Implementing the OECD Anti-Bribery Convention

REPORT ON NORWAY

Foreword

This report surveys the legal provisions in place in Norway to combat bribery of foreign public officials and evaluates their effectiveness. The assessment is made by international experts from 36 countries against the highest international standards set by the OECD Anti-Bribery Convention and related instruments. This report is published as part of a series of country reviews that will cover all 36 countries party to the Convention.

In an increasingly global economy where international trade and investment play a major role, it is essential that governments, business and industry, practitioners, civil society, academics and journalists, be aware of the new regulatory and institutional environment to:

- enhance the competitive playing field for companies operating world-wide;
- establish high standards for global governance; and,
- reduce the flow of corrupt payments in international business.

This regulatory and institutional environment is mainly based on two groundbreaking instruments adopted in 1997 by OECD Members and associated countries: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("the Convention") and, the Revised *Recommendation on Combating Bribery in International Business in International Business Transactions (*the "Revised Recommendation"). The Convention was the first binding international instrument imposing criminal penalties on those bribing foreign public officials in order to obtain business deals and providing for surveillance through monitoring and evaluation by peers. The Revised Recommendation complements the Convention by its focus on deterrence and prevention of foreign bribery.

The OECD Working Group on Bribery in International Business Transactions (the "Working Group") is entrusted with the monitoring and follow-up of these instruments. The Working Group, chaired by Professor Mark Pieth, is composed of experts (government officials), from the 36 countries Parties to the Convention (see Appendix 4, section iv). These government experts developed a monitoring mechanism which requires all Parties to be examined according to a formal, systematic and detailed procedure including self-evaluation and mutual review. Its aim is to provide a tool for assessing the implementation and enforcement of the Convention and Recommendation.

In designing the monitoring mechanism, the Working Group was eager to respect the Convention's core principle of 'functional equivalence' under which the Parties seek to achieve a common goal while respecting the legal traditions and fundamental concepts of each country. Consequently, the Working Group examines each Party's anti-bribery provisions in light of its individual legal system.

Immediately after the Convention's entry into force in February 1999, the Working Group began conducting the first phase of monitoring to determine whether countries had adequately transposed the Convention in national law and what steps it has taken to implement the Revised Recommendation.

As the Working Group neared completion of this first phase, it moved progressively into a new and broadened monitoring phase. The second phase examines compliance and whether structures are in place to provide effective enforcement of the laws and rules necessary for implementing the Convention. The second phase also encompasses an extensive examination of the non-criminal law aspects of the 1997 Revised Recommendation.

The monitoring procedures developed for the Phase 1 and Phase 2 examinations are similar. For each country reviewed, a draft report is prepared which is submitted to a Working Group consultation. This report is based on information provided by the country under examination as well as information collected by the OECD Secretariat and two other countries who act as "lead examiners" either through independent research or, under Phase 2, through expert consultations during an on-site visit to the country examined. Consultations during on-site visits include discussions with representatives from various governmental departments as well as from regulatory authorities, the private sector, trade unions, civil society, academics, accounting and auditing bodies and law practitioners.

The outcome of the Working Group consultation is the adoption of the final country report, which contains an evaluation of the country's laws and practices to combat foreign bribery. Prior to issuing the final country report, the country under review has an opportunity to review the report and to comment on it. The country under review may express a dissenting opinion, which is then reflected in the final report, but cannot prevent adoption of the evaluation by the Working Group.

This Phase Two monitoring report of Norway describes the structures and the institutional mechanisms in place to enforce national legislation implementing the Convention and assesses the effectiveness of the measures to prevent, detect, investigate and criminalise the bribing of foreign public officials in international business transactions. Appendix 1 contains the evaluation made by the Working Group under the Phase 1. In Appendix 2, the reader will find extracts of the most relevant implementation laws and Appendix 3 contains suggestions for further reading. The *(i)* Convention, *(ii)* the Revised Recommendation, *(iii)* the Recommendation on the Tax Deductibility of Bribes and *(iv)* a list of Parties to the Convention are in Appendix 4.

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(*i*) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
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(iii) Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials

(iv) Parties to the Convention: Countries Having Ratified/Acceded to the Convention

The Foreign Bribery Offence: Application and Practice by Norway

Introduction[1]

The adoption by Norway of amendments to the Penal Code in 1998 to include the offence of active bribery of foreign public servants and servants of public international organisations (section 128) was a new step in Norway's continued commitment to combat more effectively bribery in international business transactions. As part of Norway's on-going process of reforms in this area, including the signing of the Council of Europe Criminal Law Convention on Corruption in 1999, amendments to Norway's anti-bribery legislation were subsequently introduced by Act №79 of 4 July 2003, which resulted in the complete reform of the existing set of provisions dealing with the offence of corruption at large, and their replacement by two new provisions criminalising active and passive bribery of domestic and foreign public officials, as well as private-to-private corruption in Norway and abroad (sections 276a for the basic offence and 276b for the aggravated offence) and one provision introducing the offence of trading in influence (section 276c).

Economic framework

Norway is a country with important natural resources such as oil and gas, hydropower, fish and timber. Despite intensive industrial and technological developments, these natural resources continue to be a main backbone of the productive structure of the economy and account for the bulk of Norwegian exports: Norway is one of the world's largest fish exporter, with 95 per cent of its production exported, and is the world third largest net exporter of oil and supplies approximately 10 per cent of natural gas consumption in Western Europe. Norway's trade flows are and have traditionally been dominated by trade with countries in the European Union (EU): roughly three quarters of Norwegian exports go the EU, and around 70 per cent of the stock of Norwegian outward direct investment is in EU countries.[1] In this respect, Norway's participation in the European Economic Area (EEA) Agreement between the countries of the European Free Trade Association (Iceland, Lichtenstein, and Norway) and the EU plays an important role. Under this agreement, Norway, along with other EFTA states, is an integral part of the EU's internal market (with the exception of fisheries and agriculture). Additionally, the EEA Agreement requires Norway to adopt all EU legislation considered relevant to the Agreement.

The petroleum industry, Norway's most important export sector, accounts for 44 per cent of Norway's export revenues, while the manufacturing industry, the second most important, accounts for 31.5 per cent of total exports. Oil and gas is mainly exported to Western Europe. In 2001 nearly 80 per cent of crude oil was exported to Europe, while North America was the second largest market with around 19 per cent, and Asia the smallest market with only 2 per cent. The Chinese market is also a growing market for

1. This report has been examined by the Working Group on Bribery in December 2003.

Norwegian oil: in 2001, nearly 86 per cent of the exported crude oil to Asia went to China, with exports to the country increasing by nearly 590 per cent from 2000 to 2001.[2]

Major Norwegian companies are today heavily involved in foreign markets. The petroleum company Statoil ASA is involved in 25 countries, notably in Africa, Asia, South America and Eastern Europe. Norsk Hydro ASA, which operates in the petroleum, aluminium and agriculture industries, is active in 60 countries worldwide. Telenor ASA, the major telecommunications company, has fully or partly owned companies in 16 countries; 40 per cent of the company's employees work abroad. In these three top companies, the Norwegian state is the largest shareholder. The fourth largest company, Kvaerner ASA, operating within the petroleum, engineering and construction, pulp and paper and shipbuilding industries, is active in 30 countries in Asia, Australia/Oceania, Europe, Middle East, North America and South America. A survey conducted by the Norwegian Institute for Research in Economics and Business Administration (SNF) in 1996 showed that the largest Norwegian companies had a total of 43 percent of their employees in subsidiaries abroad, the equivalent of approximately 40 per cent of those employed in manufacturing goods in Norway.

Norway's exports of manufacturing goods to developing countries, while significantly smaller than that to industrialised countries (70 per cent of exported goods went to European Union countries in 2001 and around 10 per cent to North America), is continuously increasing both in absolute value and as a proportion of total Norway's global trade. Asia has become the second largest export market for traditional commodities, accounting for 10.5 per cent in 2001, with Japan, South Korea, Singapore and China as Norway's most important export markets in the region. Increases in 2001 in exports were most significant to the following countries: Singapore, Thailand, Malaysia, China, South Korea, Iran, Nigeria, Panama, Mexico and Chile.[3]

Norwegian businesses involved in foreign direct investments (FDI) are also increasingly being exposed to sensitive business environments. Norwegian FDI in developing countries, while significantly smaller than in industrialised countries, has been steadily increasing since 1990. Europe remains the major destination for Norwegian FDI, as 68 per cent of investment takes place in EU countries. America is the second largest market. Countries that attract the largest proportion of investment, and account for 66 per cent of the total FDI, are the United States, Sweden, Denmark and the United Kingdom. Norwegian investments in Asia increased from NOK 1.0 billion (approximately 122 million euro) at the end of 1990 to NOK 7.3 billion (approximately 892 million euro) at the end of 1998. The Asian share was 3 per cent at the end of 1998. In Asia, India, Singapore and Thailand are important countries for Norwegian investments. 76 per cent of all investments are in mining and oil extraction, financial services and manufacturing. Surveys carried out by Norges Bank show that a major proportion of the FDI is concentrated in a limited number of foreign companies. Almost three quarters of the investments were concentrated in some 100 foreign companies.[4]

Corruption awareness

As in Nordic countries in general, domestic corruption and bribery are not viewed as significant concerns in Norwegian society. Transparency International's Corruption Perception Index for 2003 shows that Norway is perceived to be one of the least corrupt countries in the world.[5] The fact that there have been few court cases on corruption in Norway in the past 25 years, and even fewer relating to bribery of public officials in business transactions, would be a further confirmation for many that corruption does not

really exist in Norway, including among industrial leaders. Thus, until recently, the public did not often hear about problems of corruption or the efforts carried out to fight it.

This general view is reinforced by the strong focus on corporate social responsibility that exists in Norway. For instance, a survey carried out on behalf of the European Commission showed that Norwegian small and medium enterprises are among the best rated in Europe when it comes to corporate social responsibility.[6] The explanation lies, to some extent, on demands from consumers: a survey showed, for instance, that 75 per cent of Norwegian consumers appreciate a firm's sense of social responsibility.[7]

Other factors tend, however, to indicate that corruption is an issue which Norwegian companies, like their counterparts from other OECD countries, are confronted with. A survey carried out by Price Waterhouse Coopers in 1998 amongst top leaders of 95 major Norwegian companies revealed, for instance, that 10 per cent of them had been exposed to solicitations of bribery/grease payments, and that 60 per cent felt that corruption was necessary to get into markets or to win contracts in developing countries.[8]

Partly to counter this perception by Norwegian business, and taking into account increasing exports by Norwegian enterprises to sensitive markets over the last years, attention to the issue of corruption has intensified. This has been reinforced, following the signature by Norway of the OECD and Council of Europe conventions against bribery, by recent reports in the Norwegian media of cases of corruption implicating Norwegian companies. For instance, in September 2002, Norwegian newspapers reported that a major contracting company in Norway had been put under investigation by Økokrim (the National Authority of Investigation and Prosecution of Economic and Environmental Crime) due to suspicions of active bribery of a public official in Uganda.[9] In September 2003, following Norwegian newspaper reports, Økokrim began investigations of a major petroleum company on suspicion of corruption of a public official in Iran.

Media reports on bribery cases, as well as measures taken by public authorities and the private sector, are having an impact on the level of awareness of the risks confronting Norwegian companies. Norway has embarked upon a wide range of reform initiatives, with particular relevance in the fight against bribery of foreign public officials. Norway signed the Council of Europe's Criminal Law Convention on Corruption in 1999, and transposed it through Act №79 amending the Penal Code, which entered into force on 4 July 2003. In line with the revised money laundering directive of the European Union, a new Law on Money Laundering will enter into force in January 2004, lengthening the list of institutions and professions which are under the obligation to declare any suspicions of money laundering to law enforcement authorities.

