prior to the reform of 2006, the provisions on passive bribery read as follows:

Acceptance by the official, directly or through the intermediary, of money, securities, property or property interest for committing actions/inactions in favour of the person giving the briber or person represented by him, if the commission of this action or inaction fall within the official duties or if the official was able to aid this action/inaction, as well as general connivance in service or indifference.

The PC 2000 used to define the passive bribery in a very concise manner, as 'giving a bribe to an official directly or via the intermediary. The legislative authorities exercised their statutory powers twice by adopting the Anti-Corruption Statutory Amendments Act 2006 [5] in order to introduc the following definition for passive bribery in the Penal Code 2000, Section 311:

Accepting of a bribe, ie request or acceptance by the official, for himself or third person, directly or indirectly, material or other benefits, advantages of concessions, in connection with the implementation of his official duties (powers), for committing or failure to commit an action, as well as general connivance or negligence

And the following provisions for active bribery in the Penal Code 2000, Section 312:

Giving of a bribe, giving to an official, for himself or third person, directly or indirectly, material or other benefits, advantages of concessions, in connection with the implementation of his official duties (powers), for committing or failure to commit an action

Subsequently, Criminal Law (Amendment) Act 2011 [6] introduced 'acceptance of the offer or promise' to the definition of passive bribery in PC Section 311 and 'offer and promise' to the definition of active bribery in PC Section 312, as they remain today. The offer, promise and requesting of bribes were criminalized before these amendments under the provisions of an attempt, entailing limitation in the prosecution and invoking serious crimes.

Although the newly introduced terms appear to be self-evident, the concepts underlying them are far-reaching in terms of changing the policies and methods of criminal investigation, prosecution and adjudication of corruption offences. They presuppose the development of new techniques in the field of the special investigation means, which are carried out under the statutory framework falling outside of the scope of the Criminal Procedure Law. The latter regulates investigation, prosecution and adjudication. The adoption of these changes saw limited efforts in the elaboration and application of manuals, tools and directives in the implicated institutions despite the considerable lapse of time.

As mentioned above, one of the reasons why the situation with the enforcement of offer, promise and solicitation remains uncertain is deemed to be sloppy inception of the relevant laws. The procedure of the adoption certainly varies from the practice of the advanced democracies. It would be a common practice for the Western European countries that the legislative amendments, especially the ones introducing new concepts, take a form of sophisticated process and take many years of dedicated research, advocating and editing. According to the UK Government's Guide, the processes by which legislation is developed and prepared by Government, and subsequently scrutinised and enacted by Parliament are key to making 'good law's that are "necessary, effective, clear, coherent and accessible. (UK Government, 2013). The elaboration of a new piece of legislation usually echoes either in the entire society or the communities affected by it. In the case of anti-bribery reform of the legislation, the changes exacted in the two steps did not echo with the criminal justice system, despite serious presumed implications to the criminal law policy enforcement. So, it would have been natural to suppose that this kind of statutory changes would be implemented through the embedded mechanisms that would put an emphasis on gathering and evaluating evidence substantiating the legislative provisions, reflect scrutiny of this evidence base, invoke wide discussions in the legal and law enforcement circles. In fact, the legislature did not present the robust evidence and tangible substantiation for the new provisions on offer, promise and request. Moreover, it is not the usual practice of the Azerbaijani Legislature to issue explanatory notes, a practice growingly adopted by other emerging democracies. As no immediate measure aimed at the implementation of these provisions was taken, also no substantial outcome ensued in the first years after the reforms. Popularising these concepts, raising awareness, training, testing, monitoring and reporting would probably be within the range of measures that could have been taken on board. Due to the lack of the statutory basis and practice of providing explanation and interpretation of the new legislation, it is hard to expect the uniform and common understanding of these concepts. Expectedly, the popular reference among the law enforcement officers, criminal investigators, prosecutors and judges entitled 'Commentary to the Penal Code' failed to explain the meaning of the concepts and its impact on the prosecution of bribery. The source only refers to requesting of the undue advantage as 'a wish expressed by the official by means of various media,

such as oral or written communication, etc.'. (F.Y.Samandarov, 2013) Such a definition puts the bribery back to the context of bilateral transaction where immediate or soon exchange of benefits shall take place. And this is exactly the reason why these elements have been introduced in the first place, to take it out of this concept and be prepared for the new challenges.

