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Problematic Aspects of Influence Trading in the Context of Comparative Legal Analysis of Georgia and European Countries

The present article examines the legal aspects of influence trading in light of the analysis of the “Criminal Law Convention on Corruption” of the Council of Europe and the legislation of several European countries. In this respect, the article analyzes the main legal framework of the act of influence peddling as defined in the Council of Europe Convention, the legal extent of its action, and the significance of its implementation in the national criminal law of each state. Thus, in this regard, the article analyzes in depth the key aspects of the trade institution under the influence of Georgia, Spain, France, Belgium, and Hungary, as well as the questions of their conformity with the Council of Europe Convention. Furthermore, in terms of comparative legal analysis, the differentiating legal characteristics of the trade institution under the impact of Georgia and the aforementioned European nations are explored.

Influence peddling, as a form of lever for exerting undue influence on officials through personal relationships, provides a corrupt background to the extent that this behavior undermines the reputation of state institutions and the degree of trust in them in the eyes of citizens. Influence peddling is comparable to lobbying in terms of exerting influence on government officials, which is why several European nations have declined to criminalize it. Hence, the concept of interaction between influence trading and lobbying organizations is extensively investigated. Ultimately, the key legal features of influence trading were analyzed in terms of comparative legal and systematic analysis, and a clear boundary was made between the aforementioned institution and other associated legal activities such as lobbying, legal or other services, and other consulting activities.

Keywords: *Officiary, Passive influence, Active influence, Official authority, Lobbying.*

1. Introduction

The key legal aspects of the criminalization of influence peddling are addressed in this article in the context of an analysis of Georgian and European legislation. Its character, legal nature, and the connection of the influence trading institution with bribery and lobbying activities recognized by law, in particular.

Influence peddling is well recognized to be the new norm in the ranks of corruption offences. Although it is not a conventional sort of corruption crime in its core and forms of expression, the prospect of exerting undue influence on state government officials constitutes a severe threat of

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damaging the prestige of the state apparatus and impeding its efficient functioning. In other words, influence trading appears to be one of the primary methods for unethical use of administrative resources as a type of lever for unlawfully influencing officials. As a result, influence peddling, with its functional aim, generates a corrupt backdrop.

Based on the foregoing, in order to analyze the feasibility of criminalizing influence peddling, the legal nature of the crime and the significance of the legal benefits protected by it must first be assessed. Due to the newness of the institution of trading in influence, the topic of whether it is acceptable to criminalize trading in influence, as well as the relationship between this already criminalized norm and bribery and lobbying operations, remains relevant in many European countries.

2. Analysis of the Composition of Influence Trading According to the Legislation of Georgia and European Countries

According to Article 12 of the Council of Europe's 1999 "Criminal Law Convention on Corruption", "Each Party shall take such legislative and other measures as may be necessary to establish as a criminal offense in its domestic law any act which manifests itself intentionally, directly or indirectly, in any In giving an unjustified advantage, or in promising or offering to give this advantage to someone who substantiates or confirms that he can have a negative influence on the decision-making by the persons mentioned in articles 2, 4, 5, 6 and 9, 10, 11, whether this unjustified advantage is served to such a person or to someone else. And, with regard to such influence, the solicitation, acceptance, or acquiescence to the offer or promise of such advantage, whether or not such influence has been effected, or whether or not such influence may or may not have the intended results".

On the basis of the above-mentioned Article, in accordance with the Law of Georgia of July 25, 2006, Article 339¹ – Trading under influence was added to the Criminal Code of Georgia. "The perpetrator of the crime can be either a natural person (a person close to the official) or a legal entity. In addition, a natural person should mean only a private person and not a public official who uses his official position."¹ "According to the first part of Article 339¹ of the Criminal Code, a person who needs to influence for his own or another person's interests, directly or indirectly, is interested in money, securities or others promise, offer or grant any unfair advantage to the influence peddler."²

According to the second part of Article 339¹ of the Criminal Code, a passive influence peddler is a person who claims or confirms that he can have an undue influence on the decision-making of an official or a person equal to him. Such persons can be: members of the employee's family, relatives, friends. "According to the European Convention on Combating Corruption, trading in passive influence means that a person who enjoys real or alleged influence over third parties asks for or receives unjustified privileges in exchange for influencing."³ Here, it should be analyzed what real and alleged influence means. "Real impact is seen when a person, based on a close and strong relationship

¹ *Lekveishvili M., Mamulashvili G., Todua N., Private Part of Criminal Law, Book II, 7th ed., 2020, 410 (in Georgian).*

² *Ibid, 411.*

³ *Ibid, 411-412.*

with the official, is sure that the official will definitely take his request into consideration. Presumed influence occurs when a person hopes, assumes (but is not sure) that he will be able to influence the official. However, if he fails to do so, he will also be considered a passive influence peddler, since he actually had some kind of relationship with the official, which gave him the hope of influencing the official.”⁴

As mentioned, the Criminal Code of Georgia, within the framework of one article, provides for both types of influence peddling, namely, both active (the first part of the article) and passive influence (the second part of the article).