At the time of the on-site visit, there had been no conviction for the foreign bribery offence since the Norwegian implementation law came into force in 1999. Three cases were being investigated, two under section 128 of the Penal Code and one under both section 128 and the new sections 276a and 276b, depending on the dates of the acts. To these figures, it is appropriate to add a conviction for the alternative offence of breach of trust which concerned acts of bribery of a foreign public official committed before the entry into force of the implementing legislation.

Methodology and structure of the report

In conformity with the procedure adopted by the OECD Working Group on Bribery for the second phase of self and mutual evaluation of implementation of the Convention

and the Revised Recommendation, the purpose of this examination is to study the structures in place in Norway to enforce laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor Norway's compliance in practice with the 1997 Recommendation. This Phase 2 report takes account of information obtained from Norway's responses to the Phase 2 questionnaires, interviews with government experts, company managers, lawyers, professional accountants and representatives of civil society during the on-site visit that took place on 7-10 September 2003, a review of all the relevant legislation, and independent research conducted by the lead examiners and the Secretariat.

The report is structured as follows: The first part focuses on the mechanisms in place for the prevention and detection of foreign official bribery, and discusses ways in which their effectiveness could be enhanced. The second part deals, in a similar manner, with the effectiveness of mechanisms for prosecuting and sanctioning the offence of foreign bribery and the related accounting and money-laundering offences. This part also includes a detailed examination of the most recent legislative amendments adopted by Norway to further comply with its international anti-bribery obligations and enhance efforts to fight corruption. The last part of the report sets forth the specific recommendations of the Working Group, based on its conclusions both as to prevention and detection, and as to prosecution and repression. It also identifies those matters which the Working Group considers should be followed up or further reviewed as part of the continuing monitoring effort.

Notes

1. Source: OECD.
2. Statistics from the Norwegian Foreign Trade 2001, Norwegian Trade Council.
3. Ibid.
4. Ibid.
5. Transparency International Corruption Perception Index (CPI) 2003.
6. Report 2002 / No. 4: European SMEs and Social and Environmental Responsibility.
7. Survey carried out by the Market and Media Institute AS (*Markeds og Mediainstituttet AS*).
8. Standpoint Corruption 2000, publication by the Confederation of Norwegian Business and Industry (NHO).
9. *Aftenposten*, 12 September 2002. The case has been dismissed after the on-site visit.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Prevention

At the time of the on-site visit of the examining team in Norway, both the Norwegian authorities and the private sector were carrying out a number of initiatives to raise awareness among Norwegian companies investing abroad, as well as among civil servants, in particular those primarily concerned with the detection, prosecution and sanctioning of the foreign bribery offence. In the public sector, an Interministerial Project Group on Combating Corruption and Money Laundering has been established to deal, notably, with dissemination of information on the issue of foreign bribery. The lead examiners were informed by the Norwegian authorities that the organisation of co-ordination efforts is currently being given careful consideration in connection with the on-going revision of the Governmental Action Plan against Economic Crime (see below), scheduled for spring 2004.

In the administration

Generally

There appears to be a general awareness throughout the administration that bribery of foreign public officials constitutes an offence in Norway. Moreover, awareness of international agreements, such as the OECD and the Council of Europe Conventions, and their consequences for Norway is rising as activities are increasingly undertaken by various government institutions to this end.

As concerns the institutions primarily concerned with the enforcement of the new legislation, they have been widely approached and their views solicited prior to adoption of the new legislation. This is a usual process in Norway whereby, when any legislation is being drafted, those institutions concerned with the subject matter of the law are systematically contacted to comment on the draft law. Thus, when the new penal provisions on corruption were being drafted (sections 276a, 276b, and 276c), the project was sent for comments to a broad array of institutions, ranging from the local first instance courts, appeals courts, and Norway Supreme Court, to Økokrim and other police directorates, competition authorities, banking supervisory bodies, and private sector representatives (see below). This has been an important instrument in allowing for broad awareness of those bodies primarily involved with law enforcement in Norway with respect to implementation of new legal provisions amending the Penal Code.

The lead examiners were also informed that an Interministerial Project Group on Combating Corruption and Money Laundering has been established since May 2002, under the joint initiative of the Ministry of Justice and Ministry of Foreign Affairs. As well as being involved in the drafting of the new penal provisions on corruption and new anti-money laundering legislation, the Group has as one of its tasks to raise awareness in the area of corruption; this has involved an important number of seminars and lectures aimed at various stakeholders, both in the public and private sectors. This task will be further enhanced when the Group takes responsibility for the revised plan of action for the government against economic crime, with corruption being given special attention. The first plan of action was adopted in 1992, and revised in 1995 under the responsibility of the Ministry of Justice and in 2000 by EMØK (interministerial group of senior government officials working on economic crime); a revised plan of action is due to come

out during the first quarter of 2004, and will include measures aimed at preventing bribery of foreign public officials.

Other measures include the publication of *Ethical Guidelines for the Government Service* by the Norwegian Ministry of Labour and Government Administration in spring 2004, which, the Norwegian authorities feel, will be an important tool in raising awareness of the new anti-bribery legislation in the public administration at large. Similarly, a booklet has been published by the Police Directorate on *Basic Values, Morals and Ethics – An Introduction to Ethical Codes for the Police Service,*[1] which includes ethical guidelines for police officers. A more focused handbook, specifically intended for tax inspectors, is also in preparation in the Ministry of Finance with the aim of heightening awareness in the profession on the many forms that fraudulent tax reporting may take. In the view of the lead examiners, this is a useful step forward to enhance the ability of the tax administration to detect instances of foreign bribery payments.

The Norwegian Trade Council (NTC), a foundation formed by the Norwegian state and the Norwegian Confederation of Business and Industry (NHO) to assist Norwegian business abroad, including through presence of the NTC in diplomatic missions, places great importance on behaviour of its staff in accordance with the values, norms and standards of the Norwegian state. NTC employees, when recruited and prior to being sent on assignments abroad, are informed about their obligations under the NTC mission statement. With specific regard to the issue of bribery, NTC employees are to "*discourage corruption in accordance with Norwegian law and international conventions, and […] will strive to be in the forefront of knowledge on corruption practices in various countries in order to be able to advise customers on why and how they should avoid corruption*". The NTC commits itself to providing specific information and training on this to their employees.

The Norwegian Agency for Development Co-operation (NORAD) appears, due to its focus on proper use of development aid, to have been particularly active in raising awareness of the offence of bribery of foreign public officials, notably through its Action Plan, and in cooperation with the Ministry of Foreign Affairs. The main goal of this Action Plan is to strengthen Norwegian assistance to partner countries' efforts to prevent and curb corruption within a context of good governance, through three main objectives: intensifying Norwegian assistance to good governance and the fight against corruption in partner countries; increasing awareness and knowledge of corruption prevention in the administration of aid in Norwegian-funded development co-operation; and establishing mechanisms for systematic collection, analysis and dissemination of experiences drawn from efforts at preventing and combating corruption.[2] This has notably involved informing personnel from diplomatic missions, in particular those located in developing countries, providing training courses to NORAD staff and embassy personnel on the OECD Convention, and establishing guidelines for NORAD personnel in charge of establishing bilateral aid contracts.

Development aid and export credits

NORAD has specifically developed an Action Plan with the aim of integrating the fight against corruption into all development co-operation. In connection with this plan, and in coordination with the Ministry of Foreign Affairs, the plan includes efforts to increase awareness, not only among Norwegian civil servants, but also in partner countries, notably developing countries. With respect specifically to bilateral aid agreements, NORAD stated that greater transparency is sought through systematic

publication of all NORAD agreements and information on their follow-up. Furthermore, all agreements since 2000 incorporate adequate clauses providing for prosecution in the event of corruption, and those not containing such clauses are to be renegotiated.[3] NORAD informed the examining team that, where occurrences of corruption are suspected, and following some investigation on their part, the agreements concerned may be terminated. Norwegian development aid being systematically untied, it is very rarely the case that Norwegian companies benefit from procurement contracts emanating from agreements between NORAD and partner countries. Nonetheless, NORAD clearly stated that, should Norwegian companies be suspected of corrupt practices in relation to bilateral aid agreements, NORAD employees would report to their director immediately, who would then refer such occurrences to the investigating team at Økokrim. Lead examiners were informed that no such situation has arisen to date.

With respect to export credits, a publication on bribery of foreign public officials has been distributed by the Norwegian Guarantee Institute for Export Credits (GIEK) to its clients. Additionally, applicants requesting official export credit support are systematically informed of the legal consequences of bribery in international business transactions and are required, prior to obtaining public support, to officially undertake, through a signed statement, to respect relevant provisions of the Norwegian Penal Code against bribery of Norwegian or foreign officials. The terms of the contract expressly state that an exporter found in breach of these rules would lose the right to compensation, and, if compensation had already been paid, the amount of the compensation would have to be reimbursed; the same applies to "assistants", should they act in violation of this prohibition.[4] The scope of the term "assistant" raised questions among lead examiners; according to the Norwegian authorities, this term is to be given wide interpretation. Representatives of GIEK were well aware of current discussions within the OECD on state responsibility regarding export credits. They appeared however unsure of how and when such sanctions should occur in practice. GIEK informed lead examiners that they felt they had very little power to find out whether the companies involved dealt in corrupt practices, as the credits are often granted to banking institutions rather than companies directly, and suggested that additional information and training may be necessary within GIEK to raise their capacity to detect corruption cases. Representatives of GIEK appeared unsure as to what channels were available to them to find out whether a company had been sanctioned for acts of bribery, or whether business secrecy would be an obstacle. Additionally, they admitted some lack of clarity in GIEK rules as to when the contract could be suspended depending on the trial process, or whether sentencing in the first instance, appeals or Supreme Court was necessary for suspension of the contract. As no such case has arisen to date, there was no concrete experience to build on. To remedy this lack of clarity, the Ministry of Trade and Industry, GIEK and the Norwegian Export Credit Agency (*Eksportfinans*) are in the process of elaborating guidelines, supplementing the regulations on export credits and specifically aimed at preventing corruption.

In the private sector

Large companies are increasingly aware of the adoption by Norway of the Council of Europe and OECD Conventions, ensuing amendments to the national legislation, and the potential sanctions they face if they are found in breach of these provisions. Thus, major Norwegian corporations made such changes in their internal rules. According to lawyers interviewed during the on-site visit, small and medium sized enterprises, on the other

hand, remain less conscious of these legislative changes and the ensuing criminalisation of bribe payments, and are mainly aware of the issue of non-tax deductibility of bribes.

While further efforts to raise awareness among the private sector may continue to be necessary, this is not to say that corruption is overlooked as an important issue among the Norwegian business community. A 2000 survey carried out by the Norwegian Confederation of Business and Industry (NHO) indicated that 80 per cent of the companies considered the fight against corruption was important for their company, although only 10 per cent of Norwegian companies were familiar with the OECD Convention, and only 2 per cent were familiar with the amendments made to Norwegian legislation following the signing of the Convention.[5] Representatives of the NHO interviewed during the on-site visit felt that public authorities in Norway had made many more efforts, notably in the past year, to publicise the implications of the ratification of international conventions by Norway for international business.

In a first instance, the Norwegian authorities, as they did with relevant public bodies, informed several private sector institutions of the upcoming changes in the Penal Code and requested them to provide comments to the draft Penal Code provisions on corruption. Those contacted included the NHO, several bar associations, the law faculty of major Norwegian universities, and various non-governmental organisations. Both prior to and following adoption of the new legislation, the Interministerial Group on Combating Corruption and Money Laundering has contributed to raising awareness in the private sector with seminars targeted at lawyers, law and business university students, journalism schools, as well as important auditing firms, and has taken part in public debate on corruption and economic crime.

The Anti-Corruption Team in Økokrim also contacted specific companies to inform them of the consequences of legal provisions governing foreign bribery. The lead examiners were informed that Økokrim has, in particular, targeted companies involved in public procurements abroad, operating in sectors which may be more sensitive to corruption (such as the energy or transport sector), or situated in geographically sensitive areas (such as the Norwegian border with Russia).