The Istanbul Action Plan (IAP) Evaluation Mechanism reflected on the difficulties highlighting the necessity of conducting targeted training for both, judiciary and law enforcement, encouraging proactive use of these new elements through training on methods of detection, investigation and proving, as well as through the development of methodological recommendations. (OECD ACN IAP, 2013) Monitoring of the investigation and adjudication practice will help to form common practice and keep the law enforcement officer vigilant on the new forms of the corruption behaviour. At the same time, encouraging proactive use of the relevant techniques, as recommended by the IAP, without understanding its essence may have drawbacks and cause damage to the existing practices. There is not much sense in repeating the existing mistakes by translating the raw legislative practice into practical application *impasse*,.

Doctrinal Reefs

Although the countries of the region pursue their own paths in the elaboration of legislation and institutional development, there are common doctrinal traits prone to the criminalization of offences. A common definition of a crime would characterize it as a socially dangerous act, aimed at the violation of social relations, prohibited by criminal law, the commission of which entails punishment. (F.Y.Samandarov, 2007) Notably, the definition of corruption offences in general and bribery, in particular, is pinned on the aspect of the violation of social relations emanating from the state administration, if we restrict this research to the domain of the public sector. According to Konyuk, in the classical and fundamental form, corruption is usually understood as antisocial behaviour, which consists of the abuses of office and authority in various forms, for personal gain or in the interests of third parties, based on illegal bilateral agreements. He distinguishes three parties to the corruption offences, ie a public agent (receiver), an interested party (supplier) and the victim. (A.V.Koniuk, 2016) According to this model, the agent of the state performs appropriate service activities for a fee in favour of the interested party and by doing so injures the interests of the state. As a source of administration, the state cannot be biased in the implementation of any official activity and it shall act upon the public interests of society and service.

The outstanding feature of this approach discovers three main problems. First, the state is seen as the victim of a corruption offence. This leads to the constant search of the damage inflicted upon the state by the corrupted behaviour. The reforms removed the necessity of transfer of an undue advantage on paper, but certainly not in the minds of practitioners constantly looking for a violation of state interest. So, any behaviour falling short of victimizing state will cause difficulty in being accepted as a corruption offence. Surprisingly, an excuse for agreeing to accept a bribe for the sake of getting rid of an annoying person offering a bribe could be considered valid in the course of discussions among law practitioners. A concept of a victim state puts the enforcement of the new elements under a serious test, not only at the doctrinal level, but also at the level of practical substantiation and proving. This position vividly manifests itself in the division of offences into so-called formal and material criminal offences. Formal offences signify criminal behaviour, which does not have to result in the socially dangerous consequences, and the material offences, which require some sort of damage to occur in order to qualify the offence as completed and not as an attempt or preparation. An offence of Abuse of Office requires that considerable or substantial damage be inflicted as a result of the official's abusing his office for gain.

The second problem has also been mentioned, but not explained in the OECD ACN IAP Report on Azerbaijan. The International experts link the problem with the enforcement of these elements to the concerns over a continued lack of enforcement of "non-material benefits" as objects of bribery. (OECD ACN IAP, 2013) The problem with the immaterial benefits is manifold. It could be abstract and it could be difficult to comprehend their transfer, let alone to prove it. The practitioners are struggling to prosecute the cases when the object of the bribery is immaterial benefit, linking this benefit to the action of the perpetrators. The current methodologies took on board by the specialized anti-corruption agencies clearly demonstrate that they are not prepared to deal with the immaterial benefits and hence handle the concept of an offer, promise and requesting when the non-material benefit is at stake. (Zelenski & Meretukov, 2015)

Finally, the third problem, which underscores the significance of criminalization of all forms bribery, including the mentioned elements, elucidates while handling sophisticated corrupt schemes. In the modern era, corruption takes new and quite unexpected forms. Countries rating high on various anti-corruption indices might experience highly sophisticated forms of corruption. As a matter of fact, the elements of offer, promise and request form the elements not only of bribery offences. The notorious 'spin-off' of bribery is a trade in influence, which shall also cover these elements. Transfer of the undue advantages might actually not take place long after striking the deal and carrying out the actions, which were conditioned on the agreement of transferring the benefit in the future. Passing of the beneficiary rights of a pension scheme upon reaching of a certain age could be an example.

