

1) Ad Article 15 subparagraph (a) UNCAC

Bulletin of the Lithuanian Supreme Court

Court Practice No. 26

**Overview of the Summary of Court Practice in
Criminal Cases of Crimes and Misdemeanours
against the Civil Service and Public Interests (Criminal Code Articles 225, 226, 227
and 229)**

(Only Concluding Part)

(...)

1. A bribe in cases of bribery, bribery of an intermediary and graft shall be understood as undue reward, unlawfully gained or sought to be gained, i.e. any kind of property, e.g. money, securities, works of art, immovable or movable property, legal and other instruments certifying title to property or interests thereto; material services, e.g. free-of-charge repair of a car or a house, interest-free loan, reduction of taxes, etc.

2. According to the Criminal Code (hereinafter referred to as the CC), criminal liability for bribery, bribery of an intermediary and graft shall occur irrespective of the value of the bribe, yet the value of the bribe plays a role in deciding which paragraphs of CC Articles 225, 226 and 227 should be applied and therefore shall be established in every case.

The value of the bribe shall be established according to its value (price) during the time when the offence was committed. If the bribe is not in the national currency, its monetary value shall be determined according to the exchange rate of the litas and the other currency fixed by the Bank of Lithuania.

If expert knowledge is required to establish the value of the bribe (e.g. material services), expert assistance shall be sought.

(...)

18. Graft provided for in CC Article 227 is an offer, promise to give or giving of a bribe to a civil servant or a person equivalent thereto for a desired lawful act or inaction in exercising his powers or to an intermediary seeking to achieve the same results.

The owner of the bribe, offered, promised or given, directly or indirectly, and in whose interests (for own benefit or for the benefit of relatives or friends) the briber acts has no significance for qualifying the offence.

19. The constituent elements of bribery are formal and therefore a criminal offence shall be considered completed when: 1) a bribe is offered; 2) a bribe is promised; and 3) a bribe is given.

20. An offer or a promise to give a bribe commonly shows as an instruction for a civil servant, a person equivalent thereto or an intermediary on the amount of a specific bribe, the way of giving it, time, etc.

21. A bribe shall be considered given when a briber transfers it (directly or indirectly) to a civil servant or a person equivalent thereto for a desired lawful act or inaction in exercising his powers or to an intermediary seeking to achieve the same results.

The way in which a bribe is given (openly or covertly, e.g. by not asking to return the loan, taking no payment for services, etc), the time of giving it, i.e. prior or after the performance (non-performance) or desired actions shall have no significance for qualifying the offence.

If material values (or services) are given as a gift after the performance (or non-performance) of desired actions without a prior offer or a promise to give a bribe, such a 'gift' shall be considered a bribe and such offence shall be qualified under CC Article 227 if it is determined that it was given as a bribe, i.e. came as a reward for the act (inaction) of a civil servant or a person equivalent thereto in exercising his powers.

If a civil servant, a person equivalent thereto or an intermediary does not accept a given bribe due to the circumstances which do not depend on the briber's will, the briber's offence shall be qualified as a complete crime or a misdemeanour.

22. The qualifying of bribery depends on the value of the bribe also on whether it is offered, promised or given for a lawful or unlawful act (or inaction) of a civil servant, a person equivalent thereto or an intermediary seeking the same results.

If a bribe is offered, promised or given to a civil servant or a person equivalent thereto for a desired lawful act or inaction in exercising powers or an intermediary seeking to the same results, the offence shall be qualified under CC Article 227 (1). If the same actions are performed in offering, promising or giving a bribe in the amount exceeding 250 MSLs or seeking unlawful act or inaction of a bribed civil servant, a person equivalent thereto in exercising his powers, the offence shall be qualified under CC Article (2).

Graft for a desired lawful act or inaction occurs when a bribe is offered, promised or given in exchange for actions (or inaction) of a civil servant or a person equivalent thereto which he can or must perform (or non-perform) in exercising his powers.

Graft for a desired unlawful act or inaction occurs when a bribe is offered, promised or given in exchange for unlawful actions (or inaction) of a civil servant or a person equivalent thereto and in this way acting (or non-acting) satisfy the briber's interests.

23. If the value of a bribe offered or promised to a civil servant or a person equivalent thereto for a desired lawful act or inaction in exercising his powers or to an intermediary seeking to achieve the same results is less than 1 MSL, then the criminal offence shall be considered a misdemeanour and qualified under CC Article 227(3).

24. A briber subjected to CC Article 227 and also a person released from criminal liability for graft shall **not** be considered a victim and a bribe, transferred to a bribee shall be confiscated pursuant to CC Article 72 (2). A bribe given with the law enforcement institution aware thereof shall not be confiscated and shall be returned to its owner.

2) Ad Article 15 subparagraph (b) UNCAC

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(...)

