

УДК 343.2

THE CRIMINAL LEGAL ASSESSMENT OF “APPARENT INTERMEDIATOR” ACTIONS IN BRIBERY

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SUMMARY

This article deals with research of urgent problems of criminal legal assessment of the actions of apparent intermediary in bribery. The scientific approaches concerning criminal legal qualification of apparent intermediary in the receiving or giving of illegal benefit to the public officers are considered. Legislative changes to the Criminal Code of Ukraine in order to solve the abovementioned problems concerning legal qualification of “apparent intermediary” actions are proposed.

Key words: illegal benefit, apparent intermediary, bribery, mediation, corruption crime, criminal legal assessment.

АНОТАЦІЯ

Стаття присвячена дослідженню актуальних проблем кримінально-правового оцінювання дій удаваного посередника в підкупі. Розглянуто наукові підходи, що стосуються кримінально-правової кваліфікації дій удаваного посередника під час одержання або надання неправомірної вигоди службовим особам. Запропоновано законодавчі зміни до статті Кримінального кодексу України з метою вирішення означеної проблеми під час кваліфікації відповідних діянь «удаваного посередника».

Ключові слова: неправомірна вигода, удаваний посередник, підкуп, посередництво, корупційний злочин, кримінально-правове оцінювання.

Introduction. Bribery in Ukraine is gaining more complicated organized forms, including through the use of intermediators, which greatly facilitates the possibility of implementation of criminal intent on committing acts about giving or receiving a bribe, helps to avoid criminal liability of intermediators that complicates the detection of these crimes by law-enforcement agencies.

However, after the adoption of the current Criminal Code of Ukraine in 2001 that canceled special norm which provided responsibility for mediation in bribery, specified criminal act remains as a criminal offense, and therefore complicity in qualification of receiving or giving a bribe still exists.

The purpose of the article. In the criminal justice literature a number of issues concerning the criminal liability of intermediary in bribery is debatable. Among these issues, the problem of criminal and legal assessment of the actions of so-called “apparent intermediary” still exists. However, the question of the correctness of the legal assessment of these perpetrator actions is extremely important, not only to determine the subjective side of the offense and the correct qualification of a perpetrator, but also for the establishment of a clear differentiated related actions, which may be mediation in bribery and fraud.

The abovementioned problem has been the subject of researches by A. Wyszynski, B. Volzhenkina, R. Hrebenuk, O. Dudorov, B. Zdravomyslova, A. Kvitsyniyi, T. Kondrashov, B. Korobeynykova, M. Orlov M. Melnyk, Y. Solopanova, A. Pinayev, O. Tkachov and other researchers.

In general, the mediator in crimes related to the illegal transfer of benefits can't always be “in good faith figure” that “properly” fulfills its obligations to the transfer the subject of the offense. Thus, relatively common in law enforcement practice is a situation of the “apparent mediation” that occurs when a person promising or offering their mediation services, shall receive from the person who provides (or other intermediary) illegal benefit ostensibly to transfer it to the recipient, but having no real intent to do and assigns it.

Let's consider the basic approaches to solving this problem, which offered by special scientific literature. Depending on the source of initiating such an agreement to provide mediation services between the person who intends to provide illegal benefits and “unfair” intermediary it's appear to distinguish next situations, when:

1) initiative belongs to the intermediary, which predisposes a person for transmission of illegal benefit to official or a person who provides public services;

2) also there can be the opposite situation, where the same person who intends to provide illegal benefit and is interested in a particular behavior of a public official, or person of private law that provides public services, persuades or offers “apparent intermediary” to convey illegal benefit.

In the first case, a proposal of mediation actually comes from the intermediary, and in the second case, a promise of such mediation is a response to a proposal by potential illegal benefit.

The certain attention should be drawn to the criminal assessment of the actions of the subject who tried by using intermediary to transfer illegal benefit to officer or person who provides public services. In this situation, there is no doubt about the qualification such actions as an attempt to transfer illegal benefit in both cases. These actions can be considered as implementation of the actus reus of the criminal offence – the transfer of illegal benefit – that can't be completed by the reasons that don't depend on the will of the person who intends to provide illegal benefits.

In the second case, the person who wants to transfer illegal benefits, in order to reach agreement on the transfer, can directly join the conspiracy on the transfer of the illegal benefit to the officer (the person who provides public services) without mediation.

