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CRIMINALIZATION OF THE PROMISE AND OFFER TO GIVE OR ACCEPT A BRIBE AS A COMPLETED CRIMINAL OFFENSE: COMPLIANCE WITH THE *ULTIMA RATIO* PRINCIPLE

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ABSTRACT

As the processes of globalization become more intense, the legislation adopted by international institutions occupies an increasingly important place in national criminal law, including crimes related to corruption. However, the regulation of some acts of corruption, in the context of sustainable development, raises questions about its compliance with criminal law principles. This article examines the requirements of international law to criminalize a

promise and offer to give or accept a bribe in national law, recognizing that criminalization of such actions as completed criminal offense potentially violates the principle of *ultima ratio*. The article demonstrates that there is no unequivocal conclusion from international law that states must provide for liability for all acts of bribery as a completed criminal act. In order to implement the principle of *ultima ratio*, criminal liability for acts consisting essentially in the preparation or attempt to pay a bribe should not be enshrined in the same paragraph as bribery, where the bribe is exchanged by hand.

KEYWORDS

European Union criminal law, national law, bribery, stage of the criminal act, principle of *ultima ratio*

INTRODUCTION

In recent decades, the harm of bribery and the issue of corruption have been widely discussed in the political[1], economical[2], social[3] and legal[4] agendas, noting that this phenomenon can have a major impact on the way in which decisions are made at many levels[5]. Given that the law of international organizations is playing an increasingly important role in the criminal law of states, recent researchers focus on the influence of international law on the criminalization of corruption crimes[6]. Whereas it is observed that "conventional crimes" are legal labyrinths competing with other norms[7], it is important to look for the most appropriate ways to harmonize national and international law.

Back in 1997, the Organisation for Economic Co-operation and Development adopted convention, promoting the action of taking the necessary measures to establish that it is a criminal offence not only for any person to intentionally give a bribe, but also to intentionally offer or promise to give it.[8] The above actions are also specified as a criminal offence in the legislation, adopted by the institutions of the European Union.[9] International and EU documents reflect the tendency that since 1990 there is paradigm shift from the traditional welfare state into a culture of control which also predetermined that criminal law focuses on increased criminalization of preparatory conduct.[10]

The problem of this investigation becomes apparent when looking at the promise to give or accept a bribe as actions that essentially correspond to the preparatory stage of the crime. Scientists debate whether the promise to give a bribe, which is subsequently reconsidered and refused, is an act so dangerous that it must be regarded as a completed crime without the possibility of avoiding

[1] Milan Školnik, "Corruption and Political Participation: A Review," *Sociální studia/Social Studies* 17.1 (2020).
[2] Samanta Subarna and Sanyal Rajib, "Relationship between Perceived Bribery and Economic Growth: An Empirical Analysis," *Global business and finance review* 14(2) (2009).
[3] Sean Richey, "The Impact of Corruption on Social Trust," *American Politics Research* 38(4) (2010):.
[4] Antonio Argandoña, "The United Nations convention against corruption and its impact on international companies," *Journal of Business Ethics* 74.4 (2007); Sarah Shulman, "The Criminalization of Bribery: Can the Foreign Corrupt Practices Act Be Applicable to the anti-Bribery Provisions of the United Nations Convention against Corruption," *Am. U. Int'l L. Rev*. 29 (2013): 717.
[5] Peter Larmour and Nick Wolanin, *Corruption and Anti-Corruption* (Canberra: ANU Press, 2013), 134.
[6] Carl Pacini, Judyth A. Swingen, and Hudson Rogers, "The role of the OECD and EU Conventions in combating bribery of foreign public officials," *Journal of Business Ethics* 37.4 (2002); Alfano Vincenzo, Salvatore Capass, and Rajeev K. Goel, "EU accession: A boon or bane for corruption?" *Journal of Economics and Finance* 45.1 (2021) // DOI: 10.1007/s12197-020-09522-8.
[7] Oleg Fedosiuk, "Dirbtinis kriminalizavimas kaip teisinės praktikos patologija," *Teisės apžvalga* 2.14 (2016): 32.
[8] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Organisation for Economic Co-operation and Development // https://www.oecd.org/corruption/oecdantibriberyconvention.htm.
[9] *Convention on fighting corruption involving officials of the EU or officials of Member States*, 1997, OJ C 195; *Council framework decision 2003/568/JHA on combating corruption in the private sector*, 2003, OJ L 192/54.
[10] Keiler Johannes and David Roef, eds., *Comparative concepts of criminal law*, 2nd edition (Intersentia, 2016), 205.

criminal liability by voluntarily refusing to complete the crime.[11] Especially taking into consideration that the criminal codes of many countries provide that a person may be released from criminal liability for bribery if the bribe-giver has become a "victim" of the bribe requirement or has been provoked to bribe and, having offered, promised or given a bribe, informed the law enforcement service of a statement of suspicion on him. Even if it is established that there is a need to criminalize these actions as a completed crime it is doubtful whether the imposition of the same punishment for acts which are essentially preparatory acts as in the case of a completed criminal offense, without leaving the person an opportunity to voluntarily refuse to complete the criminal offense at a preliminary stage, is not contrary to the principles of criminal law, specifically to the principle of ultima ratio.