France's approach to this issue is interesting, in particular, second paragraph of Article 432-11 of the French Criminal Code punishes passive influence trading by a declared public servant, while Article 433 – 2 punishes passive influence trading by an ordinary subject (private person). Article 433-1 provides active influence trading committed by a public servant, and the second paragraph of the same article – active influence trading committed by a private person.

As we can see, the commission of active and passive influence peddling by a public official is provided for in separate articles, and the punishment is much stricter.

According to the second paragraph of Article 432 – 11, the disposition of trading with passive influence is formulated as follows: “directly or indirectly requesting donations, gifts or other benefits or accepting such offers and promises by persons who exercise public authority, perform public duties or are in elective public positions For the benefit of their own interests or those of others, in return for exercising their alleged or actual influence over the public authority/official in order to obtain employment, contracts or any other favorable decision.”⁵

Thus, taking into account the status of a public servant, the increased responsibility of behaving conscientiously in the public or official sphere, the severity of the imposed punishment is doubled by the French legislation.

In the same way, the issue of punishment is decided in the case of active influence trading by a public official and a private person. I believe that the mentioned approach of the French legislator is fair, since the civil servant, taking into account the official responsibility assigned to him and the state's declaration of high trust in him, has a much higher level of legal obligation to act legally compared to a private person. Therefore, in case of committing the said action by an official and an ordinary subject, the legislation should clearly regulate a more severe punishment for the official. From the systematic and logical interpretation of Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, it clearly follows that an active and passive influence peddler can be either an ordinary subject – a private person, or a special subject – a public official or a person equal to him. Thus, in the theory and practice of criminal law, the issue of considering an official as a subject of passive influence trading is problematic and somewhat differently considered.

⁴ *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, *Journal of Law Herald*, No. 4, 2021, 130 (in Georgian).

⁵ Penal Code of France, 22/07/1992, <https://sherloc.unodc.org/cld/uploads/res/document/french_penal_code_html/french_penal_code.pdf> [20.05.2023].

In the Georgian legal literature, it is mentioned that “an official can be considered as a passive influence trade performer only if he does not use official authority or official authority, but uses a personal relationship, influences another official, and it is in exchange for such influence (for a fee) the object of the crime is given by an active influence peddler.”⁶

“Thus, it should be noted that when an official appears in the case, it should not be considered unconditionally as his use of official authority, and therefore, we should not make this situation a presumption of use of official authority. In this case, too, for the correct qualification of the action, it must be established whether the official exerts undue influence on another official by using official authority to carry out a criminal action, or based on a personal relationship. In the latter case, the official should be considered a private person, and the crime should be qualified under the article of influence peddling.”⁷

The mentioned issue has been decided in the same way in Hungary. In particular, according to Hungarian criminal law, the subject of passive influence peddling is not limited, it can be any person, including a public official, who claims that he can exert undue influence on another public official by actively influencing him to make a decision beneficial to the trader.⁸ However, if a public official demands or receives an unfair advantage in order to give an official subordinate to him the task of making a decision beneficial to the interests of another person, then his action will be assessed as passive bribery,⁹ because in this case the official uses his official authority and not his personal relationship with another official. The mentioned issue is regulated differently in France than in Georgia. In particular, the French legal doctrine explains that in the case of passive influence trading, a public official does not act within the scope of his official authority, but outside of it, in the process of making a decision for his “client”. He simply uses his professional (official) position or social status to influence another official in order to make a decision that he cannot make within the scope of his official authority. French scholars believe that the influence-peddling public official, within the framework of his official function-duties, does not have the actual opportunity to make a decision beneficial to his “client”, thus he uses his status or friendly/personal relationship to exert undue influence on the decision-making official.¹⁰

Thus, under French law, the use of not only a personal relationship, but also one's official authority, social status, as a kind of leverage, to influence another official, qualifies as passive influence trading. “And during passive bribery, the official bargains directly with his official powers and functions.”¹¹ Thus, only such a case is qualified as bribery, when making a beneficial decision of the bribe giver depends on the implementation of a specific action by the official based on his official

⁶ *Lekveishvili M., Mamulashvili G., Todua N.*, Private Part of Criminal Law, Book II, 7th ed., 2020, 413 (in Georgian).

⁷ *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, Journal of Law Herald, No. 4, 2021, 131-132 (in Georgian).

⁸ *Hollan M.*, Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law, Acta Juridica Hungarica, 52, #3, 2011, 244-245.

⁹ *Ibid.*

¹⁰ *Philipp J.*, The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 36.