However, on the next stage of the implementation of criminal intent and implementation of a corruption agreement between the main participators, that person can give “appar-

ent intermediary” benefits exceptionally for their technology transfer (i.e. only physical intermediary is involved).

Even in the resolution of the Supreme Court of USSR “On judicial practice in cases of bribery” dated on 24 June 1948 the Plenum stated that if a person inciting the briber derives from him some benefits or values supposedly to transfer it to official as illegal benefits, but actually appropriates them, the actions of the person required to qualify as incitement to bribe, actions of briber – as an attempt to bribe. A similar explanation was contained in the resolution of the Plenum of the Supreme Court dated on July 31, 1962.

At the same time, having studied the court’s practice, the Plenum pointed out the irregularity of prosecution of persons for fraud who falsely speak to the briber as resellers. Such persons, according to practice of the Supreme Court of the USSR, in fact encroached on object of the crime: interests of public service, as incited to bribe. A similar solution we found in its decision dated on September 23, 1977, however, with the addition that depending on the circumstances of the case, it should have been qualified as complicity.

However, the ratio of the highest court has changed dramatically in the decision dated on March 30, 1990, in which the Plenum of VSSRSR has recommended to the courts to bring “fictitious intermediators” to justice for fraud, that is stated in Article 147 of the Criminal Procedure Code of Ukraine, and provided that the actions of official who pushed briber to bribe should be qualified additionally as incitement to bribe.

In section 10 of the Supreme Court of Ukraine Resolution dated on October 7, 1994 the Plenum recommended to qualify actions of officer, who give money or other benefits supposedly to transfer to another public official as a bribe, and has an intent not to pass them, and appropriates it by the section 168 of the Criminal Code of Ukraine dated on 1960, and be the sections 143, 165 of the Criminal Code of Ukraine as a fraud and the abuse of power or official position, or by the relevant parts of Articles 19, 17 and 170 of the Criminal Code of Ukraine (attempted bribery).

In this case, the person, who gave money or benefits, believing that it gives bribe is responsible for the attempted bribery. It should be noted that the next resolution of the Plenum of the Supreme Court dated on April 26, 2002 № 5 reproduced same provision.

At the same time, the clarification of the higher courts concerning the qualification of apparent intermediary is criticized by the scientists. For example, B. Korobeinuk and M. Orlov, in particular, argued that such intention is not to transfer illegal benefits, but its appropriation. The focus of criminal intent in this case, the essence – or rather, a way to commit *actus reus* (fraud) and the target of a major encroachment here is not public relations, ensuring the normal functioning of the state and social system, and system management of enterprises, institutions and organizations regardless of ownership and activities related to the provision of public services and ownership - indicates the presence in this case of crime against property (fraud).

However, in the cases where the intent of “apparent intermediary” was originally intended to rob the person who intends to provide illegal benefit and the initiative to the performance of the functions of the intermediary came from him, such person intentionally makes all in order to generate a more intent on giving of illegal benefit.

Therefore, an opinion offered by B.Zdravomyslov to qualify such actions of apparent intermediary as attempted bribe is widely distributed.

Despite of it, the Plenum of the Supreme Court considered such actions as the completed crime of incitement “Giving a bribe”, but above solution proposed by B. Zdravomyslov, is more justified because “apparent intermediary” actually declines briber to do attempt, knowing that the commission of the completed offense will not happen.

However, there is another point of view, proposed by Y. Solopanov regarding to the qualification of a failed “briber” (the person who intends to provide illegal benefit). He believes that the actions of such persons who haven’t attained his goal against the wishes of the person as a result of errors in the true intentions of agent that caused her determination to commit a crime shall be assessed as unfit attempt with the means that objectively can’t harm object protected by law. Therefore, it is sufficient to deprive him of transferred property and transfer it to the state revenue.

Moreover, A. Vyshynskiy also argued that the victim of fraud can’t be responsible for the attempted bribe, because the state is struggling not with ill will, but only with victim’s selfish directed against the public interest. “If there is no official taking a bribe, there can’t be a bribe”.

In practice, actions of apparent intermediary also can be qualified as a fraud and incitement to attempt of providing illegal benefits.

For example, R. Hrebeniuk indicates that legal assessment of the actions of false intermediary as a fraud is questionable, because criminal law is intended to protect the positive public relations, the legitimate interests of the subjects of these relations. The property also contains a so-called interests of the briber “legal defect”, the essence of which is that neither criminal law nor jurisprudence can’t equate public relations of people who had illegal interests, to the level of legal.