The next aspect is coherence of the general part and the special part of the national Criminal code (hereinafter – CC). In some EU countries (for instance in the Netherlands from 2002,[12] also in Latvia, and Poland) like in Lithuania stages of the criminal act and liability for it are provided in general part of CC, and the question arises how criminalization of a promise or offer to give/accept a bribe as a completed crime complies with this aspect. There is even opinion that the obligation, imposed on countries by European Union law to criminalize preparatory acts as independent criminal offenses, eliminates the need to retain a separate article in the general part of criminal law on preparing to commit a serious or very serious crime.[13]

Although scientific articles examine the impact of international law on the criminalization of bribery, such research is largely limited to analyzing the impact on the extent of corruption[14], the impact on business of international anti-corruption instruments[15], and modern international law standards regarding bribery[16]. The problem of criminalizing acts which are, in essence, preparation for a criminal offense as a completed criminal offense has been examined more broadly in relation to terrorist crimes[17]. However, the need to criminalize the pledge to give or accept a bribe as a completed crime has not been sufficiently investigated.

The aim of this article is to investigate the need for a pledge or offer to give or take a bribe to criminalize as a completed criminal act in the context of international regulation and the compliance of such regulation with the principle of

[11] Armanas Abramavičius, *et al*., *Europos Sąjungos teisės įtaka Lietuvos teisinei sistemai : mokslinių straipsnių, skirtų Europos Sąjungos teisės įtakai Lietuvos konstitucinei, administracinei, aplinkos apsaugos, baudžiamajai, civilinei ir civilinio proceso, darbo ir socialinės apsaugos bei finansų teisei, rinkinys* (Vilnius: Vilniaus universiteto leidykla, 2014).
[12] Keiler Johannes and David Roef, *supra* note 10, 209.
[13] Gintaras Švedas, "Europos Sąjungos teisės įtaka Lietuvos baudžiamajai teisei," *Teisė* 74 (2010): 14.
[14] Alfano Vincenzo, Salvatore Capass, and Rajeev K. Goel, *supra* note 6.
[15] Antonio Argandoña, *supra* note 4.
[16] Sarah Shulman, *supra* note 4.
[17] Tom Chen, Lee Jarvis, Stuart Macdonald, eds., *Cyberterrorism* (Springer: Heidelberg, 2014), 155-171.

ultima ratio. The article proceeds in these aims by: 1) finding out if existing international and EU legislation require criminalization of promise/offer to give/accept a bribe as a completed crime; 2) finding out how national regulation of some EU member States criminalize preparatory stages of bribery crime and if it is related to certain historical model/pattern of criminalization. Additionally, the authors analyze if criminalisation of a promise/offer to give/accept a bribe as a completed crime complies with the principle of *ultima ratio*.

1. INTERNATIONAL AND EU LEGISLATION

The prevalence of corruption in individual countries and its globalization have been a major concern at the United Nations as early as in the late 80's.[18] The first international legal acts in the field of corruption were resolutions and conventions, mainly aimed at preventing corruption between foreign public officials in international business transactions.[19] Although these legal instruments were not binding, the parties adopted these documents willingly, for example, the Convention on Combating Bribery of Foreign Public Officials in International Business[20] was signed not only by members of The Organisation for Economic Co-operation and Development (hereinafter – OECD)[21]. With the entry into force of the Treaty of Lisbon in 2009 and gaining certain competence in the field of criminal law,[22] the EU enacts a directive also covering the aspects of corruption related to EU financial interests (further – Directive). This legal document contrary to OECD or European Council has a binding nature as to the results to be achieved, but Member States are allowed to choose appropriate tools and methods.