¹¹ *Ibid.*

function or refraining from it. In the mentioned article, there is no discussion about the use of official authority by an official in relation to another official. Accordingly, under French law, the exercise of influence by an official using official authority on another official in order to make a decision desired by another person will be considered passive influence trading.

I believe that this approach unreasonably limits the essence of bribery and its legal scope. In particular, “by criminalizing bribery, the state wants that the official status assigned to civil servants is used only for the legal interests of the state and it does not become a source of enrichment for civil servants.” That is, here the emphasis is shifted to the fact that the official “does not trade” his official position”.¹² Which, in turn, refers to the issue of implementation/non-implementation of the actions included in his/her direct functions and duties by the official, as well as the abuse of the status due to his/her official position by the official in order to have undue influence on other officials. In the case of influence peddling, a passive influence peddler, while exerting influence on another official, is completely distanced from his official powers, he manipulates only his personal relationship with the other official.

Speculation by an official with official authority/status is one of the ways of using the official status, since at this time another official is influenced not because of the close relationship with this official, but only as a result of his status due to his service. In this case, it is the fact that the official uses his position in favor of another person's interests in exchange for money or other unfair advantage, which, in turn, contains clear signs of passive bribery.

There is a different approach to the subject of passive influence trading in Belgium. Although the Belgian legislator was inspired by the French anti-corruption legislation when working on the institution of influence peddling, in the end, influence peddling by a private person was not declared a punishment. In particular, the subject of passive influence trading is special – it can only be a public official. For example, if a private person receives some kind of unfair advantage from a third party in exchange for influencing an official, the said case will not be classified as passive influence peddling, **just because the private person, not the public official, traded his influence.**¹³ **According to the Georgian criminal law, the action of the mentioned person is qualified under article 339¹ of the Criminal Code as passive influence trading.** Leaving the mentioned issue open has become the subject of quite intense debate in Belgian scientific circles. In response, the Belgian Senate drafted a bill on January 14, 2008, which also criminalized passive influence trading by a private individual, and sent the bill to the House of Representatives for consideration. The drafted law was aimed at bringing the national legislation of Belgium into compliance with the “Criminal Law Convention on Corruption” of the Council of Europe. The explanatory card of the said draft law directly referred to Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, which clearly and unequivocally declares passive influence trading committed by any entity, both a private person and an official, as a punishment. The House of Representatives believes that in case of criminalization

¹² *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, *Journal of Law Herald*, No. 4, 2021, 135 (in Georgian).

¹³ *Philipp J.*, *The Criminalisation of Trading in Influence in International Anti-Corruption Laws*. University of the Western Cape, 2009, 44.

of influence trading activities by private individuals, the process of implementing legal forms of lobbying will be endangered.¹⁴ Based on the mentioned basis passive influence, trading by private individuals is not declared as a criminal punishment, that is, this draft law was rejected.

Although Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe clearly and unequivocally declares active influence peddling as an act punishable by criminal law, in some European countries active influence peddling is still not considered a crime. For example, active influence peddling is not criminalized under Spanish criminal law. Regarding this issue, the recommendation given to the Hungarian authorities by the assessment group of the “Group of States against Corruption” (hereinafter referred to as – GRECO) established by the Council of Europe regarding the criminalization of active influence peddling is important. In particular, the group of GRECO evaluators clearly explained that “an unfair advantage should not be offered or transferred to the official, but to the person who claims that, taking into account his real or alleged relationship with the official, he can influence the actions of the public official.” Thus, the report unequivocally stated that in the absence of active influence peddling criminalization, the Hungarian Criminal Code was not in full compliance with Article 12 of the mentioned Convention of the Council of Europe.¹⁵

The GRECO evaluation commission also noted that active bribery can only include a situation where the subject of a bribe is transferred to an official through a passive influence trader. This case is clearly active bribery. However, Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe clearly states that influence peddling does not mean passive influence peddler's influence on the official through the bribe,¹⁶ this case is considered a classic type of bribery..

Despite the main features of influence peddling established by Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, in some European countries there are still cases of recognition of unusual actions for classic influence peddling as a crime, one of the prominent examples of which is Articles 428 and 429 of the Spanish Penal Code Articles. In particular, according to Article 428 of the Spanish Penal Code, according to which “an act is punishable by criminal law, when a public official uses his position, any hierarchical position or personal relationship with another public official, in order for the said person to make a decision that brings economic benefit to him or to a third person.¹⁷” Article 429 contains a similar content, but with the difference that in this case the subject of the action is a private person.¹⁸

The actions provided for in the above-mentioned articles, in terms of their content and forms of manifestation, differ from classical influence trading. In particular, as already mentioned, in this case, a public official or a private person uses his superior position and directly influences the official, in order to make a decision that brings material benefit to him or another person. However, it should be noted that during the action provided for in Articles 428 and 429, it does not matter whether the

¹⁴ Ibid.

¹⁵ *Hollan M.*, Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law, *Acta Juridica Hungarica*, 52, #3, 2011, 245.