Issues of this kind do not pose serious difficulties in the legal systems, which developed the modern concept of corruption offences transcending into the international instruments. Common law bribery offence developed for centuries gradually encompassing various categories of perpetrating officials, various forms of behaviour and elements, such as offer, promise and request. Contrary to the doctrine of a victim state in the Azerbaijani and similar legal systems, the English approach concentrates on affecting the normal course of behaviour of a state body or official, ie the ability to 'corrupt'. The very foundation and justification for the taking legal action against corruption are both based on the enforcement of the right of the people to enjoy corruption-free state service. (Lanham, 1987)Therefore the presence of these elements in English Statutes dates back to a century old ago common law offences. As it stands now:

Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (Russell 1964)

The concept of 'corrupting' behaviour of a public official entrenched in the English legal system, with the details of its mechanism honed to perfection, helps to understand one of the primary causes for limping with the enforcement of these elements in other systems. While the Azerbaijani investigators and prosecutors seek to prove bribery they are on the hunt for 'socially dangerous consequences' inflicted as the damage to the state, whereas in a common law jurisdiction the investigators have to prove the deviation in the normal and legitimate behaviour of an official. Therefore prosecution for the mere offer, promise, acceptance of offer or promise or requesting a bribe makes much more sense in the second jurisdictions.

Insecure footbridge

According to the OECD Report, the amendments to the law can partially account for the lack of cases on offer and promise [6]. The practice of investigating the bribery offences is said to be rather traditionally oriented to proving the offence of bribe giving or receiving and not instances when the transaction – or pact – is incomplete. In practice, the stages of this offence are difficult to qualify and they are faced with evidentiary challenges. Although there is no legal requirement for the prosecutor to prove the existence of a "pact" between the bribe-giver and the bribe-taker, in practice, bribery offence is considered proven when the bribed public official is caught in the act of receiving the bribe. The courts seem to expect this level of evidence. (OECD ACN IAP, 2013)

In Azerbaijan, the Anti-Corruption Directorate is the body specialised in criminal investigation and operative detection activity (special investigation means) in relation to the corruption-related offences and is subordinated to the Prosecutor General of the Republic of Azerbaijan. Established according to the Presidential Decree 114 dated 3rd March 2004, the ACD was initially entitled to look into and probe information related to the corruption infringements, to commence criminal prosecution and conduct pre-trial investigation into corruption-related offences In 2011, it was additionally entitled to perform detective measures (SIM) with the purpose of preventing, detecting and exposing corruption-related offences and to oversee their compliance with legislation in the course of carrying out of the detective measures by other bodies of the detective activity according to the written instruction of the Department [7]. So it is empowered to perform all the detective measures (SIMs) specified in Section 10 of the Operative Detection ACT 1999 of the Republic of Azerbaijan in order stipulated by this Act and, if necessary, instruct [the appropriate operational-detective authoroties] to carry out detective measures (SIMs) and to receive their report, with the purpose of prevention, detection and exposure of corruption-related offences [8]. The powers to administer the SIM became the match point in the prosecution of bribery. Previously, ACD did not have tangible powers to detect bribery offences and had to rely on Note to PC Section 312, which contains a provision on effective regret. That is to say that the ACD used to reply on the denouncements made by the people who paid bribe or were requested to pay a bribe.