Both documents require criminalization of offering or promising of a bribe, while the Directive is more precise, providing definitions of both active and passive corruption (art.4) and provides more inclusive definition of "public official" as it relates not only to the holding of official duties, but also to the fact that they are entrusted with a specific public service function in relation to European Union funds and who perform it. Thus, as can be seen from the legislation discussed, this legislation is accompanied by a requirement for Member States to criminalize acts

[18] Alexander V. Groshev, Aleksey N. Ilyashenko, and Leonid P. Rasskazov, "Criminalization of corruption in the conduct of international business transactions in international criminal legislation," *Revista ESPACIOS*, 39.44 (2018): 35.
[19] *Corruption in the sphere of state administration*, The Resolution of the VIII UN Congress held in 1990 in Havana; *Convention on combating bribery of foreign public officials in international business transactions*, *supra* note 8; *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, OJ C 195.
[20] *Convention on combating bribery of foreign public officials in international business transactions*, *supra* note 8.
[21] Alexander V. Groshev, Aleksey N. Ilyashenko, and Leonid P. Rasskazov, *supra* note 18.
[22] *Treaty of Lisbon amending the treaty on European Union and the treaty establishing the European community*, 2007, OJ C 306.

which are, in essence, merely preparing to give or accept a bribe. It should also be noted that although the regulation identifies active and passive corruption as a criminal offense, it does not state that all the acts described must be considered a completed stage of the criminal offense.

The above-mentioned legal documents speak in a very abstract way when discussing sanctions for criminal offenses of a corrupt nature. The resolution and conventions emphasize that active and passive bribery must be punished by effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition[23], or also provides for such conduct to be punishable by a term of imprisonment of at least between one and three years[24]. As in previous legislation, the Directive emphasizes the effectiveness, proportionality and dissuasiveness of criminal sanctions which are directly related with seriousness of crime: in the case of serious harm or substantial gain (more than EUR 100 000), a maximum penalty of at least four years' imprisonment must be provided. Sanctions are intended to have a strong deterrent effect on potential offenders too. Furthermore. as indicated in art.7(4), Member States may impose non-criminal sanctions for criminal offenses involving less than 10 000 Eur damages or less than 10 000 Eur benefits.

The discussed regulation shows that States have an obligation to punish for promising to give or accept a bribe by effective, proportionate and dissuasive sanctions. Given that international instruments do not specify that such acts should be considered completed crimes, it is considered that the requirements of the legislation could be implemented as a preliminary stage of a criminal offense. It also follows from the Directive that, in certain cases, in the absence of serious damage, acts constituting a bribery offence could be subject to measures other than criminal law. The most important aspect in assessing whether a State is properly implementing international law by criminalizing a promise and an offer to accept or give a bribe is whether such actions are punished effectively, proportionately, and dissuasively.

2. NATIONAL LEGISLATION AND PRACTICE

Notwithstanding the fact that States should seek to harmonize international law with the national criminal justice system when implementing international law acts, it appears that the criminalization of acts of a corrupt nature has not taken sufficient account of existing national regulations in general part. Although the

[23] *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union*, *supra* note 19.
[24] *Council framework decision*, *supra* note 9.

criminal law of the European Union does not directly recognize the preparation of a criminal offense as a criminal offense stage[25], European Union law imposes an obligation on member States to criminalize the promise and offer of giving or accepting a bribe, which is essentially in line with the concept of the preparatory or attempt stage.

In the scientific discourse, when drawing a line between a completed and an unfinished crime it is noted that an unfinished crime is when intention is not fully realized nor real harm for object of encroachment is caused[26]. So, it should be emphasized that there is a difference between the mental state of a person who commits a criminal offense and that of a person who is only preparing or attempting to commit a criminal offense. A person who has committed an inchoate crime, realizes that there is still time to refuse to complete the criminal act.[27] Scientists stipulate that: "In an inchoate crime, the defendant's purpose is to bring about a future crime, and that purpose can be internally and externally conditional in all sorts of ways".[28]

The practice of States in enshrining independent articles in criminal codes providing for liability for stages of an unfinished crime is different and depends on historical and ideological reasons. In theory two patterns based on the question for what punishment is imposed are provided: the pattern of manifest (objective criminal conduct) and the pattern of subjective criminality (intention) which "are often intertwined in contemporary thinking about criminal law".[29] Historically, criminal codes, related to liberal ideology, do not recognize responsibility for preparation to commit a crime[30] as such conduct "would fall outside the scope of criminal law"[31]. An example of such regulation is Portugal, (and up till 2002 the Netherlands)[32] the criminal code of which provides that preparatory acts are not punishable unless specified otherwise[33]. The theory above is supported in the sense that the preparation to commit a crime is often ambiguous, furthermore, this stage may be followed by a refusal to commit a crime,[34] i.e. is grounded on the pattern of manifest. Whereas, it is debated in scientific doctrine that preparation for a crime is