Where action by the Ministry of Foreign Affairs is concerned, seminars on corruption for staff in diplomatic missions abroad have been held, in cooperation with NORAD. Lead examiners were of the impression that further information efforts directed at the private sector could usefully be carried out. The Norwegian National Contact Point (NCP), situated within this Ministry and responsible for effective implementation of the OECD Guidelines for Multinational Enterprises, did not report discussing the issue of corruption with its business and trade union counterparts. Beyond the NCP, lead examiners felt that the Ministry of Foreign Affairs was uniquely placed to inform Norwegian enterprises wishing to invest abroad of potential situations of corruption and ways to face solicitation of bribes, notably through its diplomatic missions in foreign countries which are likely to be contacted by such companies; staff from the Norwegian Trade Council present in embassies could usefully assist in this respect. The Embassies could also play an important supportive role for Norwegian companies present abroad; representatives of several large Norwegian corporations stated that they would feel it useful to be able to turn to their embassy in cases where they feel, for instance, that they have been sidelined by less scrupulous competitors in bidding for public procurement. In answer to the lead examiners' concerns, representatives of the Norwegian Ministry of Foreign Affairs indicated their intention of developing awareness raising activities aimed both at their own staff and the private sector. These will include internal guidelines for

diplomatic staff that may be in a position to detect acts of bribery, and the publication, in cooperation with the Norwegian Trade Council, of an information brochure for enterprises. Additionally, the Norwegian Ministry of Foreign Affairs indicated that it was in the process of elaborating a white paper to be submitted to Parliament in 2004, which will also focus on strengthening ways to combat corruption through Norway's development cooperation.

To complement efforts by the national authorities and in order to raise the low level of awareness to the Council of Europe and OECD Conventions revealed by its 2000 survey, the NHO, in turn, has carried out a number of measures among its constituents. This has included seminars to discuss corruption situations facing Norwegian businesses and publications focusing on corporate social responsibility at large, and corruption in particular (such as "*Responsible Engagement*" and "*Standpoint Corruption*"). The lead examiners were also informed that further action is planned by the NHO, such as studies examining the perception of corruption on international markets and the costs incurred for businesses in terms of lost contracts, or the difficulties facing companies wishing to raise corruption cases legally abroad.

According to representatives of the NHO, such awareness raising efforts, as well as greater media attention to corruption cases, have brought a shift in Norwegian companies' position from wide-eyed innocence to realisation that they too, when conducting business abroad, can be faced with corruption situations. This change in behaviour was confirmed by representatives from large Norwegian companies who admitted that, while they may have preferred to ignore why or to whom certain payments were made on international markets when deductibility of bribes was allowed in the past,[6] they are now very cautious about tracking all company disbursements. Adoption by Norway of new legislative provisions to fight corruption, as well as ensuing information and training on the issue of bribery, has thus prompted Norwegian companies to establish new behavioural corporate patterns.

Many Norwegian businesses, including those interviewed during the on-site visit, have developed ethical principles in company codes of conduct or group policies. The four codes of conduct examined by the lead examiners all cover the issue of bribery, expressly stating that the offer of payments or other gifts to public officials is prohibited and detailing what should be considered a bribe. One of the codes refers specifically to the OECD Convention and quotes exact language from Article 1. The codes examined all provide for reporting procedures for employees, either directly to their supervisor or to a compliance officer, the head of internal audit, and, in one case, an ethics helpline established specifically for the purpose of providing advice or assistance with issues of an ethical nature and for reporting concerns. Additionally, most codes guarantee to employees who report such concerns in good faith protection against any professional sanction. These ethical principles are all accompanied by internal control mechanisms and specific bodies in charge of informing employees, providing relevant training and receiving reports.

However, in the view of the lead examiners, no matter how comprehensive and specific these ethical codes or charters may be with respect to bribery issues, they need to be accompanied not only by efficient internal control procedures, but also by strong commitment on the part of company management. Indeed, the recent case under investigation by Økokrim concerning irregular consultancy agreements signed by a Norwegian company, has shown the limits of such internal systems: in this specific instance, whistleblowers within the company first tried to raise the matter with senior

management, in keeping with internal procedures. When management failed to address their concerns, it was eventually through the press that this issue was raised.[7]

Whereas receiving bribes is considered not only legally but morally reprehensible in Norwegian society, several participants in the on-site visit indicated that the payment of bribes by companies conducting business abroad was considered somewhat more acceptable. Representatives of the legal profession underlined that whereas Norwegian companies would probably never volunteer to pay bribes on foreign markets, they would be more likely to accept if they felt that was the only way to carry out business in certain situations. These lawyers felt that, since the implementation of the new legislation prohibiting bribery of foreign public officials in international business transactions, the approach of Norwegian companies to bribe payments had evolved: where, prior to the new legislation, management preferred to ignore how certain funds were used in some foreign countries, they were now largely aware that the payment of bribes constitutes a criminal offence and that turning a blind eye to such practices could jeopardise both their reputation and their situation vis-à-vis the law. Nonetheless, according to lawyers interviewed, Norwegian companies may still seek to make such payments where they are solicited and feel that business can only be carried out in such a manner, while striving to remain within the boundaries of the new law by relying on the defence of facilitation payments. Indeed, the allowance for facilitation payments in the Norwegian legislation together with the notion of "impropriety" have been welcomed by corporate sector representatives interviewed by the lead examiners.

Commentary

The lead examiners congratulate the Norwegian government for their increased actions to raise awareness, in particular since 2002. They encourage Norwegian authorities to continue their efforts in this respect, notably through the establishment of the Interministerial Group as a coordinating body for corruption issues. They recommend that further and more proactive action to raise awareness in the corporate sector be taken by institutions such as GIEK, and the Ministry of Foreign Affairs (notably its diplomatic missions abroad), in view of their particularly important interaction with Norwegian enterprises involved abroad. These institutions should also further develop their internal procedures for dealing with foreign bribery cases in practice.

Detection

Across the board, over the past four years or so, allegations of violations of the anti-corruption legislation and other relevant laws have come to the attention of the Norwegian law enforcement authorities by a number of routes. Although no central mechanism exists for recording, tracking or compiling statistics about the initial complaints or who makes them, the Norwegian authorities indicated that sources of allegations include financial institutions, international organisations, public administrations such as the customs or tax administration, companies that have an internal audit process and have discovered suspicious payments, employees, external companies and persons (such as competitors or customers), and media reports. For instance, the latest case under investigation by Økokrim at the time of the on-site visit, concerning illegal influencing of foreign government officials and possible acts of corruption by a Norwegian company in the oil sector, came about in the wake of articles published first in a Swedish newspaper and then in the Norwegian media, allegedly based on reports by employees. This is reflected in the statements made by the representatives of Økokrim

during the on-site visit who regard employees of companies as one of the most efficient sources of information.

In public administrations

Public administrations may play a large part in contributing to the detection of bribery offences. Yet, to date, there is no general legal obligation in Norway for civil servants who become aware of potentially criminal activities to report these either to their superiors or to competent investigating and prosecuting authorities. While NORAD has, for instance, issued guidelines instructing its staff to report to their superior any offence or suspicious act which may come to their knowledge in the course of their work, this is not the case in most public administrations. Norwegian authorities informed the examining team that a general non-statutory principle of loyalty to the employer nonetheless exists, established through case law and legal theory, whereby public officials are obliged to report knowledge of serious misconduct to their superiors.

The legal situation remains unclear, however, for those civil servants who decide to go against the decision of a superior not to follow-up on such information, and who report directly either to investigating and prosecuting authorities, or to the media; these civil servants may risk administrative sanctions or dismissals by their employer, especially if it is later revealed that the suspicions were unfounded.[8] Representatives of the police expressed the view that public administration employees should be allowed to go to investigating authorities to report alleged offences, as the police is in a better position to evaluate the seriousness of alleged offences. The lead examiners were informed that the *Ethical Guidelines for the Government Service*, to be published by the Norwegian Ministry of Labour and Government Administration in spring 2004, will address this question and may shed some light on the issue, impact and modalities of revealing misconduct.

This being said, certain public administrations nonetheless play a role in the chain of public authorities leading to judicial proceedings. One of these is the Norwegian Customs and Excise, an administration with a potentially major role in detecting bribery offences, both at the national and international level. Under Chapter X of the Customs Act, Customs officials are implicitly required to report to law enforcement authorities, at the discretion of the Chief of the Customs District, suspicious activities they become aware of. The Customs Service cooperates extensively with the police and prosecution authorities, and reports regarding suspected criminal activity are made on a regular basis; such reports have been made on several occasions, concerning, for instance, affairs of fish exports to the EU or alcohol smuggling. Representatives of the Customs and Excise informed the examining team that they considered co-operation with Russian customs of great importance, in view of its land and sea borders with Norway, and that measures have been taken in order to establish border regulations, train Russian customs officers, and set up a common custom house. Co-operation also traditionally exists with other Scandinavian customs administrations. Further co-operation work to increase capability of customs administrations in the region will be on the agenda when Norway takes up chairmanship of the Task Force for Customs Co-operation of the Barents Euro-Arctic Council.

In the context of an overall trend in Norway aimed at improving the sources of detection of foreign bribery through a strengthening of co-operation between the different public institutions and the law enforcement authorities, the role of the Auditor General is in the process of being expanded with respect to detection of acts of bribery. The main

task of the Office of the Auditor General is to monitor that public assets are used and administered according to sound financial principles and in keeping with the decisions and intentions of Parliament. This includes monitoring of the management of the Norwegian state's proprietary interests in companies, banks etc., and reporting on this to Parliament. In a country where a number of the largest corporations are wholly or partially state-owned, the role of the Auditor General can thus be particularly important in the fight against bribery. While corporate control does not include a financial audit of the enterprise's accounts (this task being performed by chosen private-sector auditors), it does encompass all tests, examinations, and inquiries that the Office of the Auditor General considers necessary in order to be able to give a qualified opinion regarding the individual ministry's administration of the state's proprietary interests in companies. Furthermore, although corporate controls are not targeted at a specific individual enterprise, but focuses rather on attainment of policy targets and performance within a particular sector, they may entail an investigation within an enterprise, as a means to an end.[9]

To date, the Auditor General reported only to Parliament, with no legal right or obligation to contact prosecuting authorities in cases of suspected illegal transactions within a wholly or partially state-owned company. A draft law modifying this state of play, due to be approved by Parliament in the course of the first half of 2004, is underway, and would allow the Office of the Auditor General to report to the police suspicions of misconduct on the part of the companies it controls. Disclosure of such misconduct will however not be an obligation but will remain at the discretion of the Office of the Auditor General. This measure is welcomed by investigating and prosecuting authorities in Økokrim and other police districts as a helpful broadening of detection sources in the fight against bribery.

An interesting feature of the Norwegian system, and a useful tool which could be used to greater potential in detecting acts of bribery by Norwegian companies, is the Brønnøysund Register Centre, the Norwegian administrative agency responsible for national control and registration schemes for business and industry. One of the registers that the Centre is responsible for, the Register of Business Enterprises, includes information on all Norwegian and foreign business enterprises in Norway. This Register provides an overview of the financial structure of a business enterprise, up-to-date information about the various positions held, changes to shares in the capital, whether a business enterprise has been sent to the bankruptcy court for enforced dissolution or is undergoing liquidation proceedings, as well as a number of other matters. All enterprises operating business activities are obliged to register with the Register of Business Enterprises, and failure to report requested information regularly to the Register may result in sanctions ranging from penalty fees to dissolution of the enterprise in the most extreme cases. Police officers and prosecutors at Økokrim and in local police forces reported relying on this register on a regular basis to obtain exact and complete information on a company suspected of economic crime. Various other entities, such as law firms and media, also normally rely on these publicly accessible databases. While the Brønnøysund Register Centre does not have any legal obligation to forward to law enforcement authorities any suspicious report concerning a company, a mechanism has been set up to allow for monitoring, through subscription to an alert system, of certain information pertaining to enterprises. For instance, police forces specialised in dealing with economic crime could subscribe to this system in order to be alerted when repeated changes in an enterprise's external auditor occur, as such repeated changes may be, pursuant to duties established by Audit and Auditors Act, indications that the enterprise's

accounting practices are suspicious. Økokrim welcomed the setting up of such a system and informed the lead examiners that this would be a useful tool in proactive detection of corruption, which they would consider making use of.

