

## LITHUANIA

### *CONTRIBUTION TO GRECO's NON-PAPER ON THE ISSUE OF EFFECTIVE REGRET*

February 2009

#### *Legal basis*

The legal basis for 'effective regret' in Lithuania is provided for in a special norm included in Article 227(4) of the Criminal Code.

#### **Criminal Code. Article 227. Graft**

**4. A person shall be released from criminal liability for grafting where he was demanded or provoked to give a bribe and he, upon offering, promising or giving the bribe and before the delivery of a notice of suspicion raised against him, notifies a law enforcement institution thereof or offers, promises or gives the bribe with the law enforcement institution being aware thereof.**

The aforementioned paragraph deals with two instances:

1. A pure case of effective regret when a person is demanded/provoked to give a bribe and he, upon offering/promising/giving and before the delivery of a notice of suspicion raised against him it notifies a law enforcement institution.
2. When a person offers/promises/gives the bribe with the law enforcement institutions being aware thereof.

The latter part is necessary to protect the undercover agent or informant who agrees to co-operate and get involved in an undercover operation and offer a bribe to a 'bribee' when the demand element is present.

#### *Key elements of 'effective regret'*

The first part is of more relevance for the present paper and rests on several key elements.

1. The briber should be *demand*d*/provoked* to be given. In other words, the initiator of the bribe is a bribee, who becomes 'active' (rather than 'passive') in a bribery agreement. According to the existing court practice, *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. 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*

2. There should be voluntary reporting on the part of a briber.
3. The element of time is important but it is defined as *before the delivery of a notice of suspicion raised against him it notifies a law enforcement institution*. The latter phrase was chosen as a result of a compromise to avoid any confusion caused by the previous phrase ‘*without delay*’. (For more information on that see ‘historical development’ below)

### ***Historical development***

#### **Old Criminal Code, New Criminal Code and Amendments thereto**

##### **Old Criminal Code of 1961. Excerpt from Article 284. Graft**

A person who was demanded or provoked to give a bribe and he offered, promised to give or gave a bribe with the law enforcement institution being aware thereof shall be released from criminal liability.

As seen from the paragraph above, it lacked two important elements: reporting and time during which it should be done.

##### **2000. New Criminal Code (effective of 1 May 2003). Article 227(4)**

4. A person shall be released from criminal liability for graft if the bribe is demanded from his or provoked to be given and he offered, promised to give or gave a bribe with the law enforcement institution being aware thereof.

The new Criminal Code of 2000, which became effective in May 2003, eliminated ‘effective regret’ completely, leaving only the protection for agents/informants involved in an undercover operation.

Taking the new provisions into account it was agreed that the detection of corruption crimes became extremely difficult and there was no possibility of involving a whistleblower who promised/gave a bribe in the past into an undercover operation.

##### **April 2003 Amendment of CC Article 227 (4)**

A person shall be released from criminal liability for graft if he was demanded or provoked to give a bribe and he, upon offering, promising or giving the bribe notifies a

law enforcement institution thereof *without delay* or offers, promises or gives the bribe with the law enforcement institution being aware thereof.

### **2007. Amendment of CC Article 227 (4)**

The phrase “without delay” was replaced with the words “before the delivery of a notice of suspicion raised against him”. These words were used as a result of a compromise between different stakeholders (Ministry of Justice, law enforcement agencies, Parliament, the academia) which are believed to eliminate the confusion with regard to the timing of reporting.

#### ***Advantages of having ‘effective regret’:***

- 1) Many corruption crimes (which are, indeed, latent) would remain undetected. With one party reporting, the silence is broken.  
The choice is believed to be between a bigger and a smaller evil. (where big evil is the lack of knowledge of ‘a corruption agreement between two parties’ and a smaller evil is the release from criminal liability of a briber (who, in this case, gives or promises to give a bribe because he has no other choice)).
- 2) Ensures a better use of resources (human, time, financial) in detecting corruption crimes.
- 3) The practice of reporting (whistle-blowing) is encouraged.

#### ***Disadvantages:***

- A possible moral issue when one party is punished and the other one is released. However, when the bribee is the initiator of bribery, the moral issue should not cause a concern.
- Theoretical possibility of abuse, which is not an issue in practice, because of the safeguards in place.

#### ***Ensuring non-abuse of ‘effective regret’***

A report is only the grounds to start investigation. The information is checked, cross-checked and verified. The ‘reporter’ is often asked to get in confrontation with the suspect or even get wiretapped while giving a second bribe (because in many cases it is impossible to prove that the bribe was given in the first instance because the bribee would most certainly deny it). However, engagement of a reporter in an undercover operation is not mandatory.

If it is determined that there was no demand or provocation of a bribee, then the briber should be prosecuted. The briber is (made) aware of that and also that he is running the risk: the suspected bribee may certainly claim that he did not either accept any bribe or (when it is no longer possible) may try to revenge against the ‘reporter’ stating that no demand/provocation was in place. In that event, the prosecutor would have to act on the statement made by the bribee and get a verification of that information.

## *What happens to a 'bribe'?*

### *Statistics*

No statistics have been collected on the frequency of the use of effective regret.

Some figures were collected from Vilnius Department of the Special Investigation Service (the main anti-corruption body of Lithuania). Apart from Vilnius Department, the Special Investigation Service also has four other regional departments in the country.

Although the statistics are incomplete, they still give an indication of how often effective regret is used.

The table below shows the total number of pre-trial investigations of corruption offences (bribery, graft, abuse of office, bribery of intermediary) initiated at the Vilnius Department of the SIS, including the number of pre-trial investigations started on the basis of reported information (a) about the demand, offer or agreement to accept a bribe; and (b) about the bribe already given.

<b>Year</b>	<b>Number of pre-trial investigations initiated on the basis of reported information about the <u>demand, offer or agreement to accept a bribe</u></b>	<b>Number of pre-trial investigations initiated on the basis of reported information about the <u>bribe already given</u></b>	<b>Total number of started pre-trial investigations on all corruption offences</b>
<b>2005</b>	4	2	<b>31</b>
<b>2006</b>	11	3	<b>39</b>
<b>2007</b>	8	4	<b>40</b>
<b>2008</b>	1	8	<b>39</b>

In all instances, bribe is confiscated, except where it is given with the law enforcement institution and then it shall be returned to its owner. According to the existing court practice, *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) (instrument of crime).*

### *Other Grounds to Release from Criminal Liability*

**The other general provisions on release from criminal liability include the following:**

- Article 36: Release from Criminal Liability When a Person or Criminal Act Loses Its Dangerousness;
- Article 37: Release from Criminal Liability due to Minor Relevance of a Crime;
- Article 38: Release from Criminal Liability upon Reconciliation between the Offender and the Victim;
- Article 39: Release from Criminal Liability on the Basis of Mitigating Circumstances;
- Article 39<sup>(1)</sup>: Release from Criminal Liability When a Person Actively Assisted in Detecting the Criminal Acts Committed by Members of an Organised Group or a Criminal Association;
- *Article 40: Release from Criminal Liability on Bail* (the latter is also often imposed by courts in corruption cases). For instance, in 2008, the court applied this provision with respect 1 person in a ‘passive’ bribery case and to 8 persons in graft (active bribery) cases).