[25] Armanas Abramavičius, *et al*., *Europos Sąjungos tesės aktų įgyvendinimas Lietuvos baudžiamojoje teisėje* (Vilnius: Teisinės informacijos centras, 2005), 73.
[26] O. V. Us, "Qualification of unfinished crime," *Актуальні проблеми держави і права* UDC 343.21 (2018): 168.
[27] Alexander Larry and Kimberly D. Kessler, "Mens rea and inchoate crimes," *J. Crim. L. & Criminology* 87 (1996): 1139.
[28] *Ibid*.: 1142.
[29] Keiler Johannes and David Roef, *supra* note 10, 204.
[30] Jean Pradel*, Lyginamoji baudžiamoji teisė* (Vilnius: Eugrimas, 2001): 231.
[31] Keiler Johannes and David Roef, *supra* note 10, 205.
[32] *Ibid.*, 208-209.
[33] *Criminal code of Portugal*, article No. 21 // http://europam.eu/?module=legislation&country=Portugal.
[34] Jean Pradel, *supra* note 30.

not so dangerous that a person should be prosecuted[35], the liberal theory seems to eliminate the problem of excessive criminalization. There is also a social ideology that seeks to reconcile personal freedoms with the need to persecute even minor dangerous acts, leading to indifference to the preparation to commit a crime and to a subjective perception of the commencement of the crime.[36] Meanwhile, according to the subjective criminality pattern (which also dominated in most authoritarian states), the commencement of a criminal offense is understood subjectively and the person is even punished for actions prior to preparing to commit a crime.[37] This ideology needs to be discussed more broadly, as it seems that if a state criminalises preparatory acts in the general part of the criminal code, a promise and offer to accept or give a bribe may be punished under this article instead of criminalizing such acts in a special part.

It should be noted that the Polish penal code provides for liability for the following preparatory actions in order to facilitate the commission of a criminal offense: entering into an agreement with another person, obtaining or adopting resources, gathering information or drawing up an action plan.[38] The Latvian penal code describes preparation as "locating of, or adaptation of, means or instrumentalities" and also, probably in order to avoid a situation where certain preparatory actions do not fall within the scope of criminal law, a broader definition is provided: "intentional creation of circumstances conducive for the commission of an intentional offence". [39] Meanwhile, in Lithuania, not only a search for or adaptation of means and instruments is mentioned, but also a development of an action plan and engagement of accomplices is part of preparation stage.[40] Similar to the Latvian regulation, the Lithuanian regulation leaves room for interpretation by stating that preparing to commit a crime is either "other intentional creation of the conditions facilitating the commission of the crime".[41]

While a subjective criminality pattern can be criticized for overly broad application of criminal liability, States have introduced certain restrictions in their regulations that narrow the cases in which preparatory actions can be punished. In some countries, for example, in Lithuania, Latvia and Netherlands, only preparation for a serious or very serious crime is punishable. In Estonia, meanwhile, criminal offenses are identified for which preparatory actions are prosecuted. The practice of

[35] Sergej N. Bezugly, *et al*., "Preparation for Crime: Signs, Criminalization," *Talent Development & Excellence* 12 (2020).
[36] Jean Pradel, *supra* note 30.
[37] *Ibid*.; Keiler Johannes and David Roef, *supra* note 10, 204-205.
[38] *Criminal code of Poland*, article No. 16, 17 // http://europam.eu/?module=legislation&country=Poland.
[39] *Criminal code of Latvia*, section No. 15 // https://www.legislationline.org/documents/section/criminal-codes/country/19/Latvia/show.
[40] *Criminal Code of Republic of Lithuania*, Official Gazette (2000, no. 89-2741), Art 21.
[41] *Ibid.*

the countries in providing penalties for preparatory actions is also not the same; for example, Latvian regulations state that such actions are punishable under the article of the special part[42], while the Lithuanian Criminal Code additionally stipulates that in this case it is possible (but not obligatory) to apply less severe punishment than provided by law[43], and in the Netherlands the law provides that the maximum penalty must be reduced by one half.[44] In addition, many countries that provide for liability for preparing or attempting to commit a criminal offense also provide for the possibility of voluntary refusal[45], which allows a potential offender to change their mind and avoid criminal liability.