By tax authorities

The Tax Administration can be a useful source of information on the offence of active bribery of foreign public officials. Indeed, pursuant to section 6-22 of the Tax Law of 26 March 1999, it is not permissible to deduct from taxable profits bribes and similar payments if they were made "in compensation for an inappropriate service."[10] Detection of the offence of foreign bribery may thus originate from tax inspectors when carrying out a tax inspection.

The Tax Administration, which is part of the Royal Ministry of Finance and Customs, comprises the Directorate of Taxes, 19 county tax offices, 18 tax collectors' offices, 435 local tax offices and population registration offices, and three central offices whose responsibility is to assess special business activities/trades or particular tax payer groups. Of the various structures operating within Norway's tax administration with responsibility for inspecting companies, the three central offices are especially well-placed for detecting the offence of active bribery of foreign public officials: the Central Office in charge of Taxation of Large-Sized Companies, whose task is to assess and control of large taxpayers, including companies which either have a high annual turnover, are engaged in activities in many municipalities, have substantial ties abroad or are organised as a group of companies, as well as shipping companies; the Central Office in charge of foreign tax affairs, which assesses foreign activities without permanent ties to Norway, foreign activities engaged on the Norwegian continental shelf or in onshore building and construction activities; and the Petroleum Tax Office, which assesses and controls pipeline companies.

When carrying out controls, the Tax Administration has at its disposal a number of tools, including the statutory requirement that a deduction must be claimed in income-tax returns. A study of such returns can help tax officials in detecting sums which are by definition suspicious; according to the Norwegian tax authorities interviewed by the team of examiners, tax officials pay special attention to entertainment allowances, invoices in respect of offshore subcontractors and cash payments. The Tax Administration also has the right to require production of documents from financial institutions and, pursuant to the Assessment Act, to access the accounts of companies that carry on business activity in Norway or on the Norwegian Continental Shelf.

Despite these potentially powerful tools to detect instances of bribery, reporting of such offences remained somewhat limited until recently, as tax inspectors were barred from disclosing fiscal information regarding suspected fraud, including suspected bribery transactions, to competent investigating and prosecuting authorities on their own initiative. The only way for law enforcement authorities to obtain tax related information was if an offence relating to tax fraud was tried before the courts, thus making the tax information a matter of public record. A step forward was taken in 1992 when Parliament authorised law enforcement authorities to request information in the course of investigation, if there is suspicion of a criminal act punishable with more than six months imprisonment, to fiscal authorities, although there was still no possibility for tax inspectors to alert authorities of their own initiative. By a letter to the Tax Directorate of 12 July 2002, the Ministry of Finance gave new directives as to when information on suspicions of criminal acts could be conveyed to the police and prosecution authorities.

Based on these directives, and following a debate in Parliament, the Tax Directorate issued guidelines, which explicitly allow tax authorities to disclose information when there is just cause for suspicion of criminal acts; with specific regard to serious cases of corruption, there will now be an obligation to report such cases to the police where there is just cause for suspicion. The interpretation to be given to the terms "just cause for suspicion" raised interrogations among lead examiners. The Norwegian authorities indicated that further, more specific guidelines are being developed by the Ministry of Finance, which will include specific comments and guidance on the terms of "just cause for suspicion". These guidelines will be accompanied by the Norwegian translation of the OECD handbook on the detection of bribery, in order to help tax inspectors identify operations which could cover suspicious transactions. This increased co-operation between tax and law enforcement authorities could well constitute an important step in maximising opportunities for detection of bribery offences, as tax fraud may often cover a broader range of criminal offences, including corruption. Indeed, during the on-site visit, the Ministry of Finance cited as an example a case involving breach of trust which had been uncovered as tax fraud by the tax administration.[11] The lead examiners were also informed of pending civil proceedings addressing the issue of tax deductibility when the briber was acquitted in criminal proceedings.

Commentary

The lead examiners welcome the overall trend of developing better co-operation between public institutions, such as the tax authorities or the Auditor General, and law enforcement authorities. They encourage Økokrim and economic units in police districts to make further use of these mechanisms, and to take full advantage of potentially available tools for proactive detection of bribery (such as the Brønnøysund registers). The lead examiners note, however, that there is, to date, no general reporting obligation in public administrations; they encourage the Norwegian government, in its current work of developing Ethical Guidelines for public officials, to include in these guidelines a description of steps that should be taken by public officials where credible allegations arise that a Norwegian company has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Norway.

In relation to money laundering cases

Section 317 of the Penal Code provides for the prosecution of the receiving or obtaining of any part of the proceeds of a criminal act, as well as aiding and abetting the securing of such proceeds for another person. This provision therefore forbids the laundering of money deriving from the active bribery of foreign public officials. Under the provision of this section, participation in such acts is punishable by a fine or a term of imprisonment not exceeding three years, and six years in the case of an "aggravated" offence. To facilitate the detection of money-laundering transactions, the law has established extensive obligations whereby the professions closest to the point at which such transactions occur are required to exercise vigilance. These obligations will be further expanded when the new money-laundering act approved by Parliament in 2003 enters into force in January 2004.

Pursuant to this legal framework, financial organisations and other professions must draw up and retain information regarding the identity of their clients for a period of five years when a business relationship is being established, in the case of transactions of NOK 100,000 or more, and when there is suspicion that the transaction is linked to the

proceeds of a criminal offence, irrespective of its size. In addition, financial organisations and other specified professions are under obligation to report details about transactions where there is a suspicion that they may be linked to a criminal offence. Wilful contravention of the provisions of the Financial Services Act or of the new Money Laundering Act may be punishable by fine, or under particularly aggravating circumstances, by imprisonment up to one year.

The scope of the reporting regime covers the whole banking and financial sector, the Central Bank of Norway, e-money companies, persons and undertakings operating activities consisting of the transfer of money or financial claims, investment firms, management companies for securities funds, insurance companies, pension funds, postal operators in connection with provision of postal services, securities registers, as well as other undertakings whose main activity is subject to items 2 to 12 and 14 of annex I to the second European anti-money laundering directive of 4 December 2001 relating to the taking up and pursuit of the business of credit institutions, including the provision of loans, stock broking, payment transmission, financial leasing, advisory services and other services associated with financial transactions and letting of safe deposit boxes.

An interesting feature of Norway's anti-money laundering system is that branches of banks and other mortgage credit institutions having their registered offices in another state within the European Economic Area (EEA) are also obliged to report suspicious transactions, pursuant to section 8 of Regulation of 2 May 1994. Pursuant to § 5 of Regulation of 22 September 1995, the same requirement applies to insurance companies registered in another EEA country which carry on insurance business in Norway. Branches of other kinds of foreign institutions may also be obliged to do so if the Norwegian authorities make this a condition for their business activity.

With the enactment of the new money-laundering act, the reporting system will also apply to state authorised and registered public accountants, authorised accountants, estate agents, housing associations that act as estate agents, insurance brokers, project brokers, currency brokers, lawyers, other persons who provide independent legal assistance on a professional or regular basis when they assist or act on behalf of clients in planning or carrying out financial transactions or such transactions concerning real property or movable property, and dealers in objects, including auctioneering firms, commission agents and the like, in connection with cash transactions of NOK 40000 (4,900 euros) or more or a corresponding amount in foreign currency. As there are no casinos in Norway, these are not listed as persons obligated to report under the money laundering act.

The Norwegian Financial Intelligence Unit situated in Økokrim has the authority to analyse, investigate and prosecute cases. Its task is to receive and analyse declarations of suspicion made by organisations required to do so by law and to launch an investigation when appropriate. In 2002, Økokrim received 1290 suspicious transaction reports about possible money-laundering activities, against 992 in 2001 and 788 in 1999.

At the time of the on-site visit, no potential cases of bribery of foreign public officials which were subject to investigation had been opened as a result of suspicious transaction reports to Økokrim, however. To explain this lack of cases, the representatives of Økokrim interviewed by the examining team pointed out that until the entry into force of the new money-laundering act in January 2004, pursuant to section 2-17 of the Financial Services Act, financial institutions and other professions were obliged to report only where there is suspicion of a criminal offence punishable by more than 6 months of imprisonment. In other words, a report is required for active bribery, but not for some forms of passive bribery. The representatives of Økokrim felt that financial institutions

found this distinction misleading and therefore decided not to report. In the view of the Norwegian authorities, the situation should change for the better in the near future as, under the new legislation, financial institutions and other specified professions will be under an obligation to report details about transactions where there is a suspicion that they may be linked to *any* criminal offence. Those institutions and professions, in implementing their new reporting duties, should be helped by the Kredittilsynet, Norway's Banking, Insurance and Securities Commission, which has issued extensive guidelines about the new legislation and mechanisms to be put in place in order to detect suspect activities.

Commentary

The lead examiners congratulate Norway for having extended the list of financial intermediaries and other professions subject to the obligation of reporting suspicious activities to Økokrim, which now includes further sectors such as chartered accountants, auditors and lawyers. This mechanism could be strengthened by introducing stricter detection standards.

Accounting and auditing professionals

Pursuant to the Auditing Act, all limited and unlimited companies, with the exception of certain small unlimited companies which are defined as those with revenue of less than NOK 40 million, a total of assets less than NOK 20 million and fewer than 50 employees, are subject to statutory audit. This includes all private and public limited companies, branches of foreign companies with total revenues of more than NOK 5 million, partnerships with revenues more than NOK 5 million or more than five partners,[12] and sole proprietors if assets exceed NOK 20 million or if they have more than 20 employees.

The Accounting Act, on the other hand, applies more broadly to all Norwegian companies, including individual enterprises with more than 20 employees or total assets of less than NOK 20 million. Accounting requirements under Norwegian law require, among other things, that enterprises must register transactions which are of importance to the size and composition of their assets, liabilities, income and expenses in an accounting system. The registration must include all information which is of importance to the preparation of the annual accounts and other financial reporting which follows from acts and regulations (statutory reporting). The accounting system must itemise all registered information which forms the basis for the amounts stated in statutory reporting. Pursuant to section 4-6 of the Accounting Act, accounts must be kept in line with good accounting practice;[13] Norway intends to introduce the "true and fair view" principle in the next amendment to the Accounting Act. Although the Norwegian Accounting Act does not expressly prohibit off-the-books or inadequately identified transactions, the recording of non-existent expenditures or the use of false documents, provisions in both the Penal Code (section 182) and the Accounting Act do cover falsified documents. The lead examiners noted, however, that sanctions for breach of accounting rules in the Penal Code (Section 286 stipulates imprisonment for up to 1 year or 3 years in aggravated cases) are substantially lower than sanctions according to the Accounting Act (Section 8-5 stipulates imprisonment for up to 3 years or 6 years in aggravated cases). This could lead to inconsistent law enforcement response.

Accounting records, including annual accounts, directors' report, auditors' report, vouchers, time sheets, business agreements, correspondence, etc. must be preserved in Norway for 10 years subsequent to the end of the financial year for possible inspection and control by relevant authorities, including law enforcement agencies and tax

authorities. Norway requires, with a few exceptions including one for small enterprises, that companies provide consolidated accounts if a parent company has a controlling interest in another company. In addition, subsidiary companies including foreign subsidiaries must follow the same accounting methodology as the parent (unless foreign laws require a different accounting methodology).

