

## LEGAL REGULATION OF CIVIL SERVANTS IN RUSSIA AND GERMANY RECEIVING GIFTS

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*The article deals with the conflict between the provisions of the Criminal Code of the Russian Federation, where the minimum amount of the bribe is not defined, and the provision of the Federal Law 'On State Civil Service of the Russian Federation,' which, on the one hand, contains an absolute ban on civil servants receiving gifts and other types of remuneration, while, on the other hand, Art. 575 of the Civil Code of the Russian Federation admits a possibility for civil servants to receive gifts of an amount not exceeding 3,000 rubles in the performance of their official duties. This legal conflict necessitates conceptual clarification of such notions as 'gift' and 'bribe.'*

*The authors underline that a determining factor for establishing the legitimacy of the customary gifts given to government officials is whether the gifts were accepted by the officials, while executing their duties, without a prior agreement for an action or inaction. It is noted that the limitation of a gift's maximum value to 3,000 rubles, as stated in the Civil Code of the Russian Federation, creates an opportunity to abuse or evade the law.*

*The article presents a comparative study of European laws, more specifically dealing with the institute of donation, and Russian legislation regarding the possibility of civil servants receiving gifts. German law does not single out 'customary gifts;' it simply does not admit the possibility of giving gifts or the right to receive gifts by German civil servants.*

*The authors have developed proposals to improve the legal regulation concerning the giving of gifts to government officials in Russia.*

*Keywords: bribe; customary gift; remuneration; donation; donor; donee; civil servant; legal conflict.*

## 1. Introduction

Corruption among some European and Russian officials remains a very serious problem. In the civil service system, it threatens security and the successful development of a country and society in general. Therefore, actions against this international and anti-social phenomenon are an important issue for any state.

The most widespread crime in the sphere of corruption is bribery, which is sure to reduce trust in power. 'Bribery is generally defined as the offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties.'<sup>1</sup> Here it is defined as '[a]ny gift, advantage, or emolument offered, given, promised to, or asked or accepted by, any public officer to influence his behavior in office.'<sup>2</sup>

In many European states the prevalence of these crimes and civil service corruption is forcing legislators to take especially severe measures to crack down on bribery and to lay special emphasis on the not less dangerous and even more widespread crime of officials, *i.e.* receiving a low-value gift. It is the act of taking gifts, even inferior ones, that can become the first step to corruption. Professor of the University Rey Juan Carlos, Manuel Villoria Mendieta emphasizes that 'the area between gifts and bribery is too narrow, and for that reason we could conclude that in all countries it is not possible to accept gifts when they seriously affect the public official's independence.'<sup>3</sup>

A regulatory framework on anti-corruption efforts has already been created in Russia. However, the bribery control problems, including those based on the ambiguous understanding and application of the civil legislation standards concerning the donation of customary gifts to the civil servant, demand improvement of the current legislation. Therefore, examination of the issues concerning gift giving to Russian civil servants and the experience of foreign countries in this field is rather essential.

## 2. European Legislation on the Ban of Civil Servants Accepting Gifts

'Gift-bribery' research across the board cannot be executed within one legal system. The interest in the fight against corruption lies not only in the experience of other countries but mainly in the legislative control.

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<sup>1</sup> See Sten Bønsing & Lars B. Langsted, '*Undue*' Gifts for Public Employees: An Administrative and Criminal Analysis, 21(2) European Journal of Crime, Criminal Law and Criminal Justice 163 (2013), available at <[http://www.langsted.dk/artikler/ECCL\\_2025\\_bonsing\\_langsted.pdf](http://www.langsted.dk/artikler/ECCL_2025_bonsing_langsted.pdf)> (accessed Jul. 29, 2015).

<sup>2</sup> Henry C. Black, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern 191 (6<sup>th</sup> ed., West Pub. 1990), available at <<https://archive.org/stream/BlacksLaw6th/Blacks%20Law%206th#page/n203/mode/2up>> (accessed Jul. 29, 2015).

<sup>3</sup> Manuel Villoria Mendieta, *Conflicts of Interest Policies and Practices in Nine EU Member States*, in *Corruption and Democracy: Political Finances – Conflicts of Interests – Lobbying* – Justice 85, 95 (Council of Europe Pub. 2008).