Analyzing the regulation of corrupt criminal offenses in European Union member States, it should be noted that the definitions of bribery acts in their criminal codes do not differ or differ slightly from those, provided in international instruments. This shows that although it is stated that at the same time as international law asserts its primacy over domestic law, domestic legal systems increasingly demand the right to restrict international norms and decisions[46], there is also a tendency towards the literal transposition of international law into criminal codes. The promise and offer to accept or give a bribe, criminalized in the criminal codes of the Member States, is considered to be in line with the concept of preparation stage discussed above, as the person deliberately creates the conditions for giving or accepting a bribe by preparing the said actions, prepares a bribe-making plan, but his actions have not yet achieved his purpose, the intended damage to the object has not yet been done.

Although it appears that in countries with a subjective criminality pattern, promising and offering to accept a bribe could be punished under the general part of the Penal Code as preparation for a criminal offense, Greco's evaluation reports[47] show that some cases of promise and offer to give or accept a bribe in states are considered an attempt to commit a criminal offense. For example, in Poland cases of a refused offer should be understood as an attempt to "give" benefit. Such regulation was assessed positively given the fact that the same sanctions can be imposed for an attempt as for a finished crime and all acts of "offering" are

[42] *Criminal code of Latvia*, *supra* note 39.
[43] *Criminal Code of Republic of Lithuania*, *supra* note 40.
[44] *Duch Criminal Code*, Art.46, from Keiler Johannes and David Roef, *supra* note 10, 209.
[45] For example Lithuania, Latvia, Estonia, Germany, Finland, Poland.
[46] Maria Fulvio Palombino, ed., *Duelling for Supremacy: International Law Vs. National Fundamental Principles* (Cambridge University Press, 2019), 1.
[47] In order to monitor states' compliance with the anti-corruption standards, in 1999, the Group of States against Corruption (GRECO) was established by the Council of Europe. GRECO monitors countries' compliance with the Council of European anti-corruption standards through a dynamic process of mutual evaluation and peer pressure, thus helping to identify shortcomings in national anti-corruption policies (see <https://www.coe.int/en/web/greco/about-greco/what-is-greco>).

punishable under Polish law[48]. Greco report also pointed out that in Germany, cases where an offer has been formalised and issued, but has not necessarily reached the potential bribe-taker, match the concept of attempt.[49] Unlike in the case of latter countries, Armenia's choice to treat some acts of bribery as a readiness to commit a criminal offense was criticized during the assessment.[50] It is believed that such a different approach towards these countries was due to the level of sanctions, as in Armenia the penalties would be much lower in the case of preparation or assault than in the case of a completed offence once advantage has changed hands[51]. Another problem pointed out was that active and passive commercial bribery was not considered a serious crime, whereas in Armenia it was punished only for preparation for a serious or very serious crime.[52]

However, in Lithuania the completeness of bribery offence does not depend on the bribed person's reaction to it.[53] It is important to mention that this regulation in Lithuania, when, despite the fact that preparatory and attempted acts are criminalized in the general part of the criminal code, the promise and offer to give or accept a bribe is criminalized in a special part, causes not only theoretical but also practical problems. Despite the fact that a promise or similar preparatory action was criminalized as a completed criminal offense since the entry into force of the Lithuania new Penal Code in 2003[54], it is still not entirely clear to the national courts which acts of bribery should be qualified as a completed criminal offense and which as an attempt or preparation to commit a criminal offense. In rare case law, decisions regarding the qualification of the analyzed actions are heterogeneous and stimulating discussion.[55]

A systematic analysis of the general part of the states' criminal codes shows that in countries belonging to the subjective criminality pattern, where preparatory

[48] *Greco Third Evaluation Round Evaluation Report on Poland on Incriminations* (ETS 173 and 191, GPC 2).
[49] *Greco Third Evaluation Round Evaluation Report on Germany on Incriminations* (ETS 173 and 191, GPC 2).
[50] *Greco Evaluation Report on Armenia on Incriminations* (ETS 173 and 191, GPC 2).
[51] *Ibid*.
[52] *Ibid.*
[53] See *State v A. Z., A. J., and D. L.*, Supreme Court of the Republic of Lithuania (2009, no. 2K-7-48).
[54] Promise was also criminalized in the old Criminal Code of the Republic of Lithuania since 1999.
[55] See *State v A. Z., A. J. and D. L.*, *supra* note 53, where D. L., who promised a person a bribe for voting for the respective candidate during the mayor's election, was found guilty by a court for attempted bribery because the criminal offense alleged against D. L. had ceased at the stage of the final attack on the fact that V. D. did not consider the proposed transaction as an attempt to bribe him. Such a decision was overturned by the Court of Cassation on the ground that the composition of the offense of bribery was formal, so that the law linked the end of the offense to the moment when at least one of the three alternative acts was committed; also see *State v R. A. and A. C.*, Court of Appeal of the Republic of Lithuania (2018, no. 1A-304-197) and *State v R. A. and A. C.,* Supreme Court of the Republic of Lithuania (2019, no. 2K-7-162-303), where after finding that the convicts had demanded a bribe, the Court of Appeal changed the classification of their actions from preparing to commit a crime to a completed crime. The classification of the actions of the convicts in the cassation instance changed again when the court found that it is necessary to establish not only one of the alternative objective features, but also his (also through an intermediary) promise to the bribe-giver to influence the entities specified in Article 226 of the CC to act or inaction in the exercise of his powers and ruled, that this had not been proven.

