Seminar

BEST PRACTICE IN FIGHTING CORRUPTION IN BUSINESS TRANSACTIONS, FEATURES OF THE CORRUPTION IN INNOVATION BUSINESS. IS IT POSSIBLE FOR SKOLKOVO TO BE A ZONE FREE OF CORRUPTION?

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THE NOTION OF "COMMERCIAL BRIBERY" AS IT IS UNDERSTOOD IN THE RUSSIAN LEGAL SYSTEM

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We, lawyers, tend to explain every serious social problem by the imperfection of law much more often than by anything else, including national traditions. Corruption in commercial relations, however, is a special phenomenon that really depends on our history to such extent that the Russian legal mechanisms and, if you will, the very Russian concept of fighting corruption, differ dramatically from those seen in foreign countries. In the early years of the Russian Empire, bribery was a necessary instrument of governance on its vast territory as payment for official benevolence and could not be too reprehensible as it also provided a mechanism of obedience for governors, who had a true commercial incentive to hang on to their offices. After a while, authorities could not but develop a negative attitude towards corruption as a form of betrayal of the interests of governmental service. However, they often considered corruption as an inevitable evil – provided, of course, that it did not entail any terrible consequences for the state power. In commerce, bribe as payment for assistance in winning a contract was not deemed a criminal offence and no difference was made between a legal fee and an action detrimental to the principal. The Russian Empire's Criminal Code only mentioned bribery in general terms. An official receiving bribes was penalized by a six-month imprisonment (art.656).

In the Soviet Union with its huge apparatus of repression and a widespread system of snitching, corruption took more latent forms. In the last decades of existence of the USSR, however, it grew dramatically in the economic sphere and totally congested the business reality. In the economic self-regulatory system, a crucial role was played by personal relationships established with the help of gifts, presents, kickbacks and free services, sometimes really amusing ones, such as free flat renovation, opportunity to jump the queue to access a car maintenance station, etc. Bribing a civil servant or governmental official was still considered a crime, though. An individual could be convicted for jointly committing or assisting in the commitment of an offence of bribery. Until 1996, kickbacks to get benefits in relations with a privately-held entity, even with governmental participation, had not been deemed illegal at all. In 1996, Russia adopted a new Criminal Code introducing the notion of "commercial bribery" which conceptually followed the previous criteria of public danger (infringement of the interests of an employer). Since that time, commercial bribery has very rarely constituted a cause for conviction, even though it has become overwhelmingly

widespread – mostly because such crimes are usually prosecuted only with the consent of the entity whose manager was involved.

Being a very harmful social phenomenon, corruption poses a threat to the fair competition and the healthy economic environment in general rather than to any corporate material values as it can deform such competition and environment to such extent that no underlying incentive is left for self-development or self-perfection.

The legal approach described above has two intrinsic drawbacks, which have been introduced into it through neglect or deliberately. If a corruption scheme involves a top manager (such as a general director or a chief executive officer) of a company, he will hardly squeal on himself and, therefore, will always escape criminal punishment. Of course, if a juicy scandal erupts, he may be dismissed and his successor may ask that criminal proceedings be instituted against him. However, the founders of the company will often remain unaware of the corruption or any investigation conducted against the company by law-enforcement authorities. Furthermore, the top manager may hold a major interest in the corrupt company, in which case none of his blatant actions detrimental to the minor shareholders will be subject to criminal prosecution as he could not be preliminarily fired. The consequences of a complaint of commercial bribery filed with police duplicate those of a claim for tort as a civil law remedy. With clear evidence on hand, a company has no incentive to institute extensive criminal proceedings to get compensation. Instead, it would prefer to go a shorter way of claiming damage as a more logical option.

In the today's issue of "Rossiyskaya gazeta" Sergey Naryshkin, the Head of Administration of the President of the Russian Federation, adduces interesting statistics, according to which 1,500 crimes connected with commercial bribery have been reported in 2010. Meanwhile, only 250 people have been condemned. One does not need to use a calculating machine to understand that only 1 in 60 suspects was subject to criminal penalty. Further, he mentions about 150,000,000 roubles paid out as commercial bribes and withdrawn by the law enforcement authorities. A simple arithmetical operation allows us to find out the average amount of a bribe – 100,000 roubles (slightly more than $3,000).

Illegal schemes of all sorts have become so firmly entrenched in the Russian business environment that some experts believe kickback can well be considered a silent custom of trade or usage.

Responsibility for commercial bribery in Russia (Art. 204 of the Criminal Code) is not significant: criminals are imposed a fine in the amount of 200,000 roubles, regardless the amount of the bribe given or received. Of course, the responsibility becomes stricter if the crime was coupled with extortion of bribery or was committed by an organized group of persons.

Noteworthy, even though Russia is a party to both the United Nations Convention against Corruption (of 31 October 2003) and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions (of 16 December 1996), it is reluctant to bring its laws into accord with the key principles of those two documents. Under the Russian law, a legal entity still may not be subject to criminal prosecution – in contrast to the generally accepted European approach to tackling those offences of bribery which are committed by companies themselves, including world-famous brand names, to get orders, benefits or preferences. As a result, lobbyist corruption in major business is never investigated thoroughly and the legal entities involved are never subjected to heavy fines in Russia.

It should be noted in that respect that, under Article 18 of the Council of Europe Criminal Law Convention on Corruption, Russia agreed to take some measures to fight corruption. In particular, the Convention, it undertook to "*adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of a body of the legal person, who has a leading position within the legal person*."

Up until now, Russia has not met its obligations under said Convention.

We suppose that responsibility for corrupt practices shall be stricter in Russia, as the struggle against bribery is restrained to a huge extent by the low development level of social institutions in Russia, primarily those self-regulated social organisations who should create intolerable attitudes among professional judges, arbitrators, valuers and auditors towards any attempts to commit such crimes. In his Message to the Federal Assembly on 30 November 2010, President Medvedev expressly mentioned corruption among judges and the existence of a ramified system of agents and intermediaries who guarantee positive outcome of legal cases. In Russia, there is no tradition for officials to voluntarily reside as a result of a corruption scandal. While an anti-corruption law was enacted in Russia on 19 December 2008, that law has done nothing to eliminate the legal drawbacks I have mentioned.

We, professionals in law, hope that the Russian government will rely on state-of-the-art doctrinal achievements in criminal prosecution of commercial bribery to completely reform the national system of law to effectively support efforts to eradicate commercial bribery in Russia.