Most European countries have strengthened their anti-corruption legislation and are aiming to identify corruption prevention mechanisms. Among the most important anti-corruption instruments is the ban on civil servants accepting gifts.

Demanding or accepting an improper advantage that might influence the exercise of official duties or decisions that the civil servants might take is considered quite inappropriate and is an offence punishable under the Criminal Codes in most European countries. For example, the Criminal Codes of Denmark,<sup>4</sup> Finland,<sup>5</sup> France,<sup>6</sup> Germany,<sup>7</sup> and the Netherlands<sup>8</sup> – all specify that offering and accepting gifts, presents or advantage of any kind by a civil servant must be undue and shall be liable to imprisonment or, in mitigating circumstances, to a fine.

Moreover, the ban on accepting gifts by a civil servant is carried out not only by means of recognition of such an act as a crime, but by prescribing moral rules of conduct to the public servants under different Codes.

The Civil Service Code (the UK), the Code of Civil Servants (Greece), the Code of Conduct for Government Employees (Italy), the Civil Service Code of Ethics (Poland),<sup>9</sup> the Civil Service Code of Standards and Behaviour (Ireland)<sup>10</sup> and others 'reinforce the idea that civil servants must have higher standards of conduct than others in society' and 'emphasize the avoidance of conflict of interest, attitudes towards gifts and other benefits.'<sup>11</sup>

A German lawyer, Arno Hannus, defined civil-servant morals as follows: 'We could say that civil-servant morals mean, on the one hand, the codes of conduct which a civil servant should follow and, on the other hand, the question as to whether the civil servant complies with these codes.'<sup>12</sup>

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<sup>4</sup> See Sec. 144 of the Danish Criminal Code, at <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37472519.pdf>> (accessed Jul. 29, 2015).

<sup>5</sup> See Sec. 13 (Ch. 16) of the Criminal Code of Finland, at <<http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf>> (accessed Jul. 29, 2015).

<sup>6</sup> See Art. 435-2 of the Criminal Code of the French Republic, at <<http://www.legislationline.org/documents/section/criminal-codes>> (accessed Jul. 29, 2015).

<sup>7</sup> See Secs. 331–38 of the German Criminal Code, at <<http://www.iuscomp.org/gla/statutes/StGB.htm>> (accessed Jul. 29, 2015).

<sup>8</sup> See Art. 177 of the Netherlands Criminal Code, at <[http://www.iaaca.org/AntiCorruptionLaws/ByCountriesandRegions/N/Netherlands/201202/t20120221\\_808975.shtml](http://www.iaaca.org/AntiCorruptionLaws/ByCountriesandRegions/N/Netherlands/201202/t20120221_808975.shtml)> (accessed Jul. 29, 2015).

<sup>9</sup> See *Ethics Codes and Codes of Conduct in OECD Countries*, <<http://www.oecd.org/fr/gov/ethique/ethicscodesandcodesofconductinoecdountries.htm>> (accessed Jul. 29, 2015).

<sup>10</sup> See Civil Service Code of Standards and Behaviour, at <<http://hr.per.gov.ie/files/2011/06/Civil-Service-Code-of-Standards-and-Behaviour.pdf>> (accessed Jul. 29, 2015).

<sup>11</sup> Michiel S. de Vries & Pan Suk Kim, *Conclusions*, in *Values and Virtue in Public Administration: A Comparative Perspective* 275, 281 (Michiel S. de Vries & Pan Suk Kim, eds.) (Palgrave Macmillan 2011).

<sup>12</sup> Quoted in *Civil Service Ethics: A Study of the Grounds of Civil Service Ethics, Its Present State and Areas of Development* (= 2000(8) Ministry of Finance Working Papers) 7 (fn. 2) (Ministry of Finance 2000), available at <<http://vm.fi/documents/10623/307711/Civil+Service+Ethics+publication+310300.pdf/99767fe2-83f5-4476-bd64-b9d22829e0ff>> (accessed Jul. 29, 2015).