1. A bribe in cases of bribery, bribery of an intermediary and graft shall be understood as undue reward, unlawfully gained or sought to be gained, i.e. any kind of property, e.g. money, securities, works of art, immovable or movable property, legal and other instruments certifying title to property or interests thereto; material services, e.g. free-of-charge repair of a car or a house, interest-free loan, reduction of taxes, etc.

2. According to the Criminal Code (hereinafter referred to as the CC), criminal liability for bribery, bribery of an intermediary and graft shall occur irrespective of the value of the bribe, yet the value of the bribe plays a role in deciding which paragraphs of CC Articles 225, 226 and 227 should be applied and therefore shall be established in every case.

The value of the bribe shall be established according to its value (price) during the time when the offence was committed. If the bribe is not in the national currency, its monetary value shall be determined according to the exchange rate of the litas and the other currency fixed by the Bank of Lithuania.

If expert knowledge is required to establish the value of the bribe (e.g. material services), expert assistance shall be sought.

3. Bribery provided for in CC Article 225 is when a civil servant or a person equivalent thereto who, for own benefit or for the benefit of other persons, directly or indirectly accepts, promises or agrees to accept a bribe, demands or provokes giving it for a lawful act or inaction in exercising his powers. Lawful act or inaction in exercising powers shall be understood as performance or non-performance, by a civil servant or a person equivalent thereto, of actions which he should and/or can perform in exercising the powers granted to him by laws and other regulations.

CC Article 225 shall apply also in cases when a civil servant or a person equivalent thereto acts in excess of his powers.

If a civil servant or a person equivalent thereto gains material values or services which the person gives/renders to him to the effect other than the performance (or non-performance) of concrete actions in exercising his powers, CC Article shall not apply. Such an offence, taking into account the other established circumstances of the case, shall be qualified as the abuse of office (CC Article 228).

If a civil servant or a person equivalent thereto promises to exert an influence, in return for a bribe, on the respective institution, agency or organisation, civil servant or person equivalent thereto to ensure their lawful or unlawful act or inaction, his acts will be qualified under CC Article 226.

4. The objective attributes of bribery, i.e. 1) acceptance of a bribe, 2) promise to accept it, 3) agreement to accept, 4) demand to give it, 5) provocation to give it, are formulated as alternatives in the law and therefore for criminal liability to occur it is sufficient that at least one of these offences are committed. The constituent elements of bribery are formal and therefore a criminal offence shall be considered as complete when any of the aforementioned offences are committed.

There is no significance for qualifying the offence whether a person receives or sought to receive an undue reward directly or indirectly (e.g. through third persons), for own benefit or for the benefit of other persons (e.g. relatives).

5. A bribe shall be considered accepted when a civil servant or a person equivalent thereto himself or through third persons accepts the whole or at least part of the bribe. The time when the bribe is accepted, i.e. prior or after the performance (non-performance) of actions in the interests of a briber, where and in which way (openly or covertly) it is accepted and whether or not the interests of a briber are satisfied have no significance for qualifying the offence.

If a civil servant or a person equivalent thereto accepts material values (or services), referred to by the briber as a gift, after the performance (or non-performance) of actions, such gift, although it was not demanded or provoked to be given, agreed or accepted to be

accepted, shall be considered a bribe and shall be qualified under CC Article 225 if it is established that it was factually given and accepted a bribe, i.e. reward (remuneration) for act or inaction in exercising powers within the interests of the briber.

6. If a civil servant or a person equivalent thereto does not accept a bribe due to the reasons that do not depend on his will yet concerning which he had agreed, promised to accept, demanded or provoked to give, such an offence shall be considered as one completed crime.

7. If a civil servant or a person equivalent thereto did not seek to get a bribe and did not accept the given bribe (e.g., the briber left it on the civil servant's table or sent it by mail), CC Article 225 shall not apply.

8. If a civil servant or a person equivalent thereto receives material values by promising to transfer them to another civil servant or an equivalent person thereto for his act (or inaction) in exercising his powers, yet he pockets the values or fails to transfer them for any other reasons, the offence, bearing in mind the other circumstances established in the case (existence or non-existence of craft or prior intent to pocket the bribe, the existence or non-existence of an agreement with a briber, etc.), shall be qualified as fraud (CC Article 182) or as complicity in bribery and graft (CC Article 225 or 227 and a respective paragraph of CC Article 24).

9. An agreement to accept a bribe shall commonly constitute an agreement between a briber and a bribee concerning the time, way, place, etc. of acceptance of a bribe, whereas a promise shall be considered only a promise to accept it.

10. The demand of giving a bribe shall be considered to constitute such acts when a bribe is openly demanded or even threats are used indicating that if a bribe were not/is not given then unlawful acts will be performed, damage will be inflicted on the interests of third persons or lawful acts will not be performed which a civil servant or a person equivalent thereto could or should have performed in exercising his powers, or a bribe is demanded by threatening to perform lawful acts.