Therefore, we agree that there is no doubt in the fact that the criminal law is intended to protect the property from the encroachments of social relations based on legal grounds, in particular, the right of ownership and other real legal rights.

In light of the above, R. Hrebenyuk believes that Plenum of Supreme Court of Ukraine has based on a fraud (obtaining property by deception and its appropriation), but didn’t take into account the fact that apparently similar to crimes against property actions of false intermediary and, accordingly, property interests deceived briber who are harmed, contain “legal defect”. Other understanding leads to an interesting conclusion: the person who provided illegal benefits should be considered as a victim and has the right to demand return of subject of encroachment.

Thus, the question of whether to recognize victims of “apparent intermediary” actions as a person who is trying to convey potentially illegal benefits and causing some doubts to the scientists concerning the accuracy of criminal legal assessment of these actions by the Criminal Code of Ukraine.

The legislator determines victim as an individual, which suffered moral, physical or material damage by the criminal offence, as well as a legal person, which suffered property damage.

Also, on the one hand, money, valuables and other property that were the object of a criminal offense or other socially dangerous act, must be returned to rightful holder according to the part 5 chapter 9 article 100 of the Criminal Procedure Code of Ukraine.

On the other hand, part 6 chapter 9 of the article 100 of the Criminal Procedure Code of Ukraine indicates that money, valuables and other property acquired through the commission of a criminal offense, must be transferred to the state revenue.

In this case, the property of the person, who is trying to pass it as an illegal benefit through the "apparent intermediary" is acquired by "apparent intermediary" as a result of the crime, so it must be passed to the state revenue.

But most importantly, that such property is the subject of the offense committed by the "victims of fraud". Thus, recognition of *actus reus* of fraud in the actions of "apparent intermediary" doesn't mean that the subject, who tried to use it to convey illegal benefit, shall be released from criminal liability as a victim of fraud, and tangible assets must be returned to him as a victim of fraud. This subject provides an actions directly with the aim of committing a crime (giving illegal benefit) and therefore it should be responsible for the attempted crime.

However, the object of the crime can serve the social relations that are first and foremost and which legislator put under protection, having criminalized certain acts. Therefore, we partially agree with the idea that really controversial is the question of whether in the event of committing fraud in the course of committing bribery property relations putted under criminal protection suffering, if actually damage caused seemingly to illegal interests of the person who tries to act as a "briber"? Then, it turns out that in such criminal law assessment one of the missing elements of the crime – the object of attack?

Similar problem occurs in qualification of "theft of stolen property". It seems that public relations having illegal character are putting under criminal legal protection.

Yet, most scientists are supporting the position according to which the "theft of stolen property" must be recognized as a crime. This approach is justified by the fact that there is no importance, if removed property is in legal possession or illegal, anyway this offense has a social danger. That conclusion lies in the fact that one who infringes, carries a socially dangerous encroachment. Also, grade of public danger of such person can be reduced just by the fact that he or she commits a socially dangerous attack against an object that is in illegal possession of a "victim" and by the fact that stolen property is alien to the thief, and means that he or she has neither predicted, nor the actual right of ownership or legal possession of it.

For example, V. Navrotskyi notes that the theft of stolen property refers to the legal fiction when the property that has actually dropped out of the ownership is equated to that for which ownership is carried out, the second thief in any case, steals someone else property, therefore in such actions public danger exists.

Also, the same can be said about the fraud in bribery. The grade of public danger of the "apparent intermediary" is not offset by the fact that he or she commits a socially dangerous assault against an object (or rather – subject) that has unlawful purpose (referred to illegal benefit).

Similarly, the fact of legal or illegal possession of property that was removed during the theft of stolen goods, as well as fraud in bribery, origin and intended use of the property

or rights have no criminal law meaning. However, it doesn't lose its value as income, acquired through the commission of a criminal offense (attempt to provide illegal benefit), and must be passed in state revenue.

Conclusion. Summarizing the research concerning the criminal liability of "apparent intermediary", we believe that there is reason to supplement chapter 2, article 190 of the Criminal Code of Ukraine "Fraud" by the following text: "using his official position or authority of the person who provides public services". This will be enough to provide proper legal assessment of criminal actions of "apparent inter" with the differentiation on the basis of the subject. If the guilty person – official promises to the one who gives illegal benefit, to pass it to the appropriate recipient and according to the agreement of the participants reserves it as "fee for services" there are a set of crimes – the "apparent intermediation" and "receiving of illegal benefits".

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