In Denmark, for example, two guides were released – ‘Avoid Corruption’ and ‘Good Conduct’ (both in Danish) – which dictate that civil servants are not allowed to receive any gifts or advantages related to their work, except minor gifts for special celebrations.

Thus, bans on accepting gifts by a civil servant and other anti-bribery legislation do exist in many European countries. Among these are the Penal Codes, criminalizing the receipt of gifts by civil servants, and the Codes of Conduct, regulating the taking of gifts and other advantages and giving a value-based guideline for striving to reduce corruption and build an atmosphere of ethics.

### 3. Legal Regulation of Receiving Gifts by Civil Servants in Germany

It is known that corruption is an anti-social phenomenon and no country, even a model one such as Germany, is immune to it.

Anti-corruption norms in German law are contained, first and foremost, in the Criminal Code. Sections 331–35 of the German Criminal Code relate to offences concerning bribery of public officials: taking bribes (Sec. 331); taking bribes meant as an incentive to violate one’s official duties (Sec. 332); giving bribes (Sec. 333); and giving bribes as an incentive to the recipient to violate his official duties (Sec. 334).<sup>13</sup> These norms extend to civil servants.

As Dr. Bonne Eberhard notes, public officials and ministers acts contain the norms, which forbid the obtaining of any benefit connected with a post in the public service. According to Dr. Hans Herbert von Arnim, in practice the anti-corruption provisions of public official acts are considered more rigid than the articles in the Criminal Code. Officials and ministers are obliged to keep the principle of neutrality and to be guided by the principle of avoidance at the slightest hint of a private benefit. The extent of the benefit is not relevant; it is the giving or the accepting of the benefit that is important. It is also not important whether *quid pro quo* took place. In cases where someone approaches a public official with some offer, the official must analyse the situation from the viewpoint of a neutral stranger. If the official distinguishes an attempt to influence his actions in the performance of public or legal duties, he is obliged to reject the offer.

On the federal level, one of the primary statutory acts regulating the civil service is the Federal Civil Service Act (*Bundesbeamtengesetz*<sup>14</sup>) [hereinafter BBG], which forbids civil servants from accepting rewards or gifts relating to their office. According to Sec. 71(1) BBG (‘Ban on the Acceptance of Remunerations, Gifts and Other Privileges’), ‘[e]ven after retirement from the public service public servants cannot demand any rewards, gifts or other privileges for themselves or third parties in the framework

<sup>13</sup> See German Criminal Code, at <[http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p2930](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p2930)> (accessed Jul. 29, 2015).

<sup>14</sup> <<http://www.bundesbeamtengesetz.org/bundesbeamtengesetz/>> (accessed Jul. 29, 2015).

of executing their official duties. Exceptions require the consent of the supreme or superior office authority. The powers of consent may be delegated to other bodies.'

In the German Civil Code<sup>15</sup> (*Bürgerliches Gesetzbuch*) [hereinafter BGB] the institute of donation (*Schenkung*) is in Division 8 'Particular Types of Obligations' (Book 2 'Law of Obligation') right after purchase agreements. However, Secs. 516–34 BGB (Title 4 'Donation') contain only general norms on donations. BGB, as well as Arts. 572(1), (2) of the Civil Code of the Russian Federation<sup>16</sup> [hereinafter RF CC], state the existence of two main types of donation. The first type, by analogy with the Russian law, can be characterized as a cash donation: '[T]he donor transfers gratis . . . to the other party (donee) a thing into their ownership . . .' As Doctor of Law V.A. Saveliev singles out, according to German theory, this is the main occasion of donation – donation in cash, or first-hand donation (*Handschenkung*).<sup>17</sup> In Sec. 518 ('Form of Promise of Donation') BGB establishes the second type of donation – 'the promise of a donation.' This type of donation, by analogy with the Russian law, is 'the promise to donate something to someone.' Meanwhile, BGB does not contain any article similar in scope to Art. 575(2) RF CC.