Audits are conducted in accordance with the Norwegian Act on Auditing and Auditors and auditing standards generally accepted in Norway. Auditing standards generally accepted in Norway require that auditors plan and perform the audit to obtain reasonable assurance as to whether the financial statements are free of material misstatements. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. To the extent required by law and auditing standards generally accepted in Norway, an audit also comprises a review of the management of the Company's financial affairs and its accounting and internal control systems.[14]

The duties of the auditor are to document the transaction including the separate documentation of factors indicating the possible existence of irregularities and errors. An auditor is required to point out in writing to management inadequacies within the accounting information for errors and defects in the organisation and control of assets, including any irregularities or errors that may cause misstatements in the annual accounts. If appropriate action is not taken, the auditor is obliged without delay to resign from his engagement as auditor pursuant to section 7-1 of the Act; the Act further provides that the auditor shall without undue delay inform the Register of Business Enterprises that the engagement has been terminated. Finally, pursuant to section 6-1 of the Act, an auditor who, in the course of an auditing assignment or other services, detects criminal transactions or simply suspects that a criminal act has been committed, may decide, regardless of professional secrecy, to inform law enforcement agencies.

Norwegian law lays down rules to preserve the independence of auditors in performing their duties. Consulting services that could be in conflict with the audit are prohibited. There is also a prohibition of excess fee dependency on a single client where that fee could influence decisions. In addition, a statutory auditor is prohibited from having any interest in a company he/she is assigned to audit. This interest is absolute, allowing for zero flexibility on this matter. The law however allows for others within an audit company to own or have a limited interest in the company provided that they do not own or control over 10 per cent of the shares or invested capital of the audit company.

To further guarantee the quality and independence of auditors' work, auditors, like accountants, are under the direct supervision of the Kredittilsynet, Norway's Banking, Insurance and Securities Commission. Kredittilsynet's supervisory role includes the approval of individuals and firms that may perform an audit (auditors must have theoretical training, three years of experience and passed an exam), provision of continuing professional education (auditors must take 105 hours of training seminars during 3 years), and regular verification that auditors' activities comply with laws and regulations and are conducted in an appropriate manner. To perform this task, regular on-site inspections are undertaken by a Kreddittilsynet's department which controls external accountants and auditors and has accounting and auditing experts who are familiar with accounting and auditing legislation and standards. Such inspections often lead to sanctions, including the withdrawal of an auditor's licence: between 1994 and 2002, a

total of 63 auditors had their licences withdrawn. In case of bankruptcy Kredittilsynet asks for previous opinions from the auditors and for auditors' reports. It verifies, among other things, whether the auditors discovered any errors or irregularities and whether the owner or board of directors were informed by the auditors.

Despite the potential for detecting business-related offences provided by Norway's accounting and auditing legislation, accountants and auditors apparently have played only a small role in helping law enforcement agencies such as Økokrim to detect instances of bribery or even accounting offences. At the time of the on-site visit, none of the foreign bribery cases under investigation had been opened as a result of reports by auditors to Økokrim. According to law enforcement representatives met during the on-site visit, tax auditors and liquidators have been so far the two main sources of information on accounting offences.

Under the Auditing Act, an auditor has an obligation only to report suspected illegal acts to the management or the owners of the company; however, if appropriate measures are not taken by management, auditors have a right (but not a duty) to disclose suspicions of such illegal acts to the police.[15] Lead examiners felt that this does not necessarily encourage external disclosure. One senior member of the accounting and auditing profession, recognising that the auditors' priority was understandably to preserve an open relationship with their clients, observed that, for that reason, a clear obligation to report suspected illegal acts to the police would help overcome the overcautious attitude of auditors in this respect. There was also uncertainty among representatives of the profession on how this issue is covered by the obligation of auditors to file suspicious transaction reports. Although, in the view of the Ministry of Justice, the provisions in the money laundering legislation would cover the majority of cases, the Ministry of Finance is nonetheless considering amending the Auditing Act to impose an obligation to report suspected illegal acts to the police, thus supplementing provisions in the new money-laundering legislation;[16] by letter of 8 October 2003, the Ministry of Finance has asked Kredittilsynet to consider this issue and report back.

In the opinion of the Ministry of Justice and representatives of the criminal system justice interviewed during the on-site visit, the situation could nevertheless change for the better in the near future since, under the new money-laundering act, accountants and auditors are now obliged to report details about transactions where there is a suspicion that they may be linked to *any* criminal offence. For its part, the agreement between Kredittilsynet and the Norwegian Institute of Public Accountants — the Den Norske Revisorforening (DnR) which is the self-regulatory professional association for accountants and auditors in Norway — on guidelines for coordinating control of auditors, effective since the beginning of 2003, should ensure greater auditor independence and objectivity since there will now be a requirement that all accountants with audit responsibility are to be controlled on five-year cycles.

Commentary

The lead examiners are of the opinion that the Norwegian legislation governing auditing and accounting could play a more active role in detecting the offence of active bribery of foreign public officials. Given the complex nature of bribery of foreign public officials, they recommend that Norway introduce measures to make accounting professionals more aware of the provisions on accounting and auditing standards of the OECD Convention through increased training which targets the detection and prevention of bribes. Norway could also introduce and promote more stringent detection regulations and practices, making auditors subject to a clearly

understood obligation to report to law enforcement authorities any suspect activity that would indicate an unlawful act of bribery.

Protection of whistleblowers

Complaints by corporate employees have increasingly been a source of allegations of violation of anti-bribery legislation in recent years. In fact, corporate employees are, according to representatives of Økokrim interviewed by the lead examiners, one of the main sources of reports to law enforcement authorities with respect to bribes or other economic crimes committed by companies. According to Transparency International representatives at the on-site visit, whistleblowers are however discouraged from reporting violations by the fact that, on the one hand, where the identity of the complainant is known, enforcement authorities cannot guarantee that it will not be disclosed during the course of an investigation or prosecution, and, on the other hand, that no specific safeguards exist in Norwegian law to protect employees who become aware of misconduct on the part of their employer and decide to report it to senior management, law enforcement authorities or the media. The trade union representative, however, did not consider protection of whistleblowers to be a major issue, as collective agreements may be used to cover such cases; the representative of the Confederation of Norwegian Business and Industry expressed his agreement in this respect.

Within the corporate sector, some initiatives have been taken to guarantee to employees reporting possible violations of the law that no sanctions will be taken against them (see above on companies' codes of conduct). However, this protection, often expressed in the company's code of conduct or ethical principles, usually only applies to reports made by the employee to a body within the company, and does not extend to reports made to law enforcement authorities or to the media. Additionally, in situations where the employer who is responsible for offering protection to an employee is simultaneously accused by the employee of wrongdoing, the effectiveness of these measures may be questionable.

Thus, in the view of the lead examiners, broader protection for whistleblowers, guaranteed by law, could usefully be developed. This is the position that has been expressed by the Government-appointed Commission on Freedom of Expression in its 1999 report, recommending that whistle blowing should be statutorily regulated. A representative of the Commission interviewed during the on-site visit indicated that, currently, employees wishing to report possible violations of the law that they may come across in the course of their work are faced with contradictory rights and obligations: freedom of speech and the duty of loyalty to the employer. He further stated that there have, in fact, been cases where whistleblowers have been sanctioned by their employer for reporting alleged offences, although never, to date, relating to bribery. To remedy this absence of legislation in the area of whistle blowing, the Commission on Freedom of Expression has issued a report proposing a range of measures, and most notably a recommendation to modify Article 100 of the Norwegian Constitution on freedom of speech. At the time of Norway's Phase 2 examination, it was yet unclear what would become of these proposals: recommendations by the Commission are with the Ministry of Justice; lead examiners were informed that the Ministry was currently working on a white paper on this matter, which is expected to be submitted to Parliament in the course of 2004. Additionally, the Norwegian authorities indicated that the Commission on Revision of the Working Environment Act is also considering whether whistleblowers should be offered statutory protection. Finally, the Council of Europe's Civil Law Convention on Corruption, which requires that signatories provide appropriate protection against

unjustified sanction for employees reporting suspected acts of corruption,[17] is currently being circulated for public comment in Norway, specifically on the issue of whistle blowing and the necessity to regulate this statutorily; the deadline for the submission of comments is 8 January 2004.

Commentary

In view of the fact that corporate employees are a significant source of detection for the bribery offence in Norway, the lead examiners encourage the Norwegian government to regulate statutorily the issue of whistle blowing, in order to guarantee sufficient protection to employees reporting possible violations of the law in good faith.

Notes

1. "*Grunnleggende verdier, moral og etikk. En innføring i etikk for ansatte i politi- og lensmannsetaten*".
2. In this latter regard, several publications on corruption have already been published by NORAD and have been made publicly available on their website (see http://www.norad.no).
3. Text of clause in form contracts for institutional cooperation required by NORAD from parties to a bilateral aid agreement:

   "*The Parties declare their commitment to counteract corrupt practices in the execution of the Contract. Further, the Parties commit themselves not to accept, either directly or indirectly, as an inducement or reward in relation to the execution of the Contract, any kind of offer, gift, payments or benefits, which would or could be construed as illegal or corrupt practice.*"
4. Text of statement required by GIEK from applicants requesting official export credit support:

   "*We undertake to respect the prohibition in Section 128 of the Norwegian Penal Code Section against bribery of Norwegian or foreign public servants or officials of intergovernmental organisations and agree that the guarantee coverage lapses if the obligation is not met. We confirm that in that case we will compensate GIEK for payments GIEK may have made to recipients of supplier credit guarantees, lender guarantees and bonds as well as associated cost and loss of interest. The same shall apply should our assistants act in violation of the prohibition and we knew or should have known this.*"

   Norwegian authorities informed the examining team that GIEK is in the process of modifying this statement to reflect changes in the Penal Code and refer to new articles 276a and 276b.
5. Standpoint Corruption 2000, publication by the NHO.
6. Deductibility of bribes was expressly prohibited in 1995.
7. Source: Aftenposten, 23 September 2003, "*Game over for Statoil's CEO*".
8. According to Norwegian authorities, prosecution, though possible in principle, would be highly unlikely, and has never occurred to date.
9. See the website of the Office of the Auditor General of Norway, http://www.riksrevisjonen.no.
10. Section 6-22 of the *"An expense will not be deductible if the payment is a compensation for an unlawful service in return, or if the payment is meant to achieve such service in return. The service in return will*

be unlawful either when it is inconsistent with general business ethics or administrative customs where it takes place or when it is inconsistent with general business ethics or administrative customs in Norway."
Tax Law of 26 March 1999 provides that:

11. This case involved the payment of provisions to a privately owned Swedish company.

12. Limited partnerships where the general partner is a legal entity with limited liability are always subject to statutory audit.

13. Court decisions have elaborated on this concept of "good accounting practice".

14. Amendments made in the area of internal control require that all institutions with assets under management for their own and their clients' account in excess of NOK 10 billion require internal auditing.

15. This obligation stems from the new anti-money laundering act of June 2003 which entered into force in January 2004.

16. Section 6-1 of the Auditing Act.

17. Article 9 of the Council of Europe's Civil Law Convention on Corruption provides that:

    "*Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.*"

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences

Since the entry into force of the implementing legislation in Norway in January 1999, there has been no conviction for bribery of a foreign public official. However, Norway has one conviction for acts of bribery of a foreign public official committed before the entry into force of the implementing legislation, under the alternative offence of breach of trust (the UNICEF case). Moreover, by the time of the on-site visit, Norway was investigating three cases of bribery of a foreign public official: two under former section 128 of the Penal Code and one under both section 128 and the new sections 276a and 276b, depending on the dates of the acts.

