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### On Gifts, Courtesies and Other Business Amenities

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#### On Gifts, Courtesies and Other Business Amenities

Kazakhstan is known as a hospitable and generous country. Indeed, there exist ancient cultural traditions thanks to which the country deserves such epithets. According to dictionaries, hospitality and generosity have such common features as a special kind of warm welcome that is associated with the ability to provide selfless assistance to others, often manifested in gifts. In turn, a gift is an item or a benefit which the "gift-giver voluntarily and gratuitously presents into full ownership in order to afford pleasure or use to the gift recipient". [\[1\]](#)

The most widespread causes for a gift are customs and holidays, expression of gratitude and appreciation, and expression of love, friendship, empathy or sympathy. Gift-giving is a manifestation of benevolence and a sign of good manners too. Of course, gifts are also given with causative motives in order to receive a consideration; such consideration can often be of an implicit nature – preferential treatment for giver's products, popularization of the giver's name, or enhancement of brand visibility.

The legislator was aware that these factors would inevitably affect mutual relations in the private (B2B) and public (B2G) sectors. Therefore, despite the fact that the Kazakh state declared, since its very inception, adherence to the course of harsh fight against corruption, the former Law on Fight Against Corruption contained a regulation allowing for acceptance of "*symbolic courtesies and symbolic souvenirs in accordance with the generally accepted standards of politeness and hospitality or during protocol or other official events*" (which conformed, to a certain extent, to the generally accepted practices; for instance, policies of many large foreign corporations allow for gifts to government officials of up to USD 50 value). However, the legislation on fight against corruption and administrative legislation established no value threshold for such gifts, while the criminal legislation used the threshold value of a gift only for the purposes of exemption from criminal liability (given other available circumstances).

In attempting to render the issue some clarity, Kazakhstan's Civil Code introduced limitations on the value of gifts in the amount of 10 MCI [\[1\]](#), also expressly allowing for handing the "normal" gifts within the said value to government officials and their family members in connection with the government officials' official position or in connection with their discharge of official duties. One could assume that this amount served as a certain benchmark of permissible gift value until the subsequent changes in anti-corruption and other punitive legislation have come to completely ban gifts, not only in the public, but practically in the private sector as well (it should be mentioned that persons in charge of the anti-corruption legislation development were somewhat surprised to learn about the existence of the RK Civil Code regulation on permissible value of gifts).

Kazakhstan continues to declare its commitment to combating corruption and attempts to toughen in every possible way the legislative regulation in this field. Even given all the indiscriminate harshness of the "law on the books" coming to contradict other acts of domestic legislation, its effectiveness ("law in practice") keeps Kazakhstan below the 120 ranks of other countries in the Corruption Perception [\[2\]](#)

As an example, under the slogan of strengthening fight against corruption, the provision allowing for acceptability of "symbolic courtesies and symbolic souvenirs in accordance with the generally accepted standards of politeness and

hospitality or during protocol or other official events" was deleted from the legislation in 2007. Acceptance of gifts was completely banned, the gifts received were to be handed over to a special fund and the cost of services received was to be paid to the state budget. But, as the saying goes, the severity of our laws is compensated by the optionality of their performance: gift-giving is still pretty common in the B2G relations.

In the context of gift permissibility, the civil legislation speaks about "normal" gifts, the gift "normality," however, being defined neither in the Civil Code, nor in the known commentaries thereon. Without going into discussion about the connotation of the "normal gift" phrase, one can say that there is a special category (or, if you prefer, subcategory) of gifts or offerings, which is quite widespread in the practice of relations between private suppliers and their potential counterparties from public sector.

We are talking about private supplier's different branded materials transferred to the employees of public sector organizations – stationery, special clothing, other professional accessories, various teaching and visual aids, etc. These may differ from "normal" gifts by the possibility to use such items and accessories directly in the work or official activities of such employees, including in the interests of society.

But despite their "abnormality" such offerings evidently possess all features of a gift in a general sense: *"the gift-giver voluntarily and gratuitously presents into full ownership in order to afford pleasure or use to the gift recipient"* (of course, there are questions regarding the absolute gratuity in this case – business receives in return enhancement of the brand visibility and, to a certain extent, favorable treatment of its products by the potential counterparty).

Besides, the legislation does not differentiate between the nature of items transferred in this context, universally calling them "benefit," "profit" or "advantage," and is absolutely indifferent as to the nature of their further use. Accordingly, from the legal standpoint, all signs of unlawful giving of "normal" gifts can as well be identified in the offerings in question: the item transferred is essentially a tangible benefit of a particular value, such benefit arising with the corrupt or other offender on the initiative and at the expense of another person who is related to the official activities of the recipient, and, finally, such transfer is not permitted by legislation (leaving out charity regulations).

Moreover, if applying a certain degree of sophistication, the transfer and subsequent use of branded materials in official activities may be subjected to a more extensive range of the current legislative sanctions. For example, a clinic employee using in his/her official activities branded items of a particular manufacturer visible to an unlimited number of patients and other visitors may be regarded as a healthcare professional's participation in the advertising of medicines. Such advertising is recognized by law as an offence and is punishable by an administrative fine with cancellation of professional certificate.

Furthermore, if such actions are qualified as advertising, a risk arises that this may not be it: advertising can essentially be interpreted as "actions in favor" [of the manufacturer/supplier] or "general patronage" and these are already the terms operated by criminal law when describing such crime as bribery. Of course, in practice such qualification is unlikely, but the risk cannot be completely eliminated, especially in case all the requisite adverse circumstances occur concurrently. As life shows, in case of another campaign "to clean-up ranks" or in order to get rid of "undesirable" employees or vacate a position "for one's own people" any means may be used.