Thus, German legislation does not distinguish such a notion as 'customary gifts' and therefore does not allow any possibility of gift donation or the right to receive such a donation by German public servants. Moreover, the law holds those who break the ban responsible: 'In the event of violation of the ban specified in paragraph 1, the public servant, at the request of the employer, has to return the received remuneration owing to the fact that it is illegal behavior until it is collected in favor of the state . . .'<sup>18</sup>

#### 4. Legal Basis of Civil Servants Receiving Customary Gifts in Russia

In Russia, corruption as a negative phenomenon of public life, and the need to fight against it, has been discussed during the entire period of free market formation. From time to time, a legislator adopts the relevant anti-corruption acts and marks up separate standards of sectoral laws.

In this process one of the main anti-corruption security measures is to ban donations and remuneration to civil servants. However, some statutes of the existing Russian law, which are intended to establish a reliable barrier against corruption in

<sup>15</sup> <[http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)> (accessed Jul. 29, 2015).

<sup>16</sup> Гражданский кодекс Российской Федерации (часть вторая) от 26 января 1996 г. № 14-ФЗ // Собрание законодательства Российской Федерации. 1996. № 5 [*Grazhdanskii kodeks Rossiiskoi Federatsii (chast' vtoraya) ot 26 yanvarya 1996 g. No. 14-FZ // Sbranie zakonodatel'stva Rossiiskoi Federatsii*. 1996. No. 5 [Civil Code of the Russian Federation (Part Two) No. 14-FZ of January 26, 1996, 1996(5) Collection of Russian Federation Legislation]].

<sup>17</sup> Савельев В.А. Дарение в римском праве и в современном законодательстве // Журнал российского права. 2007. № 3. С. 41–48 [Saveliev V.A. *Darenie v rimskom prave i v sovremennom zakonodatel'stve // Zhurnal rossiiskogo prava*. 2007. No. 3. S. 41–48 [Vyacheslav A. Saveliev, *Donation in the Roman Law and in the Modern Legislation*, 2007(3) Journal of Russian Law 41–48]].

<sup>18</sup> Section 71(2) BBG.

the system of governmental authorities and municipalities, do not actually facilitate fulfilment of this task.

The status of the civil servant is primarily determined by the Federal Law No. 79-FZ of July 27, 2004, 'On the Public Civil Service of the Russian Federation'<sup>19</sup> [hereinafter Federal Law No. 79-FZ]. The Federal Law No. 79-FZ allocates rights and obligations of the civil servant and sets proscriptions.

The Federal Law No. 79-FZ (Art. 17(1)(6)) forbids a civil servant from receiving, in the framework of executing official duties, remuneration from natural and legal persons (gifts, remuneration, loans, services, and payments for entertainment, transport charges and other repayments).

Legal literature has repeatedly paid attention to the contradiction of Art. 17(1)(6) of the Federal Law No. 79-FZ and Art. 575(1)(3) RF CC. Article 575 RF CC allows the possibility of civil servants receiving customary gifts in the framework of executing their official duties when the value does not exceed 3,000 rubles. According to the Professor A. Erdelevsky, this fact 'decriminalizes the acts provided by Arts. 290 and 291 of the Criminal Code of the Russian Federation (taking and giving bribes – remuneration if it is an ordinary gift) as Art. 575 of RF CC defines such a kind of donation to the public servant (and what is more not because of one's personal sympathy, but due to the performance of official duties by the latter) as a lawful action that excludes its lawlessness.'<sup>20</sup>

Thus, there is a legal conflict between the provisions of the Criminal Code of the Russian Federation [hereinafter RF CrimC]<sup>21</sup> in which the minimum sum of a bribe is not designated by the provision of Art. 17(1)(6) of the Federal Law No. 79-FZ containing an absolute ban on civil servants receiving gifts and other remunerations, and Art. 575(1)(3) RF CC admitting the possibility of receiving a customary gift worth no more than 3,000 rubles by a public servant in the execution of his official duties.

## 5. Legal Nature of the Donation of a Customary Gift

In Russian legal doctrine, attempts to substantiate the legitimacy of 'customary gifts' donated to civil servants have not been successful. Therefore, the current situation in Russia is to legalize small bribes, which can be interpreted as the chance to take modest bribes.

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<sup>19</sup> Федеральный закон от 27 июля 2004 г. № 79-ФЗ «О государственной гражданской службе Российской Федерации» [*Federal'nyi zakon ot 27 iyulya No. 79-FZ 'O gosudarstvennoi grazhdanskoi sluzhbe Rossiiskoi Federatsii'*].