Although the effective regret was considered as a necessary incentive for reporting instances of corruption, it attracted criticism from GRECO, mainly for its automatic nature. Effectively, it was criticized for the possibility of application in situations where the bribe-giver reports the offence either before it is discovered or before s/he learns that the offence has already been discovered. GRECO recommended to analyse and accordingly to revise the automatic exemption from punishment. (GRECO, 2010)

The law enforcement and judicial bodies have advanced sufficiently and show the signs of understanding of the issue. The application of the SIM opened new opportunities to act more confidently in the discovery of bribery. Use of technical means allows to audio or video record the dialogue between parties and fix the fact of the offer, promise, acceptance of the offer and promise or requesting of a bribe. Nevertheless, the situation with the enforcement of offer, promise and solicitation still remains uncertain. It is exactly uncertain, as the current practice can demonstrate neither adequate implementation nor lack of it. It is worth looking at the statistical numbers of the ACD operations to understand that the body is reasonably active in detecting and prosecuting both forms of bribery. In 2015, the Anticorruption Directorate with the Prosecutor General of the Republic of Azerbaijan investigated and referred to court 14 criminal cases against 34 persons on charges of passive bribery and 9 criminal cases against 13 persons on charges of active bribery. In 2016, the Anticorruption Directorate with the Prosecutor General of the Republic of

Azerbaijan investigated and referred to court 10 criminal cases against 52 persons on charges of passive bribery and 14 criminal cases against 17 persons on charges of active bribery. In 2017, the Anticorruption Directorate with the Prosecutor General of the Republic of Azerbaijan investigated and referred to court 7 criminal cases against 17 persons on charges of passive bribery and 11 criminal cases against 19 persons on charges of active bribery. To form an idea as to the weight of the bribery cases in the total workload, the ACD investigated and referred to court 201 criminal cases against 313 persons in 2017. (ACD, 2017)However, the Directorate does not maintain a separate section in its statistics, which would make it possible to discern the numbers of the criminal cases investigated for requesting or offering or promising of bribes. The number of officials caught *flagranto delicti* in 2016 was 6 out of total 52.

In the absence of the cases of the prosecutions under the specified elements of bribery, there could arise two prevailing impressions. Either the specialised anti-corruption investigators and prosecutors are not confident about going ahead with the case based on offer, promise and request, or they are unwilling to do so refusing the concept completely. However, the analysis of the cases shows that there are many cases when the bribery was reported *ex poste* the corruption bargain or even the discharge of the duties under illegal transactions. That is to say one of the parties, usually the supplying side, informed the ACD about bribery only after paying a bribe and obtaining the necessary action. The successful investigation and prosecution of such cases in court demonstrates that recording of the actual transfer of the undue advantage is not absolutely necessary. The investigators are capable of collecting the necessary evidence and proving that the bribe was paid without ever recovering the undue advantage itself.

On the other hand, there is a string of ACD cases where the investigation managed to prove that bribery transaction was stricken for a certain amount, but ‘honored’ in payment only in part. So only a portion of undue advantage was transferred in order to obtain or later obtain the action required. The evidence on the transfer of undue advantage usually played a principal role in proving the guilt of the defaulting public official. However, the indictment encompassed the full value of the negotiated deal. In one case, the claimant of the social benefit negotiated with the employee of the regional social security organization to obtain certain benefits in exchange for a certain sum of money. The person supplied only a fifth part of the negotiated sum, after which a criminal investigation was launched. The prosecution indicted the perpetrator with the full amount of agreed amount of bribe and obtained a conviction under more serious crime.

At the same time, the number of cases launched on the basis of the offer, promise, acceptance of the offer or promise or request continues to remain low. The analysis and objective observation of the statistics do not allow forming a clear picture of the real cause of a low number of such cases. For a better understanding of the situation, a study shall be conducted among the representatives of all the law enforcement officials, investigators, prosecutor and judges to check their opinion and mood about the cases of this category. The standing presumption is that the investigators and prosecutors feel unsafe acting solely on the basis of ‘intangible’ elements of offer, promise and request and prefer a safer leeway of ‘tangible’ charges.