11. A provocation of giving a bribe shall be considered such actions when a civil servant or a person equivalent thereto does not openly ask for a bribe but behaves in a way which leads to a situation when a person, seeking to protect his lawful interests, is forced to give a bribe. A provocation of giving a bribe shall also constitute such actions or talks of a civil servant or a person equivalent thereto which clearly indicate to the person that if he did not give a bribe, lawful acts (or inaction) adverse to his interests will follow.

12. The qualifying of bribery depends on the value of the bribe and also on whether lawful or unlawful act (or inaction) in the exercise of a civil servant's (or a person's equivalent thereto) powers is sought or received.

If a civil servant or a person equivalent thereto accepted, promised or agreed to accept a bribe, demanded or provoked giving it for a lawful act or inaction in exercising his

powers, i.e. for the acts (or inaction) which a civil servant or a person equivalent thereto can and must perform (or non-perform) in the interests of a briber, the offence shall be qualified under CC Article 225 (1).

If a bribe is accepted, promised or agreed to be accepted, demanded or provoked to be given for an unlawful act or inaction in exercising powers, the offence shall be qualified under CC Article 225(2). Bribery for unlawful inaction is when a civil servant or a person equivalent thereto satisfies or promises to satisfy the briber's interests without performing actions which he must perform in exercising his powers, and bribery for unlawful act is when a civil servant or a person equivalent thereto satisfies or promises to satisfy the briber's interests by performing unlawful actions, i.e. those which a civil servant or a person equivalent thereto cannot or shall not perform in exercising his powers.

13. If a civil servant or a person equivalent thereto accepted, promised or agreed to accept, demanded or provoked to give a bribe in the amount exceeding 250 MSLs¹ for a lawful or unlawful act or inaction in exercising his powers, the offence shall be qualified under CC Article 225 (3).

If a civil servant or a person equivalent thereto, who agreed, promised to accept, demanded or provoked to give a bribe in the amount exceeding 250 MSLs, accepts it in parts and has not yet received all of it, the offence shall be qualified under CC Article 225(3) as a completed offence.

If bribery has been committed by a group of accomplices, the value of the whole bribe, rather than its parts distributed among the accomplices, shall be taken into account in qualifying the offence.

14. A person committing bribery provided for in CC Article 225 shall be an individual having the features of a special subject, i.e. a civil servant or a person equivalent thereto.

In addressing a question of whether or not a person has features of a special subject, the explanation of concepts of a civil servant and a person equivalent thereto provided in CC Article 230 shall be taken into account, as well as other laws and regulations on his activities. In recognising a person as a perpetrator of a criminal offence, his position, functions and powers are identified on the basis of laws and other regulations.

The features of a special subject shall be necessary only for the perpetrators of this criminal offence. Accomplices of a criminal offence (organisers, instigators, assistants) shall also include persons without the having the features of a special subject.

15. If a civil servant or a person equivalent thereto also commits other criminal offences in addition to bribery, e.g. participates in smuggling (CC Article 199), knowingly accepts property gained by criminal means as a bribe (CC Article 189), uses knowingly forged documents (CC Article 300), they are qualified as concurrence of offences.

¹ MSL is a minimum subsistence level. 1 MSL = LTL 130 (EUR 37.6), 250 MSL = LTL 32,500 (EUR 9,412)

3) *Ad Article 19 UNCAC*

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If expert knowledge is required to establish the value of the bribe (e.g. material services), expert assistance shall be sought.

(...)

25. The objective features of the abuse of office provided for in CC Article 228 are the following: 1) dangerous offence: abuse of office or exceeding powers; 2) dangerous consequences: major damage to the state, an international public organisation, a legal or natural person; 3) presence of a causal link between the committed offence and the occurring consequences.

26. An abuse of office happens when a civil servant a person equivalent thereto abuses his official position or use or non-use of his rights, duties and powers provided to him by

laws and regulations adversely to the interests of the office, its operational principles, substance and content.

The abuse of office shall be committed by active actions (by using material values in contrast to their purpose, concluding unlawful and ungrounded transactions, exploiting the work of subordinates for own benefit, unlawfully granting oneself or other persons exemptions or privileges, etc.) or inaction, i.e. non-performance of actions which were necessary in exercising one's duties and powers properly.

27. Exceeding powers shall be acting beyond the limits of powers provided by laws and regulations to a civil servant or a person equivalent thereto.

Exceeding powers shall be committed by unlawful act only. Most commonly such acts constitute actions which do not fall within the competence of the perpetrator, actions for which a special decision or permission is required, actions which were not necessary and which could have been performed only in cases established by laws or regulations; actions which are completely prohibited; etc.