¹⁶ Ibid.

¹⁷ Criminal Code of Spain, 23/11/1995, <https://www.mjusticia.gob.es/es/AreaTematica/Documentacion/Publicaciones/Documents/Criminal_Code_2016.pdf> [10.05. 2023].

¹⁸ Ibid.

offender received any benefit from a third party or received such a promise from a third party. In this regard, in the Spanish criminal law doctrine, it is noted that the designation of these articles as influence peddling is a legal error.¹⁹

According to the Georgian Criminal Law, the commission of the action described in Article 428 by an official is not unequivocally considered passive influence trading, because, in the case under consideration, the influence of the official on another official for the benefit of the interests of a third party is carried out not necessarily for any benefit offered by the third party or requested by him / on the condition of preference, but also, possibly, based on the direct and independent will of the official. Accordingly, the fact of an official trading his influence, “selling” the leverage of his influence over another official to a third party is definitely not apparent here. In order to qualify trading under the influence of an action as a crime, it is necessary that the fact of the official's actual possibility of influencing/influencing other persons becomes an object of trade.

Therefore, in the Georgian legal reality, the commission of the mentioned action by an official or another private person is qualified as complicity in the crime committed directly by the official under the influence. On the other hand, there will be complicity only if the other officer committed a crime and not a disciplinary offense. And if the official under the influence commits a disciplinary offense, in this case, depending on the factual circumstances of the case, the action of the official exercising the influence can be assessed as a disciplinary offense. In the event that he fails to influence the official (failed incitement), he can be held responsible for the preparation of a specific crime. If the official under the influence has not yet committed the crime, in this case the official is liable as an accomplice in the stage of preparation or attempt of this crime.

Let's consider the following example for more visibility: the judge of the Supreme Court asked his friend, who was the chairman of the council of one of the municipalities, to sell the plot of land owned by the municipality to his relative at a symbolic price. The chairman of the city council could not break the bond with his friend and sold the plot of land owned by the municipality to the said person at a symbolic price, that is, in fact free of charge. According to the current legislation, the mentioned issue should be resolved collegially, by the relevant commission, and at the same time, the real estate should be sold at the actual market price, not at the symbolic price.

In the case under consideration, the action of the chairman of the City Council, according to the factual circumstances of the case, is qualified as embezzlement, which was committed by using the official position (subsection “d” of part 2 of Article 182 of the Criminal Code of Georgia), and the judge of the Supreme Court is responsible for complicity in the aforementioned crime, namely Yes, for incitement (25; Article 182, subsection “d”) and/or will be qualified as exceeding official authority (Article 333), and the influencing official – as complicity in this crime, in particular, as incitement. According to the Spanish Penal Code, the judge's action would be considered passive influence peddling and he would be punished under Article 428 discussed above.

In addition to the mentioned Articles 428 and 429, Article 430 of the Spanish Penal Code contains the composition of classic passive influence peddling. In particular, according to the

¹⁹ *Philipp J.*, *The Criminalisation of Trading in Influence in International Anti-Corruption Laws*, University of the Western Cape, 2009, 39.

mentioned article, “a person who demands a gift or any kind of material compensation or agrees to financial benefits offered by a third party, in order to influence the official to make a decision in favor of the third party, is considered a trader with passive influence.”²⁰

As already mentioned, active influence peddling is not punishable under Spanish criminal law. Unlike the Georgian Criminal Code, in which unfair advantage is also specified as the subject of influence trading, in this case only material values are included as the object of influence trading and nothing is said about non-material goods.

Therefore, in Spanish judicial practice, the question of placing the cases of non-material goods requested by the official or his consent to the offer within the scope of the mentioned article is problematic. In particular, the person offered the official to employ his (the official's) spouse, if official would use his influence to convince another official to make a favorable decision for him, the official agreed to the said offer.

In the case under consideration, the Supreme Court discussed the extent to which the employment of the spouse could be considered as a subject of influence peddling, since, as mentioned, the crime in question provides for the offer of only direct material benefits to the official. Finally, the Supreme Court went beyond the legal scope of the material good contained in the article and explained that the definition, any kind of remuneration, allows for a broad interpretation and includes any kind of benefit, which, in turn, also goes beyond the economic nature of the benefit.²¹

Thus, judicial practice has also considered non-material goods to be the subject of the crime of influence peddling. The mentioned approach is correct and uniquely applicable to the standards established in international law. In particular, the United Nations Convention against Corruption of 2004 provides the concept of influence peddling,²² in the definition of this article, the legal doctrine analyzes the scope of undue influence, according to which: “The range of undue advantage is wide, for the most part it can be something material and valuable (valuable), such as, for example: money, valuables, etc. But there can also be a type of non-material benefit, such as: important internal information, sexual or other favors, protection”.²³ Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe²⁴ defines unjustified advantage as a crime, which, in its content, includes both material and non-material benefits

Article 299 of the Hungarian Penal Code, which is called abuse of function, provides for another case of recognition of unusual actions for classic influence peddling as a crime. The disposition of the mentioned article is formulated as follows, namely: “The person who asserts the

²⁰ Criminal Code of Spain, 23/11/1995, <https://www.mjusticia.gob.es/es/AreaTematica/Documentacion/Publicaciones/Documents/Criminal_Code_2016.pdf> [10.05. 2023].