<sup>20</sup> Эрделевский А. Прощение долга и договор дарения // Российская юстиция. 2000. № 3. С. 12–14 [Erdelevsky E. *Proshchenie dolga i dogovor dareniya* // *Rossiiskaya yustitsiya*. 2000. No. 3. S. 12–14 [Alexander Erdelevsky, *Forgiving the Debt and Donation Contract*, 2000(3) Russian Justice 12–14]].

<sup>21</sup> Уголовный кодекс Российской Федерации от 13 июня 1996 г. № 63-ФЗ // Собрание законодательства Российской Федерации. 1996. № 25 [Ugolovnyi kodeks Rossiiskoi Federatsii ot 13 iyunya 1996 g. No. 63-FZ // *Sobranie zakonodatel'stva Rossiiskoi Federatsii*. 1996. No. 25 [Criminal Code of the Russian Federation No. 63-FZ of June 13, 1996, 1996(25) Collection of Russian Federation Legislation]].

A donation is a gratuitous deal. In the *Collins English Dictionary*, the word 'gratuitous' means given or received without payment or obligation. It is obvious that the explanation of any definition in its philological sense cannot replace the meaning of this definition in the legal aspect for the concrete legal regulation. Nevertheless, judging by this we can come to the conclusion that the gratuitousness of a gift cannot be confined to its payment. The donor may expect no consideration from the donee in any form whatsoever.

Meanwhile, the transfer of a thing cannot be considered gratuitous if the action of the donee (gift acceptance) represents property interest for the donor.

It should be noted that nobody gives gifts to civil servants, specifically regarding their official duties, for no special reason. The offerings are brought before or after the satisfaction of a request. Can we speak of any payment for specific actions of public servants in this case? Of course we can, although it is very difficult to prove. It is important to realize that a gift is given to the civil servant not because he is 'a good person' but owing to some motive. In Art. 575(1)(3) RF CC, the donation of a customary gift is connected with the official position of a civil servant or the performance of his official duties.

The donation of an ordinary gift can show gratitude, respect and appreciation for the official (e.g., flowers, or a box of chocolates), for fast and fair examination and settlement of the question. Meanwhile, Professor V.A. Shirokov fairly underlines that 'diligence' and 'equitable decisions' are the duties of an office holder who is intended to ensure the observance and protection of citizens' legal interests, but are not an additional source of revenue.<sup>22</sup>

According to the Judge of the Constitutional Court of the Republic of Belarus, V.V. Podgrusha, delimitating gifts handed to the civil servant under the terms of the donation civil agreement from the actions lying in the sphere of public law there must be the disinterestedness of a gift (remuneration) which is not caused by commission (or expectation of commission) by the official of any professional actions (omission to act) in favour of the donor. Moreover, V.V. Podgrusha considers that the receiving of the gift handed to the civil servant allusively to be in his good graces professionally, followed by failure to take measures for the allowed offence and the commission of another action (omission to act) in which the donor or the person representing him is interested should be treated as bribery.<sup>23</sup>

Article 575 RF CC establishes the size of the permitted 'ordinary gift' which entails no liability to either the donor or the public servant accepting a gift with regard to

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<sup>22</sup> Широкое В.А. Противоречие законов как серьезное препятствие в борьбе со взяточничеством // Современное право. 2005. № 4. С. 39–41 [Shirokov V.A. *Protivorechie zakonov kak ser'eznoe prepyatstvie v bor'be so vzyatochnichestvom* // *Sovremennoe pravo*. 2005. No. 4. S. 39–41 [Vladimir A. Shirokov, *Contradiction of Laws As a Serious Obstacle in Bribery Control*, 2005(4) *Modern Law* 39–41]].

<sup>23</sup> Подгруша В.В. Когда подарок еще не взятка // Юстиция Беларуси. 2005. № 12. С. 44–50 [Podgrusha V.V. *Kogda podarok eshche ne vzyatka* // *Yustitsiya Belarusi*. 2005. No. 12. S. 44–50 [Valentina V. Podgrusha, *When Gift Is Not a Bribe Yet*, 2005(12) *Justice of Belarus* 44–50]].

his official position or the performance of his official duties, but it does not stipulate any other terms of legitimacy for similar actions (except the gift size).