acts are criminalized in a stand-alone article, a promise and offer to give or accept a bribe is in line with the concept of that article and could be punished under it. Moreover, in some cases, the definition of attempt could cover some aspects of preparation for a crime, and the promise and offer to give or accept a bribe may also be in line with the notion of assault. The debate could arise on the seriousness of the offenses, as it determines whether preparatory actions would be punished under the general part. On the other hand, an attempt could be punished in all cases where there is no voluntary refusal to end the criminal offense. It has been established above that the main requirement for states under international law is the effectiveness, proportionality and dissuasiveness of sanctions. Therefore, as the example of Poland shows, if a country is able to punish certain acts of bribery not as a completed crime but as a preparation or an attempt in an effective, dissuasive and proportionate manner, this should be sufficient to comply with international law.

In the light of the circumstances discussed in this section, it is concluded that when liability for an unfinished crime stage is provided for in the general part of the Criminal Code and the promise and offer to give or accept a bribe falls under the definition of an unfinished offense, the requirements of international law may be implemented without criminalizing such acts as finished crime in a special part of the Criminal Code. In order to achieve the goals of sustainable development, states should seek to find the most appropriate ways to harmonize national and international law themselves, in this particular case by deciding which acts of corruption should be considered completed criminal offence. However, countries did not pay enough attention to the harmonization of international and national law; on the contrary, they chose to "automatically" transpose the content of international law into their legal system, regardless of the impact on the general part of the Criminal Code.

Given that such a regulation, when preparatory and attempted acts are considered a completed criminal act, can lead to confusion not only in the theory of criminal law, but also in its practice, it is important to analyze whether such regulation is compatible with the principle of *ultima ratio*.

3. CRIMINALISATION OF THE PROMISE AND OFFER OF A BRIBE AS A COMPLETED CRIMINAL OFFENCE. THE PRINCIPLE OF *ULTIMA RATIO*

Since criminal law has been internationalized and Europeanized, the *ultima ratio* principle has been mentioned in EU documents.[56] For example, in the

[56] Sakari Melander, "Ultima ratio in European criminal law," *Eur. Crim. L. Rev. 3* (2013): 45.

Stockholm programme it is stated that: "Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort."[57] In the scientific discourse, the principle of *ultima ratio* is perceived primarily as the last resort for the regulation of public relations, which should be used only in uttermost cases.[58] This means that in the presence of other sufficient legal instruments, e.g. civil, administrative liability measures, criminal liability should not be used. According to the Rudolf Wendt, from a theoretical point of view *ultima ratio* is intended to prevent "excessive state action towards the citizens".[59]

Analyzing the content of this principle, it should be noted that it is perceived as a criterion for criminalizing an act.[60] More specifically, *ultima ratio* means that the legitimate act of criminalization must be, *inter alia*, based on the danger of the conduct being assessed and the importance of the legal good protected, the necessity, effectiveness and economic expediency of criminal liability.[61] *Ultima ratio* lays down guidelines for describing the objective itself, justifying the prohibition of certain conduct by criminal means.[62] In this context, the principle of *ultima ratio* should be used to assess whether the criminalization of a promise to give or receive a bribe as a completed criminal offense, without leaving the possibility of avoiding criminal liability by voluntarily refusing to accept or give a promised bribe, is not contrary to the concept of criminal liability as a last resort.