²¹ *Philipp J.*, *The Criminalisation of Trading in Influence in International Anti-Corruption Laws*, University of the Western Cape, 2009, 40.

²² United Nations Convention Against Corruption, New York 2004, <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [10.05. 2023].

²³ *Philipp J.*, *The Criminalisation of Trading in Influence in International Anti-Corruption Laws*, University of the Western Cape, 2009, 15.

²⁴ “Criminal Law Convention on Corruption” of the Council of Europe, Strasbourg, 27/01/1999.

possibility of influencing the actions of a public official, requesting or receiving an illegal advantage for himself or another person, as well as expressing consent to such an offer.”²⁵

It is worth noting here the second paragraph of Article 299²⁶ – Abuse of function (trade with passive influence), which provides for a case where a trader with passive influence claims that he can bribe a public official by transferring the bribe to the official. This article also provides for the situation when a person claims to be a public official. Both of the mentioned cases, by their essence and functional purpose, do not belong to the crime of classic influence peddling, because from Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe and its explanatory card, it clearly follows that the passive influence peddler uses a kind of “weapon” to convince the official only his personal relationship/attitude with the official.

In this regard, let's evaluate the following two cases:

1. Let's consider a situation where the case provided for in the second paragraph of Article 299 occurs. In particular, Vaso proves to Ivan that he can bribe the official, and “to provide this service” he asks for a certain fee both for himself and for the official to meet with the official to give the object of the bribe and to convince him to perform an action beneficial to Ivan or to refrain from performing such an action. If Vaso and Ivan agree on this, as mentioned, the act in question (Vaso's assertion that he can bribe the official) is considered a qualifying circumstance of passive influence peddling under Hungarian criminal law. According to the criminal law of Georgia, if Ivan agrees to Vaso's offer, pays him the “service fee” and also gives the amount to be transferred to the official as a bribe, this action may be qualified as preparation for giving a bribe at most (Article 18; 339 of the Criminal Code of Georgia), while If Vaso actually offers or gives money to the official, it will be considered giving a bribe. Such qualification is due to the fact that Ivan does not have any kind of relationship with the official, in particular, Ivan does not use Vaso as an intermediary link providing information (indirectly offering or giving a bribe) to communicate with the official, but in this relationship, Vaso, on his behalf, personally offers the subject of the bribe to the official and asks to perform the action within the scope of his official competence in favor of Ivan. In this situation, Ivan will be an accomplice in giving the bribe, namely an accessory, since by his action, by giving money to Vaso, he intentionally contributed to the commission of the crime. And Vaso will be the direct perpetrator of giving the bribe.

2. As for the case provided by the second paragraph of Article 299, when a person lies that he is allegedly a public official. According to the criminal law of Georgia, such an action is qualified not as influence peddling, but as fraud.

As already mentioned, based on Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, trading in influence is a formal crime, which is manifested in the fact that it is concluded from the moment of the agreement of the traders with active and passive influence on the exercise of real or probable influence on the official, regardless of whether it was actually carried out or not. Not the impact or whether the desired result for the interested person came as a result of the impact.

²⁵ Criminal Code of Hungary, 25/06/2012, <https://sherloc.undoc.org/cld/uploads/res/document/hun/2013/hungary_criminal_code_2012_html/Hungary_Criminal_Code.pdf> [29.05.2023].

²⁶ Criminal Code of Hungary, 25/06/2012, <https://sherloc.unodc.org/cld/uploads/res/document/hun/2013/hungary_criminal_code_2012_html/Hungary_Criminal_Code.pdf> [29.05. 2023].

In Belgian legal doctrine, the issue of termination of influence peddling is controversial. In particular, it is controversial when the influence is confirmed by the official, although it is not actually implemented or when the supposed influence does not have the desired result. In this regard, it should also be noted that the fact of an official exercising influence due to his official position is considered an aggravating circumstance and, therefore, is punished with a higher term of imprisonment.²⁷

Therefore, the mentioned circumstance makes us believe that trading with passive influence is completed from the moment of the agreement of the parties, in particular, from the moment the official agrees to the benefit offered to him or from the moment the official requests such a benefit and the interested person (active influence trader) declares his consent to this request, regardless of whether or not the impact actually took place. And the actual implementation of the influence is considered not as the basis of the composition of influence trading, but only as its aggravating circumstance.