The 2002 UNICEF case, sanctioned under the offence of aggravated breach of trust (sections 275 and 276 of the Penal Code) as the illegal acts took place before the entry into force of the implementing legislation (1991-1996), was concerned with a Norwegian national having bribed a Norwegian official of UNICEF in Denmark to obtain UNICEF procurements. The official was sanctioned for aggravated breach of trust towards his employer (UNICEF in Denmark), and the Norwegian company's manager who had bribed him was convicted as his accomplice.[1]

One of the cases under investigation at the time of the on-site visit (the "Sweden case") involved four Norwegian citizens charged with bribing a Swedish public official (section 128), who on behalf of a certificate issuer, issued them inspection certificates for sailing ships for their private use. The case is scheduled for trial in 2004.[2] The second case under investigation at the time of the on-site visit concerned a Norwegian company, whose foreign subsidiary was suspected of having hired a consultancy company to facilitate bribes to Ugandan officials in relation to the construction of a hydropower dam, contrary to section 128 of the Penal Code.[3] The third case under investigation involved a consultancy agreement between a major Norwegian oil company and a foreign consultancy company. The oil company was investigated for violation of the provision on bribery and illegal influencing of foreign government officials. The investigation was launched in September 2003 under both the former section 128 for the alleged acts committed before 4 July 2003, and the new sections 276a and 276b for the alleged acts committed after this date.

Because of the extensive reforms made to the foreign bribery offence since the Phase1 report of Norway, this part of the Phase 2 report analyses the recent amendments to the foreign bribery offence before turning to actual experience in investigation and prosecution.

The 2003 amendments and the introduction of two new offences of bribery of a foreign public official

Up to 4 July 2003, active bribery of a domestic or foreign public official was covered by section 128 of the Penal Code,[4] together with threats against public officials. Passive bribery was provided for in other sections of the code (sections 112 to 114), and bribery in the private sector was covered by several specific provisions (section 405b of the Penal Code, sections 6 and 17 of the Marketing Control Act).

This set of provisions was completely modified by Act n°79 amending the Penal Code, adopted by Parliament on 10 June 2003, and which entered into force on

4 July 2003. The law amended the offences of corruption in the private sector, which had contained several shortcomings, as well as the offences of passive bribery of Norwegian public officials, where problems of interpretation and enforcement had been encountered.[5] Section 128 was not very frequently used either; the Norwegian authorities indicated that, generally speaking, there was a preference for using sections 275 and 276 on breach of trust where applicable, as these provisions carry more severe penalties and have more adequate statutes of limitation.[6]

With the 2003 amendments, section 128 is now limited to threats against public officials (including foreign public officials), and provisions on passive bribery and bribery in the private sector were repealed. Active and passive bribery of domestic or foreign public officials or private agents are now covered by the new section 276a,[7] gross or aggravated bribery by the new section 276b, and trading in influence by the new section 276c. The lead examiners noted that those provisions go beyond the requirements of the Convention in that they cover bribery in the private sector and trading in influence. The elements of the new offence of bribery are contained in section 276a. Section 276b contains a higher sanction for aggravated bribery and elements that may be taken into consideration in deciding whether the bribery is aggravated. The distinction between bribery and aggravated bribery always depends on the specific circumstances of a case. It entails differences in sanctions and procedure (statute of limitation, availability of specific investigative tools). As a consequence of this reform, the offence of active bribery of a foreign public official has changed both substantially, entailing numerous amendments to the elements of the offence, as well as formally because of the modernisation and simplification of the language of the Penal Code dated 1902 (see annex 1). All those amendments are commented in detail in the preparatory works to the 2003 Act. Some elements of the offence under section 276a are similar to the one under section 128, whereas other elements have been extensively modified. Finally, section 276b on aggravated bribery and section 276c on trading in influence constitute innovations in the Norwegian Penal Code.

The role of the preparatory works

The preparatory works to the 2003 amending Act (Ot.prp. nr. 78 (2002-2003)[8]) provide extensive explanations, clarifications and reasoning for the new sections 276a, 276b and 276c. The Norwegian authorities and lawyers interviewed during the on-site visit explained that, in accordance with Norwegian legal tradition, preparatory works go beyond merely giving explanations to the Parliament prior to the adoption of a new legislation, but also establish guidelines concerning the interpretation. Therefore explanatory reports are published and regarded as relevant sources of law.

A representative of the Ministry of Justice indicated that the law usually does not regulate everything in detail, further explanations being given in the preparatory works which may thus somewhat extend the wording of the law. However, as recalled by a judge, the penal law should be strictly applied, as a certain limit is nevertheless set by Article 96 of the Norwegian Constitution, which provides that "no one may be convicted except according to the law". The representative of the Ministry of Justice indicated that the only situation where a court would not rely on the preparatory works would be where these preparatory works have excessively stretched the provision. The courts are not obliged to refer to the preparatory works when resolving a problem of definition or interpretation. Nevertheless, courts attach importance to such documents, which are regarded as an expression of the will of the legislature, and a great number of the Supreme Court decisions refer to preparatory works. A judge indicated to the evaluating

team that, when deciding on a case, he would rely first on the provision under consideration, second on the interpretation already provided by the Supreme Court on this provision, and third on the preparatory works.

The Convention and its commentaries may also have interpretative weight. The Norwegian authorities indicated that pursuant to the "presumption principle" (*presumsjonsprinsippet*), national law is presumed to be in accordance with binding international instruments, except if the law clearly provides otherwise.[9] Here again this principle must be applied in accordance with the legality principle laid down in Article 96 of the Constitution. The Norwegian authorities consider that there will rarely be need for a judge to take the OECD Convention into account when trying a bribery case. In practice, a judge interviewed during the on-site visit considered that he and his colleagues would initially presume that the Norwegian law and preparatory works had fully implemented the relevant international conventions, especially as several judges were consulted at the drafting stage of the law and its preparatory works, and furthermore because the Convention has not been published in the law book (*Norges Lover*). However, the judge indicated that he could consult international law, and even optionally look at foreign decisions and the arguments retained therein.

Elements not affected by the 2003 amendments

The intentional element of the offence

Section 128 used the term "seeks to induce", which has not been retained in section 276a. Nevertheless bribery remains an intentional offence (see section 40(1) of the Penal Code).[10] General defences excluding the liability of a natural person are also applicable to bribery. Among them, insanity and unconsciousness, being under the age of criminal responsibility (15 years old), and self-defence have never been applied to bribery cases. The defence of persons and property from an unavoidable danger[11] cannot exempt a briber from sanctions, according to the Norwegian authorities. Also, in a case of bribery of an official of a Russian state-owned company by Norwegian companies, the argument of a general climate of corruption surrounding the activity was not taken into account by the judges as a defence. However, this general atmosphere of corruption, if not relevant in determining the culpability, could be taken into account as a mitigating circumstance in determining the level of the sanction. As concerns section 57 of the Penal Code providing a defence of ignorance of the illegal nature of the acts, a prosecutor indicated that this would certainly not cover a briber arguing that he thought the advantage given to a foreign public official to be legal, as the Norwegian law is clear on this point.[12]

Whether directly or through intermediaries

The issue of bribery through intermediaries is not explicitly incorporated into legal text (section 276a of the Penal Code, like the previous section 128). During Phase 1, Norway stated that a person bribing through intermediaries would be held directly liable and would be treated as being in direct breach of section 128. Similarly, during the on-site visit the Norwegian authorities referred to the preparatory works, which explain that, as concerns section 276a paragraph 2 dealing with the coverage of foreign public officials, "it has no significance for criminal liability if the active party to bribery uses another person, for example a person who resides in the passive party's home country, to carry out the act of bribery itself." In those instances in which an intermediary – unknowingly –

is used in connection with an act of bribery, this will have no effect as regards the assessment of criminal liability incurred by acts of the briber.

The issue of bribery through intermediaries under section 276a and the previous section 128 of the Penal Code has not been yet tested by the Norwegian courts: the issue has been so far considered in a corruption case only pursuant to section 276 of the Penal Code (gross breach of trust).[13] The lack of case law under section 276a and former section 128 of the penal Code, as well as the fact that the new penal provisions governing the offence of bribery had been introduced in Norwegian law only a couple of weeks before the on-site visit may explain why the coverage by section 276a of acts committed abroad by foreign companies under contract with Norwegian companies did not seem to be yet fully appreciated by some lawyers interviewed by the examining team at the time of the on-site visit. Indeed, some representatives of the legal profession were of the opinion that such a case could be covered by the new section 276c dealing with trading in influence, rather than by the sections on bribery. The treatment of the recent alleged case of bribery of an Iranian public official by the offshore consultancy[14] of a Norwegian company will certainly shed some light on this issue, as well as the on-going Sweden case in which the alleged bribers and the intermediary have been charged simultaneously under former section 128 of the Penal Code. The lead examiners are therefore confident that case law will soon confirm the Norwegian authorities' explanations; this should help solve the uncertainty that some practitioners might have as to the coverage of the offence.

For that official or for a third party

Neither former section 128 nor sections 276a or 276b specify whom the favour must be intended to benefit. A judge conceded that the wording of section 276a could raise questions, but that, given the preparatory works' clarity on this point, there should not be any problem in courts. However, the preparatory works adopt the same reasoning as the one presented by the Norwegian authorities during Phase 1.[15]

The preparatory works indicate that "punishment may be imposed even if the advantage is intended to benefit persons other than the passive party, cf. *'for himself or other persons'* in section 276a, first paragraph (a) [passive bribery] and the word *'anyone'* in section 276a, first paragraph (b) [active bribery]. The bribe may for example be deposited in an account held by a limited company or by a relative of the passive party. Even advantages donated to charitable organisations may constitute grounds for punishment pursuant to section 276a. In such cases, the recipient of the advantage may be punished for complicity in corruption if the act can be regarded as corruption owing to the manifest fault of the person concerned in relation to the actual circumstances."

The Working Group had concluded that it was unclear whether section 128 of the Penal Code also applies to cases where a third party receives the benefit and that it would be advisable to re-examine this issue in Phase 2 of the evaluation process to establish whether the actual practice reflects the intent in this regard. As there is no case law to date that confirms this point, either on the basis of section 128 or on the basis of section 276a, Norway, in the opinion of the lead examiners, should report to the Working Group when case law confirms this interpretation, especially in respect of cases where the bribe is directly transferred from the briber to a third party beneficiary.

In order to retain business or other improper advantage in the conduct of international business

As with the former section 128, section 276a does not address the "aim" of the bribery. The provision contains no requirement that bribery has any relation to national or international business. In Phase 1 the Norwegian authorities stated that pursuant to the principle that laws should be interpreted in accordance with the treaties by which Norway is bound, the courts would interpret section 128 so that it only covers bribes given in relation to international business. However, during Phase 2 the Norwegian authorities affirmed that this interpretation was no longer valid, first because in the Swedish case the Norwegian nationals are prosecuted for bribes given for a personal benefit, and second because the Council of Europe Convention that the 2003 Amending Act implements does not contain such a restriction. The offence is, in this sense, broader than required by the Convention.

Elements affected by the 2003 amendments

To offer, promise or give

Section 128 covered the actions of "granting or promising a favour". Section 276a, first paragraph (b) now provides for the punishment of a person who "gives or offers anyone an improper advantage". The preparatory works explain the terms "gives" and "offers" as follows:

- "The alternative *'gives'* constitutes the counterpart of 'receives' in section 276a, first paragraph (a). The Ministry finds that the commission of an offence by a person who gives anyone an improper advantage is completed at the same time as the other party – alternatively a third person or another legal person – receives the advantage." A representative of the Ministry of Justice indicated that in case the advantage is transferred but not received, a person may be convicted of the offence of attempt which may result in sanctions as severe as the completed offence.[16]
- "A person who *'offers'* anyone an improper advantage may also be punished pursuant to section 276a, first paragraph (b). A violation of this alternative will normally be completed when the offer comes to the attention of the other party. If the offer has been dispatched but has not yet been received by the addressee, punishment for attempted active bribery may nevertheless be appropriate. (…) The active party may also be punished even if he did not intend to follow up the offer by giving the passive party an improper advantage." According to the Norwegian authorities, the offer can take any form: letter, oral conversation, etc., as well as implicit offers.[17]

In the view of the lead examiners, these two interpretations introduce a difference between the new provisions and former section 128. As explained by the Norwegian authorities during phase 1, the stage of an attempt to bribe a domestic or foreign official was included in the offence,[18] and the offence was considered to have been committed irrespective of whether the bribe had become available to that public official.

