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汪维才 ◆ 著

商业贿赂犯罪研究

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中文摘要

商业贿赂犯罪是一个全球性的问题,也是当下中国最受关注的重大社会问题之一。研究商业贿赂犯罪不仅仅是现实的需要,也是刑法理论本身完善的需要,更是刑事立法与司法实践发展的需要。

商业贿赂犯罪,简言之,就是商业领域中发生的贿赂犯罪。作为犯罪的商业贿赂行为,其范围应当对应于刑法中的全部贿赂犯罪。

从商业贿赂犯罪侵犯的客体看,它既包括公平竞争的市场秩序,也包括有关单位工作人员的职务廉洁性。其中,发生在经营者之间的商业贿赂犯罪,其侵害的主要客体是公平竞争的市场秩序,次要客体为公司、企业或者其他单位人员的职务或业务行为的廉洁性。而发生在经营者与国家工作人员之间的商业贿赂犯罪,其侵犯的客体则与之相反。把握这一点,对于商业贿赂犯罪的司法认定和立法完善都是有益的。

从商业贿赂犯罪的职务要件看,“利用职务上的便利”与“利用本人职权或者地位形成的便利条件”是一种对立统一关系。其中“利用职务上的便利”,是指利用本人职务范围内的权力,具有直接职务制约性的特征;而“利用本人职权或者地位形成的便利条件”,是指行为人所利用的一种既是基于本人职务身份而形成,

同时又未达到直接制约程度的便利条件,具有间接职务制约性的特征。

从商业贿赂犯罪的利益要件看,无论是索贿还是受贿,在现行刑法的框架内都要求以“为他人谋取利益”为条件。从利益的实现方面来看,“为他人谋取利益”包括准备为他人谋取利益,正在实施但尚未为他人谋取到利益,以及已经为他人谋取到利益等不同阶段,是一个动态的过程。

商业贿赂犯罪是当今世界各国面临的共同课题。境外与国际社会反商业贿赂犯罪立法日益呈现出严密刑事法网、加大法律责任、拓宽证据收集渠道、降低证据运用法律要求、强化资产追回程序合作等方面的发展趋势。而我国商业贿赂犯罪立法与境外及国际立法虽有对应契合之处,但总体而言“形似神离”。为此,应参酌《联合国反腐败公约》的思路、借鉴境外与国际社会惩治商业贿赂犯罪的成功经验,对我国商业贿赂犯罪的刑事实体法与程序法予以完善。

就商业贿赂犯罪刑事实体法的完善而言,应以“严而不厉”的刑事政策为导向,注重如下几点:(1)调整和充实罪名体系。取消单位受贿罪、单位行贿罪、对单位行贿罪,将其分别与受贿罪和行贿罪相整合;增设对外国公职人员或国际公共组织官员行贿罪、外国公职人员或国际公共组织官员受贿罪,对有影响力人员行贿罪、有影响力人员受贿罪;同时将商业贿赂犯罪的先行行为和后续行为犯罪化。(2)改革和完善主体要件。将《刑法》中国家工作人员的范围予以纯化,仅限于国家机关工作人员;同时相应拓展非国家工作人员受贿罪的主体和介绍贿赂罪的主体与行为对象。(3)扩大贿赂范围,将商业贿赂犯罪的贿赂范围由“财物”扩张到一切“不正当好处”。(4)补充行为方式,将许诺给予、提议给予和实际给予行为一并规定为行贿犯罪的行为方式,将收受、约定收

受和索取行为一并规定为受贿犯罪的行为方式。(5)取消利益要件,包括取消受贿犯罪中的“为他人谋取利益”要件和行贿犯罪中的“为谋取不正当利益”要件。(6)取消贿赂犯罪定罪数额标准,对商业贿赂行为“零容忍”。(7)优化刑罚资源配置,逐步实现死刑设置现代化、刑罚方法多样化、刑罚配置均衡化以及非刑罚方法之强化。

就商业贿赂犯罪刑事程序法的完善而言,应以“强化惩治犯罪力度,保障正当程序底线”为价值取向,侧重于以下方面:(1)充分保护证人、鉴定人、被害人、举报人,使其免遭可能的报复或者恐吓。(2)建立污点证人制度,根据污点证人对商业贿赂案件提供的“实质性配合”的程度以及所提供的证据对侦破商业贿赂案件作用的大小,规定不同的免责方式。(3)确立特殊侦查措施,明确赋予侦查机关以特殊侦查权,同时允许法庭采信这些通过特殊侦查手段所取得的证据。(4)建立推定和举证责任倒置规则,以减轻控方的证明责任,加速司法进程,实现司法经济。同时确立“惯例”证据排除规则,破除商业领域中形形色色的“潜规则”。(5)建立健全公益诉讼制度和刑事缺席审判制度,完善资产追回诉讼机制,以应对商业贿赂犯罪资产追回之需。

Abstract

The commercial bribery crime is a global problem, and also one of the important social issues that the current Chinese society pays the most attention to. To study the commercial bribery crime is not only the demand of reality, but also the demand of the perfection of theory of criminal law itself, and even more the demand of the development of criminal legislation and judicial practice.