Conclusion

Lack of the elements of offer, promise, request of bribe would qualify bribery as inchoate offences. The provisions on preparation and attempt do not cover in an unambiguous manner the offer, promise, request and acceptance of an offer or promise, placing the prosecution in case of unilateral withdrawal and less serious cases on a shaky ground. It also compromises the adequateness of punishment., Bringing the legislation in line with the requirements of the criminalization of the elements of bribery of offer, promise, acceptance of offer or promise and requesting does not always add up to the actual potential of investigating and prosecuting. Lack of action in popularizing and explaining the new statutory provisions turns into a missed opportunity for effective implementation and promotes uncertainty with the enforcement. In such situations, the number of the investigations launched on the basis of allegations pertaining to these elements of bribery remains low. At the same time, the prosecution and adjudication practice does not demonstrate the real situation with these elements as sufficient ground for a successful legal action. The law enforcement and judicial bodies may show the signs of understanding of the issue, but the real picture could be drawn from polls and surveys on the feeling of practicioners. Finally, the legal systems entrenched on the doctrine of victim state and damaged social relations face substantial complications in the application of these elements of bribery. While other legal systems, such as common law systems, may hold the key for the problem forged with the century-long jurisprudence. Targeted training for judiciary and law enforcement, on methods of detection, investigation and proving, as well as through the development of methodological recommendations could alleviate the situation.

REFERENCES

1. Ukraine, Georgia and Moldova
2. Kazakhstan, Uzbekistan and Turkmenistan

3. For the sake of brevity both active and passive forms of bribery are merged in one definition
4. Signed by Azerbaijan on 27th February 2004 and Ratified on the 1st November 2005, just before the Convention in entered into effect on 14 December 2005
5. Act № 92-IIIQD of 7th April 2006
6. Act № 1668 of 27th July 2011
7. In 2013, Azerbaijan reported only 4 cases
8. Amended by the ACD Charter (Amendment) Presidential Decree of 08/04/2011
9. Amended by the ACD Charter (Amendment) Presidential Decree of 08/04/2011
10. ACD. Anti-Corruption Directorate in Figures. Statistical Report, Baku: ACD Print House, 2017.
11. A.V.Koniuk, ред. Combatting Corruption. Minsk: Academy of Public Administration , 2016.
12. CoE Commmitee of Ministers . «Council of Europe.» Resolution on the Twenty Guiding Principles For the Fight Against Corruption. 1997.
13. CoE Commmitee of Ministers . «Council of Europe.» Resolution on the Twenty Guiding Principles For the Fight Against Corruption. 1997.
14. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc17c (дата обращения: 19 12 2018 г.).
15. Council of Europe. «Explanatory Report to to the Criminal Law Convention on Corruption.»
16. European Treaty Series. 27 01 1999 г. https://rm.coe.int/16800cce441999 (дата обращения: 12 12 2018 г.).
17. F.Y.Samandarov. Criminal Law: General Part. Baku: Digesta, 2007.
18. F.Y.Samandarov, ред. Jus Commentarium - Commentary tp the Penal Code of the Republic of Azerbaijan. Baku: Digesta, 2013.
19. GRECO. «Evaluation Report on Azerbaijan on Incriminations (ETS 173 and 191, GPC 2) .» Gropu of States Against Corruption. 01 10 2010 г.
20. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c65cf (дата обращения: 19 12 2018 г.).
21. Lanham, D. «Bribery and Corruption, Essays in Hoour of J c Smith.» Law Com Report (Butterworths) 92, № 104 (1987): 92-93.
22. OECD ACN IAP. Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges. Paris: OECD, 2013. —. «Organization for the Economic cooperation and Development .» Istanbul Action Plan. 25 09 2013 г. https://www.oecd.org/corruption/acn/AZERBAIJANThirdRoundMonitoringReportENG.pdf (дата обращения: 19 12 2018 г.).
23. Russell, William Oldnall Sir. Russell on crime. 12. London: Stevens, 1964.
24. UK Government. «Office of the Parliamentary Counsel.» When laws become too complex. 16 April 2013 г. https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex (дата обращения: 19 December 2018 г.).
25. UNCAC IRG. «UNCAC.» UNODC. 14-16 11 2012 г.
26. http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1256252e.pdf (дата обращения: 19 12 2018 г.).
27. UNODC. «Legislative Guide for the Implementation of the UNCAC.» Anti_corruption. 2006. https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (дата обращения: 19 12 2018 г.).
28. Zelenski, V.D., и G.M. Meretukov, . Criminalistics. St.Petersburg: Yuridicheski Centre, 2015.