Although the promise of a bribe is no longer expressly mentioned in the law, the preparatory works clearly state that the word "*promises*" has been intentionally omitted, as "the Ministry cannot see that the alternative "promises" would have any independent significance in a Norwegian penal provision against corruption in addition to the

alternative "*offers*"". In response to concerns expressed by the lead examiners about whether an offer would cover the situation where the briber agreed to a solicitation from the foreign public official (i.e. no offer is made per se by the briber),[19] the Norwegian authorities confirmed to the Working Group on bribery that "promise" is covered by the offence, because of both the preparatory works' clarification on this specific point and the presumption principle.

Any undue pecuniary or other advantage

Section 128 was directed at "a favour" while the new section 276a is directed at "an improper advantage". The preparatory works specify that the term "advantage" is intended to mean the same as the term "favour". The differing language is therefore not intended to affect application, but merely reflects the modernisation of a Code dating back to 1902. The only substantive difference is that, pursuant to section 276a, an advantage may only constitute grounds for punishment if it is "improper" (see below).

Neither section 128 nor section 276a specifies that the advantage may be pecuniary or non-pecuniary, but the Norwegian authorities reaffirmed that both are covered. This is confirmed by the preparatory works, which broadly define the term "advantage" as "everything that the passive party finds in his/her interest or can derive benefit from". The preparatory works further indicate that the advantage is not required to have an independent material value (unlike money or even services), as punishment for corruption may be appropriate in cases where the passive party is awarded an honour, is admitted to an association with restricted membership, receives sexual services or inside information concerning a limited company (which may have no intrinsic value, but which may be used when buying or selling shares), or where his/her child is accepted by a private school. To date, however, case law covers pecuniary advantages only including money in cash or in bank accounts (Supreme Court decision, 13 February 2001, breach of trust), a car, free trips and shares in a company (UNICEF case, Oslo District court judgement, 28 January 2002, breach of trust).

As concerns the notion of what is an "improper" advantage, the preparatory works contain an extensive explanation of what is proper and what is improper, citing examples and guidelines.[20] Because section 276a covers the offence of corruption at large (active and passive bribery of domestic and foreign public officials, as well as private-to-private corruption in Norway and abroad), it is recognised that the threshold for impropriety may vary from sphere to sphere, from enterprise to enterprise and from agency to agency. The preparatory works establish criteria for deciding whether an advantage is improper or not, including the purpose of the advantage, the openness between the employee and his/her principal (i.e. whether or not the principal is aware of the advantage received or offered), and the internal rules or contract applying to the passive side. None of these factors is decisive and all of the circumstances are to be considered on a case by case basis. As to facilitation payments, the Norwegian government confirmed that they are not allowed. The new law treats such payments in the same manner as other bribes: if a facilitation payment is considered improper, then criminal sanctions will apply. However, the lead examiners were concerned that this point was not sufficiently communicated to the business sector.

A police representative who participated in the on-site visit was confident that if the application of those guidelines appears difficult in practice, the Director of Public Prosecution would issue general instructions as to which cases should be prosecuted. The lead examiners welcomed Norway's explanations, but nevertheless expressed the view

that there is latitude for interpretation and that the issue should be followed-up as case law develops. Special attention should be drawn to Commentary 9 to the Convention on small facilitation payments and to Commentary 7, when applying section 276a to cases of active bribery of foreign public officials.

Definition of foreign public officials

References to foreign public officials were completely modified by the 2003 amendments. Section 128 covers "foreign public servants and servants of public international organisations". Section 276a now covers "anyone in connection with a post, office or commission in a foreign country". This fundamental change has been inserted with the aim to cover both public and private officials. In Phase 1, the Working Group decided to follow up the development of any case law in this regard in the context of the Phase 2 evaluation process, because the Norwegian Penal Code did not contain a definition of "foreign public official", and there was no case law supporting the Norwegian authorities' interpretation.[21] So far there has been no trial on the basis of section 128. In the Swedish case scheduled to be tried by the court in 2004, the prosecution authority was confident that the Swedish Maritime Inspector will be regarded as a foreign public servant for the purposes of applying section 128.

Although the preparatory works indicate that "the Ministry wishes it to be made clear that Norway complies with its obligations pursuant to the OECD Convention and the Council of Europe Convention in respect of acts of corruption committed by or against persons in all the posts, offices or commissions covered by the conventions", the terms "anyone in connection with a post, office or commission in a foreign country" in the new section 276a are quite different from the definition of foreign public officials set in article 1.4 of the Convention.[22] Posts, offices or commissions in Norway or in a foreign country are not further defined and the qualification as foreign public official seems to depend on the contractual link between the foreign person involved and his Administration (post, office or commission).

The preparatory works to section 276a also indicate that the reference to foreign countries was "not strictly necessary" but was included in respect of both active and passive corruption, as well as trading in influence, "to avoid uncertainty". In fact, the Ministry of Justice "wished to make it quite clear that the amendment is directed at corruption committed by or in relation to persons holding all the posts, offices and commissions affected by the Council of Europe Convention and the supplementary protocol."[23] For that reason, the coverage of public international organisations is implicit. The preparatory works indicate that the reference to posts, offices or commissions "in foreign countries" in the legislation clearly implies that acts of corruption committed in connection with posts, offices or commissions in both intergovernmental and other international organisations (such as the Red Cross and Amnesty International) are covered.[24] In the Ministry's view, this is why the decision was taken to omit the reference to public international organisations.

The Council of Europe Criminal Law Convention on Corruption does not provide for an autonomous definition, as it refers both to the definition in the law of the State of the public official, and to the domestic definition of the prosecuting State. As to the coverage of officials, pursuant to the preparatory works, "the provision covers corruption committed by or in relation to a number of groups of persons that fall outside the penal provisions that currently apply in relation to corruption. Any public employee who falls

outside the term 'public official' is also covered". The preparatory works further define the three concepts:

- "By corruption in connection with a '*post'* is meant act of corruption committed in connection with ordinary service and employment."
- "Through the alternative '*office',* the proposed amendment covers corruption committed by or in relation to persons with political office, board appointments or other positions of trust. It is not a requirement that the passive party to bribery receives remuneration for the position of trust, and it is immaterial whether the person concerned occupies the position by virtue of election or appointment. Elected officers in associations and organisations fall into this category, as do members of the Storting [Parliament], municipal councillors and other popularly elected representatives. Judges, lay judges, jury members and arbitrators are also included, although it may be more natural to say that an arbitrator has a 'commission' for the litigating parties."
- "Contractors also fall under the first paragraph, cf. the alternative '*commission'*. Section 276a may therefore be applied in cases where a lawyer, a consultant or an estate agent holding a single commission for an enterprise, an organisation or a public agency requests or receives improper advantages. Acts of corruption in contracts of extremely brief duration may also be punished pursuant to section 276a. An adjudicator during a sporting event who receives an improper advantage from a contestant or from a person who has staked money on a specific result may therefore be punished for corruption provided that the remaining conditions for criminal liability are fulfilled."

The Norwegian authorities highlighted that the absence of an autonomous definition of foreign public officials is compensated by the possibility to punish the briber, whatever the public or private status of the person corrupted, and thus this should not result in any difficulty before the courts. Moreover, the categories of persons listed in the preparatory works as covered by section 276a(1) seem to cover all the categories of "foreign public official" within the meaning of the OECD Convention.

Act or omission sought from the foreign public official

The link between the bribe and the act or omission from a foreign public official has been modified with the adoption of section 276a. Section 128 was directed at persons who seek to induce a public servant "illegally to perform or omit to perform an official act,"[25] whereas section 276a is now directed at persons who give or offer an improper advantage "in connection with a post, office or commission". It is explained in the preparatory works that conditions such as breach of duty or illegality have not been included in the new section 276a, as "it is sufficient that the bribery has taken place 'in connection with' the passive party's post, office or commission".

Both acts and omissions appear to be covered, even if this is not expressly mentioned in the provision, as the preparatory works specify that "the advantage normally involves a benefit provided in return for something that the passive party to the bribery will do or omit to do in connection with the performance of his duties in the post, office or commission". The preparatory works specify that the new provision against corruption "only affects advantages offered, requested or received 'in connection with' the post, office or commission of the passive party to bribery. This entails a required association

between the advantage and the post, office or commission." It is not specified, however, whether bribes given in order for the public official to perform acts that are not directly within his tasks are covered, as, for example, bribes given to a foreign public official so that he forges a document that he is not entitled to take. The Norwegian authorities consider that the provision on bribery would be applicable, even though the provision of trading in influence was also mentioned.

As to the exercise of discretion, the preparatory works provide that punishment pursuant to the new section 276a "may be imposed even if the passive party could not have acted otherwise within the framework of current legislation. However, characterisation of such acts as improper requires a stronger case than otherwise". The Norwegian authorities indicated that this means that evidence regarding the impropriety of the act must be stronger than if there is a breach of law (see the discussion on improper advantages and small facilitation payments). One limit mentioned is the distinction between the professional and private lives of the passive party, as the preparatory works indicate that "advantages offered, requested or received by the passive party as a private person are not associated with that person's post, office or commission and fall outside the scope of the provision."

The aggravated bribery offence

The elements of the offence of basic bribery must all be present for aggravated bribery to be applicable. The Norwegian authorities indicated that "whether an act of corruption is to be considered as aggravated or not, will depend on an overall evaluation." Paragraph 2 of section 276b gives indications of the elements that may be taken into account: "In deciding whether the corruption is aggravated, special regard shall *inter alia* be paid to whether the act has been committed by or in relation to a public official or any other person in breach of the special confidence placed in him as a consequence of his post, office or commission, whether it has resulted in a considerable economic advantage, whether there was a risk of significant economic or other damage or whether false accounting information has been recorded or false accounting documents or false annual accounts have been prepared".

The lead examiners were particularly interested in the notion of a public official having special confidence placed in him, and the definition that would be retained, as the preparatory works do not clarify this point. The Norwegian authorities unanimously consider that the public status of the passive party would not be decisive, a more important factor being whether the person concerned holds a position of special trust. Nevertheless, uncertainty remains as a prosecutor indicated that he would try to obtain relevant information abroad as to the position of the passive party, whereas a judge stated that he would not pay very much attention to the foreign law's definition of a public official.

However, the Norwegian authorities indicated that, as stated in the preparatory works, the decision to apply section 276b in a specific case depends upon a concrete assessment of the circumstances, and that the list in paragraph 2 contains only examples of elements to be taken into account. A prosecutor indicated that the distinction between basic and aggravated economic offence is an important legal tradition, and that this distinction with similar criteria also exists for other offences such as breach of trust, fraud, embezzlement or theft. A representative of the Ministry of Justice indicated that a usual threshold to distinguish between basic and aggravated offences is approximately 12,000 euros (NOK 100,000). For a bribery offence, this threshold will likely be applied to the amount of the bribe. As such, according to him, most situations covered by the Convention would

certainly be considered as aggravated cases. However, a representative from Økokrim indicated that if, for instance, a bribe was only 1,200 euros (NOK 10,000) but was directed at a judge, this would also be considered a case of aggravated bribery, as a judge has special trust placed in him/her.

Commentary

The lead examiners welcome the 2003 amendments to the offence of active bribery of foreign public officials, which are supported by extensive preparatory works which have important weight in the Norwegian legal tradition. As no definitive assessment on the effectiveness of such provisions can emerge until court interpretation develops, in particular as regards the notion of impropriety of the advantage they recommend that the Working Group follow up this question as case law develops.