One of the elements that must be met in order to impose criminal liability is the factual component (*actus reus*) consisting of criminal conduct. Even in cases where the composition of the criminal offenses is formal and does not require consequences, damage is one of the aspects that is assessed when considering the danger of an act. The danger of corrupt criminal acts is that such acts damage political culture, the social fabric[63], the normal functioning of the public service, the activities of state institutions, their prestige and the public interest[64]. Bribery affects the structure of public relations[65], and confidence in national or international

[57] *The Stockholm Programme*, European Council, 2010: 5.
[58] Krisztina Karsai, "Ultima ratio and subsidiarity in the European Criminal Law," *Forum: acta juridica et politica*. 3.1 (2013); Nils Jareborg, "Criminalization as last resort (Ultima Ratio)," *Ohio St. J. Crim. L.* 2 (2004): 521.
[59] Rudolf Wendt, "The Principle of 'Ultima Ratio' and/or the Principle of Proportionality," *Oñati Socio-Legal Series* 3.1 (2013): 92.
[60] Kaarlo Heikki Tuori, "Ultima ratio as a constitutional principle," *Oñati Socio-Legal Series* 3.1 (2013).
[61] Oleg Fedosiuk, "Baudžiamoji atsakomybė kaip kraštutinė priemonė (Ultima ratio): Teorija ir realybė," *Jurisprudencija* 19.2 (2012): 722.
[62] M. Kaida-Gbandi, "The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law," *European Criminal Law Review* 1.1 (2011): 17.
[63] Peter Larmour and Nick Wolanin, *supra* note 5, 135.
[64] Gintarė Šatienė, "The Peculiarities in describing Corruption's Criminalistic Description," *Jurisprudencija* 65 (2005): 118.
[65] Kseniya E. Kovalenko, Viktoriya Yu Gorovaya, and Svyatoslav A. Gorovoy, "Theory about the object of a bribe: analysis of the Law," *Estação Científica (UNIFAP)* 9.2 (2019): 71.

institutions[66]. In the Council Framework decision on combating corruption in the private sector it is stated that bribery poses a threat to a law-abiding society as well as distorting competition in relation to the purchase of goods or commercial services and impeding sound economic development.[67] Despite that, the question raised in the legal discourse is whether the promise to give a bribe, which is subsequently reconsidered and refused, is an act of such dangerousness that it must be regarded as a completed crime without the possibility to avoid criminal liability by voluntarily refusing to complete the crime.[68]

An argument for criminalizing such actions, especially when there is a high possibility of harm, could be that the criminalization of inchoate crimes allows law enforcement to get involved before the person has done any harm.[69] According to Ashworth, criminal liability applies not only to the occurrence of damage but also to its prevention.[70] This view is to be welcomed in the sense that, in fact, merely promising and offering to accept or give a bribe is a person's intentional intent to give or accept a bribe, and his actions attempt to influence the values protected by law. Moreover, in cases where, for example, an official of an influential and well-known public institution promises to accept a bribe but fails to fulfil his promise because law enforcement becomes aware of it, the spread of such information through the media is undoubtedly affecting people's trust in public authorities. Moreover, a reconsideration to end a criminal act made by one counterparty does not mean that the other party also voluntarily renounces the encroachment on values protected by law. Thus, a promise and an offer to accept or give a bribe, is undoubtedly an attack on the values protected by law. On the other hand, it is considered that the effect of such acts, where the crime is terminated before the bribe is exchanged and the public is unaware of the actions of the civil servant, should not be equated with the effect of the actual receipt or transfer of the bribe.

In the context of the *ultima ratio* principle the promise or offer to give or to take a bribe is also considered to be a dangerous act, because it triggers purposeful actions that lead to the bribe. In this article it has already been established that such actions may also have a negative impact on the image and trust of state institutions. Nevertheless, some authors criticize the criminalization of predicate offenses as a completed offense because of the excessive preventive

[66] Anastassia V. Obydenkova and Bruno Arpino, "Corruption and trust in the European Union and national institutions: Changes over the great recession across European states," *JCMS: Journal of Common Market Studies* 56.3 (2018).
[67] *Council framework decision*, *supra* note 9.
[68] Armanas Abramavičius, *et al*., *supra* note 11.
[69] Kristin Wibke Timmermann, "Incitement in international criminal law," *Int'l Rev. Red Cross* 88 (2006): 826-827.
[70] *Ibid.*

criminalization, when the actions are too far from the intended goal.[71] In reality, a promise or offer alone does not guarantee that a person will accept/give a bribe. Given that a promise may not necessarily result in a bribe, treating the promise alone as a completed criminal offense without considering all the circumstances, e.g. whether or not the person subsequently changed his mind and refused to accept/ to give the bribe which would presuppose the disappearance of his danger as well as the fact that perhaps such actions did not cause real harm may contradict the principle of *ultima ratio*. Thus, while a promise or offer to accept or give a bribe is a dangerous act, it is questionable whether it is so dangerous that it should be considered a completed criminal act.