Therefore, if by receiving a gift the civil servant is not expected to return the favour, such action shall be deemed to be donation and shall not entail any criminal liability. The criminal liability arises only when the official receiving the gift assumes some obligation in the interest of the donor. However, the scope of Article 575(1)(3) RF CC excludes the indifference of a public servant to the gift.

It is impossible to forbid the delivery of a gift to a civil servant in case of retirement or other traditionally accepted events. In the absence of conditional remuneration by any actions (non-action) of the donee on *ex professo* or other selfish interest of the donor, this ban would even be immoral. Therefore, such situations will always take place, but they will be outside the scope of special regulation and will be covered by the general rules of civil norms concerning donation. Furthermore, in the stated cases, the donation of gifts in the sum exceeding three thousand rubles is possible.

Receiving a gift without any preliminary arrangement with the donor defines the legitimacy of a customary gift in the framework of an official position or official duties.

The characteristic feature of bribery in its classical meaning is the stipulation of actions (omissions) by receiving remuneration. In this case, the time of receiving remuneration – before or after commission of the desired action – does not matter. Moreover, for a donation to be legitimate, the behaviour of the civil servant should not violate his official duties. In other words, the actions of the official who has earned the reward have to be absolutely lawful.

In our opinion, if we apply the norms of Art. 575 RF CC only to civil cases or matters, then what shall we do with the bans established for civil servants, and what shall we do with the norms of public (criminal, administrative) law?

In the RF CrimC the definition 'bribe' is not given. At the same time the provisions of the RF CC are considered when determining the bribe amount. However, a gift having been received by a civil servant without a preliminary arrangement, after the performance of his functions, and without extortion is not considered to be a criminal offence.

The main factor distinguishing a donation in civil relations from a donation in the public relations is its gratuitousness. The donor shall not expect any consideration from the donee.

One cannot forget, though, that in giving a gift, the donor somehow fosters the hope of being in the civil servant's good graces in future. Is such gift 'with a view to the future' then a trivial bribe?

If in the civil sphere a donor's expectation of any kind of positive response from a donee does not have any legal meaning, then in the sphere of public service giving a gift to a civil servant after he has done an act, even if it does not go outside the bounds of his duties, but the donator hopes to be in the donee's good graces, is forbidden. In accordance with criminal law, the mere fact of giving or receiving such

a 'gift' is not enough. It is necessary to prove the intent of the donator or the donee to give or receive a bribe. From a moral point of view, such 'gifting' of public servants within the framework of their duties fouls the reputation of public service.

## 6. Conclusion

Legal research into donations in the Russian legislation has shown that there is a legal disagreement between the provisions of the RF CrimC, in which the minimum sum of a bribe is not stated, the provision of Federal Law No. 79-FZ, which contains an absolute ban on public servants receiving gifts and other remunerations, and Art. 575(1)(3) of the RF CC, which admits the possibility of public servants receiving customary gifts in the amount of no more than 3,000 rubles. The restriction of the maximum cost of a gift to 3,000 rubles creates an opportunity for legal abuses and circumvention of the law.

Receiving a gift without any preliminary arrangement with the donor seems to be a determining factor for the legitimacy of an ordinary gift to public servants in the framework of their official position or executing their official duties.

The status of public servants in Russia, as well as in Germany, is defined primarily by the Federal Law No. 79-FZ. In German legislation there is an absolute ban on gifts and other privileges for public servants.

To prevent corruption from spreading, we suggest taking into account the experience of Germany, thus to exclude para. 3 from Art. 575(1) of the RF CC. At the present time, relying on said paragraph, a civil servant can try to avoid taking responsibility for accepting a gift by establishing that bribery did not take place.

Moreover, the exception of the stated paragraph of the RF CC does not mean that public servants will be forbidden to accept gifts in case of anniversary, retirement or any other event (occasions) not connected with their official position or execution of their official duties. It is obvious that such situations will take place, but they will be outside the scope of special (public) regulation and subject to the general rules of civil norms concerning donations.

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