We think that the mentioned approach is quite correct, since the actual influence on the official significantly increases the danger of encroaching on the legal good, thus a stricter punishment should be provided for the mentioned action at the legislative level.

3. An Analysis of the Arguments Against the Criminalization of Influence Peddling

Despite the declaration of influence peddling as a criminal act in Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, influence peddling is not considered a crime in some European countries. Thus, it is interesting to discuss the arguments against influence peddling as a criminal act from a legal and social point of view. In this direction, three arguments are mainly distinguished. Consider each of them:

The first argument is that some states have legal provisions for acts similar to influence peddling that they consider sufficient to criminalize influence peddling. For example, Germany has not criminalized influence peddling as a separate crime, although the German authorities suggest that some crimes, such as “breach of trust in an enterprise”, may cover influence peddling to some extent.²⁸ It should be emphasized here that Germany did not make an official reservation on Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe, although, as mentioned, this action is not recognized as a separate crime.

Also, influence peddling has not been criminalized in the Kingdom of the Netherlands. According to their explanation, “the legislation regulating bribery, including the institution of its attempt or complicity, sufficiently ensures the protection of the state apparatus from unauthorized influence, and, therefore, they do not consider it necessary to consider the mentioned action as a separate crime in the criminal law code.” A similar approach exists in Denmark as well. In their view,

²⁷ *Philipp J.*, *The Criminalisation of Trading in Influence in International Anti-Corruption Laws*, University of the Western Cape, 2009, 43-44.

²⁸ *Slingerland W.*, *Trading in Influence: Corruption Revisited*. Saxion University, 2010, 3, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.12. 2023].

“Trading in influence is partially combined with the crime of bribery in the private sector, in the aspect of complicity”.²⁹

In relation to the mentioned issue, it should be noted that “in the case of the crime of influence peddling, the focus here is not directly on the official, but on the person who, on the basis of receiving personal benefits, will try to exert undue influence on the official, and if the official acts within the scope of the mentioned influence and makes an illegal decision, he will be held responsible. It will not be given directly for taking a bribe, but – under another article of official crime (for example, abuse of official position or exceeding official authority). It should also be noted here that influence peddling is not a classic type of corruption crime, because in this case the official is not directly involved in corrupt transactions and profit-making processes. In order for bribery to appear, it is necessary to identify the direct participation of the main character of the mentioned crime – an official – in the corruption processes, and the latter is not clearly identified as part of influence trading. Thus, in the absence of influence peddling, those persons whose efforts the official committed an illegal act, in particular, another official crime (but not bribery), remain outside of criminal liability. In connection with this, there may be an opinion that the action of these persons can be evaluated as complicity in another official crime committed by the official, for example, organization or incitement. However, the consideration of the mentioned problem in such a narrow aspect is unjustified and cannot ensure the effective protection of the legal benefits provided for in the influence trading article. In particular, the legal significance of the criminalization of influence peddling and the scope of its harmful effects on the state/society is much wider compared to the commission of a specific official crime. Trading in influence includes a systematic chain of actions promoting the creation and development of a corrupt background, which undermines the prestige of the administrative apparatus of a democratic state and its effective functioning. In case if influence trader's actions will be considered to be complicity in other crime, the said person will be punished by criminal law only if he really influence the official, convinces him to commit the crime. And, if he tries to influence in vain (unsuccessful incitement), in this case he can be charged with criminal liability at most only for the preparation of the crime. Accordingly, the situation when a person asserts or confirms the possibility of influencing an official, for which he receives an unfair advantage, will remain beyond criminal liability, although in the end he will not even try to influence the official. At this stage, the legal good – the prestige of the state apparatus – has already been violated, although this action can no longer fall within the area of criminal protection. This, in turn, will also encourage active influence trading, which will ultimately help to create a corrupt atmosphere in the state.

In this case, considering these persons as mediators in bribery and classifying their action as complicity is legally groundless, since we do not have a perpetrator of bribery – an official, without whom the said composition does not exist. Taking into account all of the above, it should be noted that bribery in its classical sense does not include the signs of trading under influence, therefore, the presence of the latter as a separate crime in the Criminal Code is necessary.”³⁰

²⁹ *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, *Journal of Law Herald*, No. 4, 2021, 134 (in Georgian).

³⁰ *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, *Journal of Law Herald*, No. 4, 2021, 135 (in Georgian).