It is clear that offering of other ("normal") gifts that do not refer to professional accessories and other items used in official activities in no way mitigates the risk of their qualification as unlawful.

As noted above, as of today, the legislation has two mutually exclusive approaches to gift value. The RK Civil Code allows for gifts to public officials in connection with their official position or in connection with their discharge of official duties, thus expressly implying receipt of a certain consideration by the gift-giver. The established gift value limit (10 MCI) probably means that a gift of greater value should be recognized as an invalid transaction (according to the Normative Resolution No. 6 of the Supreme Court of the Republic of Kazakhstan of 7 July 2016 – a void transaction).

But on the other hand, offering public officials a gift of any value in connection with their official position or in

connection with their discharge of official duties (for committing acts or omissions in favor of the giver, i.e. for consideration) is qualified by criminal law as a bribe.

We have repeatedly pointed out this conflict between the permitting regulation of the RK Civil Code and the absolute ban on gifts in other anti-corruption acts, written special information memos to high authorities and submitted our proposals to improve and harmonize the legislation. We spoke (among other things) about the need to distinguish gifts from teaching and visual aids, professional accessories and other gifts used in the work for public interest; suggested to introduce regulation in respect of dinners, lunches, breakfasts, transportation services or expenses to travel to business meeting venues, etc. However, all these proposals did not find any reflection in the new 2015 Law on Counteracting Corruption.

Since bribery qualifies as a corruption offence, both parties – the briber and the bribee – are held liable and bribery does not fall under the period of limitations and probation. Criminal liability may be avoided (but with imposition of disciplinary or administrative penalty), if all the three conditions are concurrently met, as follows: this happened for the first time, there has been no prior arrangement and the value of the gift does not exceed 2 MCI [3]

Beside the classical bribe, there also exist other elements of offence punishable by law, which could directly apply to the giving of gifts. These are receipt/provision of illegal material remuneration – a corrupt administrative offence whose sanctions cover both the gift giver and recipient. In this case, the value of the gift is irrelevant.

It should be mentioned that in order for an offence to qualify as corrupt, the person unlawfully receiving a benefit must have a special status, by virtue of which the law refers such persons to corrupt offenders. It is a fairly extensive list of persons, which includes not only government officials, but also the employees of other organizations, including commercial organizations with state participation and international organizations – this article does not seek to detail the list.

As to non-corrupt offences in private sector (meaning commercial B2B and service relationships), applicable to gifts may be regulations on commercial bribery, which qualifies as a criminal offence. The essence of commercial bribery illegality is in the unlawful granting/acceptance of certain benefits, accordingly, the criminal sanction applies to both parties – the giving and the receiving.

In case of commercial bribery, the gift recipient must have a special status: perform managerial functions at a commercial or other organization. The wrongfulness of such person's act or omission may be in divulging a commercial or banking secret, or some secrets of the organization, entering into or failure to enter into a contract, extending a soft loan in violation of the established rules, satisfying a creditor's claims to the detriment of other creditors, etc. In order to avoid criminal liability (but with imposition of disciplinary or administrative penalty), all the following three conditions must be concurrently met: no prior arrangement, action (omission) must be lawful and the value of property or service (gift) cannot exceed 2 MCI. Same as in case of a bribe, the person may be released from criminal liability if he/she has been subjected to extortion or has voluntarily reported the fact of bribe.

Finally, gift-giving may represent the so-called obtainment of illegal remuneration punishable under criminal law. This crime does not qualify as corrupt and liability applies only to gift recipients employed at public sector organizations whose activities are unrelated to administration of state functions, as well as to the representatives of private sector who do not perform managerial functions. The gift value under 5 MCI and absence of prior arrangement can in aggregate serve as a ground for the gift recipient's exemption from criminal liability.

Thus, the state is fairly comprehensively trying to curb the giving of gifts where the giver receives some implicit or explicit consideration. Are there any methods in the current legal situation to mitigate the risk of recognition as unlawful the giving of gifts and extension of other courtesies? Such methods do exist, but these are few.

Firstly, it is necessary to exclude the personal element in such acts, i.e. not give such gifts and other items personally to a specific employee or official. Preferably, all such items should be transferred to the organization under a contract or another document. One should also keep in mind other circumstances precluding or mitigating liability: one-time nature of gift-giving, absence of prior arrangement, gift value limitation, etc.

Secondly, it is desirable to take advantage of the opportunities provided by the 2015 Law on Charity, in particular, use the instrument of sponsorship, which may be extended to non-profit institutions and organizations working in the social sphere. The Law clearly defines sponsorship as a way to popularize the name of the sponsor, which is implemented through the "*dissemination of information in visual and/or audio form about the sponsor's own name (denomination), its products, trademarks, works or services in exchange for financing and/or material-and-technical support of event.*"

Notwithstanding the provisions of internal policies and other compliance rules of commercial organizations allowing for gifts of limited value, extension of courtesies and other business amenities in B2G relations, the legislation is worded in such a way that every occasion of giving a gift to a public sector representative is fraught with the risk of such act's recognition as punishable. Legitimate popularization of goods, works and services and enhancement of brand visibility via gifts can only be implemented through sponsorship and only in respect of non-commercial organizations and organizations working in the social sphere. As to other public sector organizations, it is advisable to refrain from giving gifts or extending courtesies and other business amenities until the law comes to feature more clear and permitting regulations on this.

[1] Monthly calculation index; as at the time of this article preparation, 1 MCI is approximately equal to USD 6.

[2] In the Transparency International's 2015 Corruption Perception Index Kazakhstan scored 28 and advanced from the 126th to 123rd position.

[3] A person may also be exempted from criminal liability if he/she has been subjected to extortion or has voluntarily reported the fact of bribe to the relevant authorities.