28. In application of CC Article 228, damage shall be understood as a material of any other type of damage detrimental to the material situation of a state, an international public organisation, a legal or natural person and/or causing a negative effect on the non-material interests thereof.

Material damage shall be the loss of property or harm done thereto, expenses incurred (direct losses), as well as non-received benefit or income which would have been received if there were no unlawful acts (or inaction).

Other type of damage shall be physical, moral, organisation or any other type of non-material damage caused to values protected law (personal health, honour, dignity, reputation of a legal entity, authority of the civil service, etc.).

29. A feature of major damage for a criminal liability to occur is to be assessed and therefore shall be determined on the basis of concrete circumstances of the case, i.e. the type of damage, the legislation providing for protection of violated interests, the number of victims, the time and duration of a criminal offence, the importance of the perpetrator's position, etc.

When deciding on a question whether or not material damage is major, consideration shall be given not only of the monetary value of damage but also how significant it was for the person who was caused this damage (e.g. if a victim is in a difficult material situation major damage shall also constitute the damage whose monetary value is not big).

Other, i.e. immaterial, type of damage shall commonly be considered major if it is suffered from a violation of rights and freedoms enshrined in the Constitution of the

Republic of Lithuania or commission of another offence in addition to the abuse of office.

A violation of rights and freedoms enshrined in the Constitution of the Republic of Lithuania, undermining the authority of the civil service or any other substantial damaging consequences shall be commonly acknowledged as major damage not only the service or person, but also for the state.

30. The abuse which caused the consequences provided for in CC Article 228 (1) shall be qualified under CC Article 228 (2) if the offence was committed seeking material or other type of personal gain in the absence of the features of bribery.

Seeking of material gain shall be understood as seeking any type of material gain (e.g. using the enterprise assets free-of-charge or its procuring at discount price, receiving it from other persons) not only for own benefit but also for the benefit of one's relatives, family members or other persons with whom the perpetrator has friendly, partnership or similar relations or seeking other personal gain, i.e. seeking to receive immaterial type of gain (honour, promotion, etc.).

31. The perpetrator provided for in CC Article 228 is a person bearing the features of a special subject, i.e. a civil servant or a person equivalent thereto. Accomplices in a criminal act (an organiser, an abettor and an accessory) shall also be acknowledged persons bearing no features of a special subject.

32. The abuse of office provided for in CC Article 228 (1) shall be committed by direct and indirect intent. The abuse of office provided for in CC Article 228 (2) shall be committed by indirect intent only.

33. If the actions of a civil servant or a person equivalent thereto who abuses office contain the features of the constituent elements of criminal offences against the civil service or public interests provided in a special norms (e.g. CC Article 225 or 228¹), the offence shall be qualified under the Article which provide for the elements of a criminal office in a special norm.

34. If a civil servant or a person equivalent thereto abuse his office and commits, e.g. smuggling (CC Article 199), fraud (CC Article 182), theft, misappropriation or squandering of property (CC Articles 178, 183, 184), such offences shall be qualified as concurrence of offences.

35. If due to the abuse of office, a victim is caused severe or non-severe health impairment or dies, such offences shall be qualified as concurrence of offences. If a victim is caused physical pain or slight health impairment, such offence shall be qualified under CC Article 228.

36. The objective features of failure to perform official duties provided for in CC Article 229 shall include the following: 1) an offence against the civil service: failure to perform

or improper performance of one's official duties; 2) dangerous consequences: major damage to the state, legal or natural persons; 3) presence of a causal link between the committed offence and the occurring consequences.

37. Non-performance of one's duties shall be unlawful inaction of a civil servant or a person equivalent thereto, i.e. non-performance of duties which fall within his competence and which are necessary to ensure the interests of the service, whereas improper performance of one's duties shall be negligent, poor quality, careless, ineffective, etc. performance of one's duties, failing to ensure the interests of the service.

38. Non-performance of official duties or improper performance thereof shows as a systemic or single non-performance of official duties or improper performance thereof.

39. The concept of damage and the feature of major damage necessary to arise pursuant to CC Article 229 shall be understood in the same manner as with respect to the abuse of office.

40. If a civil servant or a person equivalent thereto fails to perform his duties or performs them improperly due to objective reasons that do not depend on his will (e.g. no funding is ensured to perform the task), CC Article 229 shall not apply.

41. Failure to perform one's official duties shall be committed through a criminally false assumption or criminal negligence.

42. If as a result of failure to perform one's official duties another person dies, is caused severe or non-severe health impairment and if the perpetrator foresaw and due to his act or inaction such consequences may occur, but recklessly expected to avoid them, or, although he did not foresee but according to the circumstances of the offence and his personal features could have and should have foreseen this, the offences shall be qualified as concurrence of offences (according to CC Article 229 and respective paragraphs of Articles 132, 137 or 139).