The commercial bribery crime is bribery crime which occurs in the business sphere in short. As the crime of commercial bribe behavior, its scope should be corresponded to all the bribery crime in criminal law.

From the object infringed by the commercial bribery crime, it includes the market order of fair competition and the honesty of related units personnel. Among them, main objects infringed by the commercial bribery crime are market order of fair competition, which usually occurs among businessmen, and secondary object is the honesty of the personnel of the companies, enterprises and the other units. The object of the commercial bribery crime that occurs between businessmen and the state or government functionary is totally different. It is useful to differentiate these two objects for judicial identification and legislative improvement of the commercial bribery crime.

From the duty elements of the commercial bribery crime, the relationship between "taking advantage of his position" and "taking advantage of personal power or position" constitutes a unity of two opposite sides. The term "taking advantage of his position" means making use of one's post privilege, with the feature of direct post conditionality. Whereas, the term "taking advantage of personal power or position" means making use of an advantageous condition which is based on one's post privilege, but does not meet the degrees of direct conditionality, with the feature of indirect post conditionality.

From the interest elements of the commercial bribery crime, "seeking benefits for others" in the present law is a necessary constitution wherever in the crime of acceptance to demand bribery or in the crime of acceptance to receive others' property. "seeking benefits for others" is a dynamic process, comprising such acts at different stages as preparing for seeking benefits for others, being seeking benefits for others but yet to be settled, and having gained benefits for others.

The commercial bribery crime is a common problem that every country in the world is confronted with. The legislation of the commercial bribery crime in overseas and international community has been increasingly emerging such trends as tightening the arm of the criminal law, reinforcing legal liability, widening channels of collecting evidence, reducing legal requirement of applying evidences, and strengthening cooperation of procedure of recovering property. Although there are the same points about the legislation of the commercial bribery crime among China, overseas and international community, their spirit is quite different. Therefore, we should refer the thread of UN Anti-Corruption Convention, and learn the successful experience of pun-

ishing the commercial bribery crime in overseas and international community, perfecting criminal substantial law and criminal procedure law of the commercial bribery crime in our country.

As far as the perfection of the criminal substantial law of the commercial bribery crime is concerned, it should be guided by "strict but not severe" criminal policy, paying attention to the following points: (1)The accusation system should be adjusted and enriched. Such crimes as crime of bribery of a unit, organizational bribery and crime of offering bribes to a unit should be cancelled, integrated into bribery crime and crime of giving a bribe respectively. And such crimes as crime of offering bribes to foreign public officials and officials of public international organizations, crime of bribery of foreign public officials and officials of public international organizations, crime of offering bribes to influenced personnel and crime of bribery of influenced personnel should be supplemented into our law. Meanwhile, the antecedent and subsequent acts of the commercial bribery crime should be criminalized.(2)The subject elements should be reformed and perfected. The scope of state functionary in criminal law should be purified, limited to government officials. Meanwhile, the subject scopes of crime of bribery of the non- government personnel, the subject and action target of crime of introducing a bribe should also be expanded. (3)The scope of bribes of the commercial bribery crime should be expanded from "money and goods" to "unjust advantages".(4)The action modes of the commercial bribery crime should be supplemented, with the action modes of crime of giving a bribe containing the actions "promise to offer", "propose to offer" and "offer", and with the action modes of bribery crime containing the actions "accept bribes",

"promise to accept bribes" and "ask for bribes". (5)The requisites of interest, including the requisites of "securing benefits for others" in bribery crime and "for seeking unfair benefits" in crime of giving a bribe should be cancelled. (6)The condemnation amount standard of bribery crime should be cancelled, with the commercial bribe behavior carried out "zero tolerance". (7)The penalty arrangement should be optimized, with capital punishment setting's modernization, penalty measure's variety, penalty arrangement's equalization and non-penalty-measure's reinforcement realized step by step.

As for the perfection of the criminal procedure law of the commercial bribery crime, it should be complied with value orientation of strengthening the punishment of crime and keeping the base line of due process, with emphasis on the following aspects: (1)We should fully protect witness, appraiser, victim and the person who reports, making them exempt from possible retaliation or intimidation. (2)We should establish taint witness system, setting different methods of liability exemption according to the degrees of the taint witness's providing substantial coordination for business bribe cases, and the effects of the evidences which the taint witness provides for cracking down the business bribe cases. (3)We should establish special investigation measures, with definitely endowing the investigating units the rights of special investigation, meanwhile, allowing court adopt of these evidences by means of special investigation measures. (4)We should set up the rules of presumption and inversion of burden of persuasion, so as to reduce the burden of proof of the prosecuting party, and accelerate judicial progress, and then realize judicial economy. Meanwhile, we should establish the rule of conventional evidence exclusion, exploding various

latent rules in the business sphere.(5)We should construct and perfect the lawsuit system of public service and criminal absence justice system, so as to perfect the lawsuit mechanism of recovery of property, and adapt demands of recovering property of the commercial bribery crime.