The problem of clearly separating lobbying and influence trading is considered as the second argument. The United Kingdom did not declare influence peddling as a separate crime on this very basis, in their opinion such a decision would endanger legally recognized lobbying activities.³¹ The Legislative Commission of the Belgian Parliament did not support the initiative to declare passive influence trading by a private person as a separate crime, because according to their definition, all such consulting professions, for example: lobbying, legal services, will be in danger due to the uncertainty of the essence of the influence and its wide scale.³²

The Swiss legislator also finally refused to criminalize influence peddling, as they explained that it would lead to an unjustified criminalization of simple forms of lobbying activity.³³

To clarify the issue of legal and social feasibility of the above argument, it is necessary to clearly define the essence and functional purpose of lobbying and influence trading. Lobbying can be thought of as an important means of persuasion. From this point of view, the exchange of information is the main essence of the relationship between a lobbyist and a politician. A lobbyist releases valuable information and distributes it strategically to persuade a person to make the decision they want.³⁴

Thus, in order to justify the expediency of the existence of trading in influence as an independent crime, it is necessary to clearly establish the distinguishing marks between them. Due to the fact that trading in influence, in turn, creates a background of corruption,³⁵ in order to clearly distinguish between trading in influence and lobbying, first of all, it is necessary to analyze the interdependence of corruption and lobbying activities in general. "An important distinguishing sign of lobbying and corruption can be considered the forms of their implementation. Lobbying mainly involves the exchange of information, persuasion and the use of other methods allowed by law, while corruption involves the transfer of money or other benefits.³⁶ Thus, lobbying activity, in its essence, aims to exert influence, although the form/method of its implementation is markedly different from influence peddling.

In particular, lobbying activity involves legitimate influence, while influence trading is about the implementation of unfair, illegal influence. There is a very big content difference between them. The influence exerted in the process of lobbying activity as a lever of attraction/persuasion is legal to the extent that it is mainly aimed at solving issues of state/social importance, which is based on professional, analytical reasoning and relevant arguments related to this topic. Thus, here there is a kind of intellectual competition between two parties, the lobbyist and the decision-maker(s), a debate that takes place only around the discussed issue, related to its fundamental elements, and the final decision is the relevant fruit of this educational/analytical work process.

³¹ *Slingerland W.*, Trading in Influence: Corruption Revizited. Saxion University, 2010, 4, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.05.2023].

³² *Philipp J.*, The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 48.

³³ Ibid.

³⁴ *Philipp J.*, The Criminalisation of Trading in Influence in International Anti-Corruption Laws, University of the Western Cape, 2009, 20.

³⁵ *Lekveishvili M., Mamulashvili G., Todua N.*, Private Part of Criminal Law, Book II, 7th ed., 2020, 410 (in Georgian).

³⁶ *Gogiberidze G.*, Doctoral Thesis on the topic: Lobbying and Legal Aspects of its Regulation, Tbilisi, 2012, 66 (in Georgian).

In the case of influence peddling, the illegality of the action stems from the fact that in this case, the passive influence peddler, in exchange for money or other benefits, uses his personal relationship with the official (acquaintance, friendship, kinship, etc.), speculates with which official with close status” and tries to persuade him to commit a specific action or refrain from it. It is this method that adds influence to the character of irregularity. The main thing here is that the influence trader's main lever is the existing relationship with the official, which is used to convince the official and ultimately achieve an illegal goal. In lobbying activities, the lobbyist's main “weapon” is his intelligence/knowledge in relation to a specific issue, which is expressed in putting forward weighty arguments and thereby convincing a person.

In the case of influence trading, the influence trader is not at all interested in the essence of the issue to be resolved, its future consequences, etc. He mechanically strives to satisfy the interest of the merchant only by active influence, for which he uses only the existing relationship with the official, and not his professional knowledge/experience in relation to the issue to be decided. At this time, the official's decision is not based on the result of analyzing objective arguments, but on the wishes of his relative/friend or other close people.

Specific individuals benefit from lobbying activities precisely for the purpose that lobbyists introduce issues/problems/opinions of interest to this group of individuals at a professional level to the representatives of the legislative/executive authorities and discuss legal ways of solving them. Lobbyists are a kind of intermediaries/representatives of these persons in relations with state bodies. In this aspect, lobbying activity is very similar to the provision of legal services, because in this case too, in exchange for the provision of legal services, a person pays a certain amount to a lawyer to represent and protect his interests in court or any other third parties.

In this sense, the lawyer also tries to influence the court in order to make a decision in favor of the person under his protection, which is a completely legal action. In this case, the most important thing is to exercise reasonable influence, which means that the lawyer should act only within the legal framework to protect the interests of his client, in particular, he should use all the legal ways and means of protection established by the procedural legislation. Thus, both the lawyer and the lobbyist are required to perform their professional duties legally. If signs of any crime are revealed in their actions, they will be held accountable under the relevant article.

Finally, it should be recognized that there is a distinct difference between influence peddling and lawful lobbying efforts, depending on how they are carried out. Criminalizing influence peddling does not prevent genuine lobbying or other advising actions from being carried out effectively. On the contrary, by criminalizing the aforementioned behavior, a clear boundary was created between legitimate and unfair influence, defining the legal scope of legitimate lobbying and other activities.