After discussing the previous aspects, it is important to comprehensively assess the necessity, efficiency, and expediency of criminalization of the analyzed actions as a completed criminal act. The fact that convictions based solely on a promise or offer are extremely rare raises questions as to whether it is necessary and appropriate to provide for criminal liability for acts such as the completion of a criminal offense. The compliance of such regulation with the criterion of necessity is also questionable, since, as stated above, in some cases Greco is satisfied with the choice of the parties to punish some phases of a promise or offer as an unfinished criminal offense.[72] In addition, there are also examples in the case-law where a person's actions are offered the same punishment for offering a bribe as an assault and subsequently reclassifying his actions as a completed criminal offense. The fact that even after reclassifying the offense from attempted to completed offense the court left the same punishment shows that the court held that classifying a promise to give a bribe as an unfinished offense also imposed a sufficiently effective, fair, and proportionate punishment.[73] On the one hand this could mean that the qualification of a promise or offer of a bribe as an attempt or preparation to commit a crime is effective; on the other hand, the fact that the leading countries in the corruption perception index in 2020 have established criminal liability for a promise or offer as a completed criminal offense[74] could potentially indicate that such regulation is effective too. However, it is difficult to determine to what extent the latter fact had an impact on the ranking of the parties, and it does not prove that such regulation is necessary.

The necessity of criminalizing the promise and offering to give or accept a bribe as a completed criminal offense is particularly debatable in such cases where the person who promised to give a bribe or made the offer, changes his mind and

[71] Armanas Abramavičius, *et al*., *supra* note 11; M. Kaida-Gbandi, *supra* note 62.
[72] *Greco Third Evaluation Round Evaluation Report on Poland*, *supra* note 38.
[73] *State v A. Z., A. J. and D. L.*, *supra* note 53.
[74] See // https://www.transparency.org/en/cpi/2020/index/nzl.

refrains from further action. Although it was mentioned before that most states provide for the possibility of acquiring a person from criminal liability if he or she notifies the law enforcement authorities of bribery, according to Lithuanian legal regulation only a person who was not the instigator of bribery may be released from criminal liability (for example, if he or she was required or provoked to give a bribe). This regulation could be an alternative to voluntary renunciation, although in such a case it would not be sufficient to refrain from further criminal action alone, and law enforcement authorities should also be notified. Moreover, it is particularly important that the person who initiated the bribery himself is not motivated to stop his actions, because from the very beginning of the offer, regardless of whether the bribe will be given or accepted, such a person is considered to have committed a completed criminal offense. Thus, such a regulation cannot be said to be a viable alternative to voluntary renunciation, since the criminalization of a promise and an offer to give or accept a bribe as a completed offense significantly reduces the number of cases in which a person can avoid criminal liability.

Taking into consideration, the promise and offer to give or accept a bribe, criminalized as a completed criminal offense, contradicts the principle of *ultima ratio*. Although such actions may encroach on values protected by law, they are not considered to be as dangerous as actions where bribes are exchanged by hand. In other words, it is considered that the above-mentioned actions are not so dangerous themselves to be considered a completed crime. Furthermore, criminalization of a promise and offer to give or accept a bribe as a completed criminal offense is not necessary, effective and expedient. Adequate legal protection can be provided by criminalizing such actions as an unfinished criminal offense, while giving the person who made the promise or offer more opportunities to rehabilitate and avoid criminal liability.

CONCLUSIONS

Although international regulation obliges countries to consider a promise to give or accept a bribe as a crime, the treatment of such acts as a preparatory or assault stage of a criminal offense under national law should not conflict with the requirements of international law if the sanctions imposed for such actions were effective, proportionate and dissuasive.

The promise to give or accept a bribe is to be understood as an unfinished stage of the crime, and when by such actions a person deliberately creates the conditions for giving a bribe by preparing the said actions, these acts alone do not fully implement his intent, nor do they fully encroach on the object of the crime.

The analysis of national criminal justice systems has shown that States' practices in criminalising the stages of criminal offences are not uniform. In States in which subjective criminality pattern prevails, a promise and offer to give or accept a bribe could be punished under the general part of the Criminal Code as a preparation and, in some cases, as an attempt to commit a criminal offense. However, while implementing international law, States have not paid sufficient attention to the harmonization of international and national criminal law.

Criminalization of the promise or offer to give and receive a bribe as completed criminal offenses is contrary to the principle of *ultima ratio*, since in such a case it is not assessed whether the person continued to pursue his or her purpose and actually attacked the object of the crime, equating his actions with more dangerous intentional and deliberate bribe giving. Furthermore, legal protection can be provided by criminalizing lesser dangerous actions such as an unfinished criminal offense and giving the potential offender a chance to make amends.

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