序

商业贿赂的治理是当前我国乃至世界范围的一个热点话题和难题,商业贿赂犯罪的刑罚惩治则是商业贿赂治理体系中的一个重要组成部分。近年来,我国刑法理论和实务部门对于商业贿赂犯罪的研究取得了一些有价值的成果,但从治理商业贿赂实践需要看,目前理论研究大都停留于现象和技术性分析,缺乏广度和深度,整体上只能说处于起步阶段。而在全球化的背景下,如何依据《联合国反腐败公约》的要求,结合我国本土的国情,研究我国反商业贿赂犯罪基本理论,形成具有一定特色的惩治商业贿赂犯罪的理论体系,为相关立法完善提供理论支撑,成为当前刑法理论界应担当的重要课题。因此,对商业贿赂犯罪进行系统、深入的理论研究具有理论和实践价值。

汪维才博士所著《商业贿赂犯罪研究》一书,是在他的博士论文基础上修改而成的。本书围绕商业贿赂犯罪立论,在对商业贿赂犯罪的概念进行界定并据此确定商业贿赂犯罪范围的基础上,从实然出发,对商业贿赂犯罪的现行立法进行观察和解构,就商业贿赂犯罪法律适用中的若干有争议的理论 and 实践问题作了较为深入的探讨。与此同时,从应然入手,对商业贿赂犯罪的现行立法进行反思。在对我国商业贿赂犯罪立法与境外和国际立法作全方位、多视角比较的基础上,遵循刑事一体化的理念和方法,就我国商业贿赂犯罪的立法完善问题作了系统的研究,其中不仅涉及

到完善商业贿赂犯罪立法规制的一般原则,也涉及到刑事实体法和程序法的具体制度设计。

值得肯定的是,作者通过比较分析的方法,考查并梳理了法律制度相对完善的国家和地区中关于商业贿赂犯罪的理论和立法的变化,揭示其共通性的规律和立法的发展趋势,探寻其立法的价值取向和立法的特点,考察其立法实施的效果;尤其是作者以《联合国反腐败公约》所确立的诸制度为参照系,揭示其与我国商业贿赂犯罪立法的同步性与差异性,以期为我国商业贿赂犯罪立法的完善提供比较法上的借鉴。例如,作者指出,我国商业贿赂犯罪立法与《联合国反腐败公约》相比,在刑事实体法方面,罪名体系不够广阔,构成要件不够宽松、刑罚制度不够合理;在刑事程序法方面,证据收集渠道过窄、证据运用标准过高,特别是与《联合国反腐败公约》所确立的商业贿赂犯罪资产追回机制相匹配的法律制度付之阙如。为此,作者主张以《联合国反腐败公约》为蓝本,借鉴和参酌境外一些国家和地区的先进立法经验,在实体法上贯彻“严而不厉”的刑事政策,在程序法上以“强化惩治犯罪力度、保障正当程序底线”为取向,对我国商业贿赂犯罪刑事实体法和刑事程序法进行完善。应该说,这种将商业贿赂犯罪作为一个全球性的法律问题来加以研究的方法,反映了作者学术视野比较开阔,同时也为我们全面了解整个商业贿赂犯罪的理论、立法和司法实践提供了一个比较新的研究进路。

本书主题明确,结构合理,条理清晰,观点鲜明,其中不少观点具有创见。例如,关于商业贿赂犯罪的概念及其范围的界定、关于商业贿赂犯罪的成因及其防治对策的分析,都是具有新意的。此外,作者关于商业贿赂犯罪构成特征中的“利用职务上的便利”、“利用本人职权或者地位形成的便利条件”、“为他人谋取利益”、“谋取不正当利益”等构成内涵的理解,以及对于商业贿赂犯

罪既遂与未遂认定标准的把握,不仅推进或丰富了本领域的学术研究,更对司法实践中正确认定与处理商业贿赂犯罪案件具有指导作用。尤其值得关注的是,本书关于商业贿赂犯罪的立法完善,不仅是全书的重点和核心内容,而且通篇论述不乏创新之处。诸如对《联合国反腐败公约》影响力交易罪的理解及其在我国转化的合理途径的探寻,对我国刑法规定的“国家工作人员”应然范围的探讨,对惩处商业贿赂犯罪非刑罚方法的探索,以及对如何在《联合国反腐败公约》框架下,结合中国的法律实际,建立健全商业贿赂犯罪资产追回诉讼机制的有效途径的探究等等,都对完善我国商业贿赂犯罪的立法有着积极意义和参考价值。

汪维才同志是我指导的首届博士生,他勤奋好学、刻苦努力、积极进取。经过数年的专业训练,已经具备了较扎实专业基础。他的博士论文付梓出版,我由衷地感到高兴,期待他以此书出版为契机,对商业贿赂犯罪作进一步追踪研究,同时祝愿他的学术之路越走越宽广。

是为序。

孙国祥*

2008年10月于南京大学

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