They use the complex structure and lack of clarity of the regulation on influence peddling as a third justification. For example, because to the complexity of the crime's structure, Danish authorities have declined to punish influence peddling, albeit they have not explicitly stated what they mean.³⁷

³⁷ *Slingerland W.*, Trading in Influence: Corruption Revisited. Saxion University, 2010, 4, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.05.2023].

According to the Swedish authorities, neither Article 12 of the Council of Europe Convention nor the Explanatory Report clearly states the essence of “undue influence”, which is why it is difficult for them to write the exact disposition of this crime in the Criminal Code.³⁸

In this regard, it should be said that the Convention of the Council of Europe created the basic structure of influence trading, which clearly describes the essence of the crime, its functional purpose and its main difference from bribery. And the rest of the issues, such as: essence and scope of influence, subjects of action, subject of bribery, etc. It should be regulated by the domestic law of a particular state, taking into account the social/political factors existing in that state.

4. Conclusion

The institution of influence peddling was discussed in this article in terms of Article 12 of the Council of Europe's “Criminal Law Convention against Corruption” and a comparative legal study of numerous countries' criminal legislation. In general, it should be noted that Article 12 of the Council of Europe Convention provides constitutional aspects of the criminalization of influence peddling, a kind of clear pattern that, while protecting its main legal value, should be reflected in national criminal legislation, taking into account each country's socio-political situation.

It should be clearly and unequivocally noted that Article 12 of the “Criminal Law Convention on Corruption” of the Council of Europe punishes both active and passive influence peddling, and at the same time, the perpetrator of the mentioned actions can be any entity, both a private person and a public official or a person equal to him. It should be emphasized here that an official or a person equal to him will only be considered a subject of passive influence trading if the actual possibility of exerting undue influence stems from his personal relationship with another official only, and not from his official status/authority. In the latter case, the action should be qualified as passive bribery, since it is the fact that the official uses the privileges related to his position as a kind of leverage to influence another official.

In addition to the above, it is also important to briefly analyze the arguments against the criminalization of influence peddling. One such argument is the opinion that active and passive bribery includes the signs of influence peddling crime. In this regard, it should be noted that the subject of passive bribery is an official who “sells” his official position, which is manifested in the fact that the issue to be resolved is within his direct competence and/or uses his official status to influence another official.

In the case of influence trading, the lever for making the desired decision for the active influence trader is not the passive influence trader, but the official who is the addressee of undue influence. Trade in influence, by its essence and forms of manifestation, does not clearly fall within the legal area of classic bribery, it goes beyond its scope, which is why it became necessary to declare trade in influence as an action contributing to the background of corruption, as a separate crime.

Regarding the issue of the relationship between influence trading and lobbying activities, it should be clearly noted that they, by their purpose and forms of manifestation, are sharply different

³⁸ Ibid.

from each other. What is expressed in the fact that during influence trading, the fact of exercising undue influence on the representative of the government, using a personal relationship, and the lobbying activity essentially involves persuading the representatives of the state government in order to make the desired decision through the procedures established by law, based on the discussion of appropriate arguments and mutual exchange of opinions.

Bibliography:

1. Penal Code of France, 22/07/1992, <https://sherloc.unodc.org/cld/uploads/res/document/french_penal_code_html/french_penal_code.pdf> [20.05.2023].
2. Criminal Code of Spain, 23/11/1995, <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf> [10.05.2023].
3. "Criminal Law Convention on Corruption" of the Council of Europe, Strasbourg, 27/01/1999.
4. Criminal Code of Hungary, 25/06/2012, <https://sherloc.unodc.org/cld/uploads/res/document/hun/2013/hungary_criminal_code_2012_html/Hungary_Criminal_Code.pdf> [29/05/2023].
5. *Gamkhitashvili G.*, Problematic Aspects of the Separation of Bribery and Influence Peddling, Law Herald Journal, No. 4, 2021, 130-135 (In Georgian).
6. *Gogiberidze G.*, Doctoral Thesis on the topic: Lobbying and Legal Aspects of its Regulation, Tbilisi, 2012, 66 (In Georgian).
7. *Hollan M.*, Trading in Influence: Requirements of the Council of Europe Convention and the Hungarian Criminal Law. *Acta Juridica Hungarica*, 52, #3, 2011, 244-245.
8. *Lekveishvili M., Mamulashvili G., Todua N.*, Private Part of Criminal Law, Book II, 7th ed., 2020, 410, 413 (In Georgian).
9. *Philipp J.*, The Criminalisation of Trading in Influence in International Anti-Corruption Laws. University of the Western Cape, 2009, 35-36, 39, 40, 43-44 48.
10. *Slingerland W.*, Trading in Influence: Corruption Revizited. Saxion University, 2010, 3-4, <https://www.law.kuleuven.be/integriteit/egpa/egpa2010/slingerland_trading-in-influence.pdf> [28.05.2023].
11. <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf> [10.05.2023].