The liability of enterprises with regard to the anti-bribery legislation and to Norwegian law in general

Norway introduced the concept of criminal liability for legal persons in 1991 (act of 20 July 1991 No 66), governed by a special discretionary prosecution. The liability is provided for in section 48a of the Penal Code, and rules for exercising discretionary prosecution, applying liability by the court and assessing the penalty are codified in section 48b. These sections apply to the criminal liability of Norwegian or foreign legal persons on account of bribery of Norwegian or foreign public officials introduced by the 2003 Amending Act, and previously covered by section 128.

At the time of Norway's evaluation under Phase 2, there had been no cases of domestic or foreign bribery in which a legal person had been charged with active bribery, nor money laundering. Similarly, no optional fines have been imposed (see the discussion under prosecutorial discretion). Prosecutors interviewed by the examining team indicated that the absence of prosecution of enterprises for the bribery offence after 1991 was not due to a lack of awareness – as it is considered that bribery is an offence for which the liability of the enterprise involved should be sought[26] – but to the particular circumstances or profiles of the cases involving companies and prosecuted since 1991. In one case, the company was liquidated at the time of the trial. In two cases, the briber was the sole manager and shareholder of the company, and the prosecutor therefore considered that it was not necessary to sanction the company in addition to the owner. As to the "Swedish case" which was scheduled for trial in 2004, only natural persons were prosecuted, as the bribe was not linked to the activities of the enterprise, but advantages for the bribers' personal use. In a last case, the Norwegian authorities have not indicated why the enterprise of the briber was not sanctioned, but mentioned that four foreign nationals have been charged, their prosecution being left to the responsibility of their national authorities (Haugland case, First instance decision 28 January 1999).

Yet, the lead examiners noted that an offence falling within the scope of Norway's anti-bribery legislation and involving a company that was being investigated at the time of Norway's examination: the investigation concerning Statoil was initiated against the company alone.

Thus, until specific cases of bribery have been tried by the courts, it is difficult to assess how courts will interpret the criminal responsibility of legal persons in relation to bribery. The lead examiners consequently discussed some aspects of the application in practice of the liability of legal persons set by section 48a of the Penal Code,[27] based on additional interpretations given by the Norwegian authorities during the on-site visit, and

on the few examples available from other areas of law: five cases of felonies have already been decided by the Supreme Court. Three ended with the conviction of the enterprises for offences to the environment and a purely economic offence (illegal price fixing). The other two dealt with intentional "ordinary" offences and have led to the acquittal of the newspaper enterprises. However, the Norwegian authorities indicated that acquittals of enterprises before courts are extremely rare.[28]

The criterion of guilt of a legal person is determined by examining the relevant offence. For instance, a newspaper has been acquitted for the offence of drug purchasing, as this was done for the purpose of drafting a series of articles, and not for drug consumption. Thus the court considered that applying liability to the newspaper would not serve any legal purpose, and considered that sometimes, in the interest of society, it was necessary for the media to document problems through acting on important societal issues, such as the sale and use of drugs (Supreme Court decision, 1 November 2001). By comparison, in cases of bribery of a foreign public official pursuant to section 276a, a person must have acted on behalf of an enterprise with the intent to induce anyone in connection with a post, office or commission.

As far as the Norwegian authorities know, no case law relates to conviction of a legal person where no natural person could be identified, but all the interlocutors interviewed at the on-site visit were convinced that this would not constitute a problem. Indeed, in the aforementioned case of drug purchasing by a newspaper, no individual could have been identified, which led to the prosecution of the newspaper itself.

Holding companies liable for the illegal activities of foreign subsidiaries is indeed important in the fight against transnational corruption, particularly in the case of companies which might be tempted to resort to "externalisation", i.e. setting up structures constituted under foreign law in which decision-making power and therefore responsibility are concentrated, so that they can continue to pay commissions to foreign officials without running the risk of being in breach of their domestic criminal law. According to the prosecutors interviewed by the examining team, nothing would prevent the prosecution of a Norwegian enterprise for acts committed by a foreign subsidiary, provided that the subsidiary acted on behalf of the company and that the managers knew or should have known about the offence. Authorisation or instigation would most likely be an aggravating circumstance.

As to entities subject to criminal liability, a fairly wide range is covered by the relevant provisions of the Penal Code: the criminal liability of "enterprises" is applicable to "a company, society or other association, one-man enterprise, foundation, estate or public activity". "One-man enterprise" represents a type of registered company, the owner of which is 100% liable for its obligations. A judge interviewed by lead examiners explained, however, that in this case the owner would normally be punished as a natural person and the enterprise would not be sanctioned. Although state-owned enterprises are not expressly covered, the Norwegian authorities indicated that the preparatory works state that these entities are covered. Moreover, the examining team was informed about a case where a public company accepted an optional fine. A recent case, in which the city of Oslo was convicted for breach of security norms resulting in a tramway accident, has also confirmed that the term "public activity" encompasses various departments of the public sector, irrespective of the organisational structure.

As to enterprises subject to a merger after an offence was committed, the Supreme Court has considered that it was of no relevance that, in an offence of illegal price fixing, one of the companies was merged into a parent company that had not taken part in the

illegal price fixing. Thus, enterprises cannot artificially escape sanctions using mergers. A prosecutor indicated that in the reverse situation, i.e. in cases where a company would split, it would be up to the prosecutor to determine which of the new companies to prosecute. As to the sanctioning of foreign enterprises for the commission of bribery, the Norwegian authorities were not aware of any foreign enterprise having been sanctioned in Norway. A prosecutor indicated that even if this was possible, law enforcement authorities would certainly encounter problems in practice.

The discretion to apply sanctions on legal persons

Section 48a of the Penal Code provides for discretionary liability of legal persons (“the enterprise *may* be liable to a penalty”) and section 48b prescribes the grounds that allow the court not to impose a penalty on legal persons at its discretion. Particular consideration is paid to the following grounds: a) the preventive effect of the penalty, b) the seriousness of the offence, c) whether the enterprise could have prevented the offence by guidelines, instruction, training, control or other measures, d) whether the offence has been committed in order to promote the interests of the enterprise, e) whether the enterprise has had or could have obtained any advantage by the offence, f) the enterprise's economic capacity, g) whether other sanctions have as a consequence of the offence been imposed on the enterprise or on any person who has acted on its behalf, including whether a penalty has been imposed on any individual person. The Norwegian authorities confirmed that this list is not limitative and that other factors can be taken into account, such as for instance the employee’s status or rank.

In practice, in the Supreme Court decision of 18 December 2000 (environmental offence, destruction of cultural heritage), the Court took into account factors listed in section 48b, such as the preventive effect of the sanction and the fact that the offence served the interests of the enterprise which received considerable earnings as a result of the acts committed, but also other factors, such as the central position in the enterprise of the manager responsible for the offence. As well, in the Supreme Court decision of 18 December 1995 (illegal price fixing), the Court took into account the fact that the offence served the interests of the enterprise, as well as the preventive effect of applying sanctions.

As concerns criterion (g) on other existing sanctions, the Norwegian authorities indicated that the sanctions imposed on the enterprise as a consequence of the offence could be tax fines and administrative sanctions. Additionally the conviction of the enterprise may not be requested by the prosecutor in cases, for instance, where the owner(s) or manager(s) of the enterprise are all personally sanctioned, as was the case in the UNICEF judgement. In these cases there is such a close link between the person and the enterprise that it may not be necessary to impose a fine on the enterprise. However, in the case of illegal price fixing, the managing directors of the companies were convicted together with the companies (Supreme Court, 18 December 1995).

In theory Norwegian law does not require the direct involvement of a leading person of the enterprise, thus the liability could be triggered by acts of a simple employee; this should however be linked to criterion (c) on existence of internal preventive rules. A prosecutor indicated that the existence of internal rules prohibiting the offering of bribes could prevent the sanction of the enterprise, provided that the management applied and monitored such rules. Similarly, some representatives of the law profession and companies indicated that, where such internal procedures lead to the discovery of a possible bribery, the company would investigate the case and inform the police. Such

action on the part of management could, in their opinion, prevent the company from being prosecuted together with the natural person.

Finally, the discretion lays both at the prosecutorial and court levels, as once the responsibility of the legal person is established the court may still decide not to sanction it (see the discussion under sanctioning of the bribery offence). Hence, in a decision dated 22 December 1998, the Supreme Court cancelled the acquittal by the Court of Appeal not because of the interpretation of the liability of legal persons in sections 48a and 48b, but because the preparatory works to the pollution act stated that "the main rule is that corporate punishment *should* apply when a violation of the law is established". The court discretion is thus reduced in those cases. In the view of the lead examiners, while sections 276a – 276c apply to all forms of bribery, the offences falling under the scope of the Convention would often warrant serious effort to punish the legal person(s) involved.

Commentary

Despite the existence of criminal liability of legal persons for 12 years in Norway, the lead examiners take note of the absence of prosecution of or optional fines imposed on legal persons for acts of active bribery, irrespective of legal qualification. They recommend revisiting this issue within a reasonable period to ascertain whether the offence of bribery of foreign public officials in international business transactions is effectively applied to legal persons.

Investigating and prosecuting the offence

Law enforcement agencies

Criminal investigation is instituted and carried out by the police. It may be instituted on the basis of a report or on the basis of intelligence, or other circumstances constituting "*reasonable grounds to inquire whether any criminal matter requiring prosecution by the public authorities subsists*".[29] Prosecution can be carried out either by the police prosecutors, at district level, or by the regional prosecutors. Økokrim, the unit in charge of investigating and prosecuting economic crimes, including bribery of foreign public officials, is a unit encompassing both the police and the prosecutorial authorities, with the Director of Økokrim holding the rank of both chief constable and chief public prosecutor.

The Norwegian Police Service has general responsibility for the prevention and investigation of crime. The Directorate of the Police (established in 2001), under responsibility of the Police Department of the Ministry, is the central authority for the police. The local Police Districts have been recently reorganised and their number brought down from 54 to 27. This reorganisation should allow for increased efficiency and establishment in all police districts of economic crime sections, with prosecutors, police investigators and investigators with specific experience in accounting or business administration. Prior to this reorganisation, economic crime sections were concentrated in the larger police districts only (such as Oslo, Vestfold and Kristiansand).

The formal rules concerning Økokrim are found in chapter 35 of the Official Prosecution Instructions. As Økokrim encompasses both police and prosecutorial authorities, it is under the joint responsibility of the Directorate of the Police and the Director of Public Prosecutions. Among Økokrim staff, there are several chief public prosecutors heading separate investigation teams, including anti-corruption and money-laundering teams. These investigation teams are multidisciplinary and include, together with one or two prosecutors, investigators with police experience as well as investigators with specific experience in business administration, auditing and accounting. The

Økokrim Anti-Corruption Team was set up in 1994, when the Ministry of Justice decided that Økokrim should have national responsibility in the fight against corruption.

Representatives of the economic sections of local police forces indicated that decisions to refer cases to Økokrim, in part or in whole, would depend on factors such as the dimensions of the investigation, the complexity of the case and its economic size, whether the case has ramifications to foreign countries, and the fundamental character of the case.[30] Local police forces do not however automatically refer important cases to Økokrim, and have been involved in investigating and prosecuting a number of serious economic offences, including cases of corruption. For instance, the case involving payment of bribes by Norwegians to a Swedish public official mentioned previously was investigated and prosecuted by the Oslo police. The ultimate responsibility in deciding if a case is to be handled by Økokrim or a local police district lies, in case of a dispute, with the Director of Public Prosecutions. To date, no such conflict has arisen, and all decisions in this regard have been taken by the Director of Økokrim; representatives of Økokrim explained to lead examiners that such a decision to take up a case from a local police district would be based on the perception that Økokrim is better equipped to deal with such cases. For instance, the ongoing investigation of the alleged bribery of Iranian officials by a Norwegian company is being carried out by the Anti-Corruption team at Økokrim, as had been done in the UNICEF case. Alternatively, Økokrim may not take up a case but choose to provide local police forces with their expertise on relevant issues, where necessary. Overall, Økokrim handles a small proportion of cases (approximately 1.4 per cent of all economic crimes), with the Oslo Police District handling between 50 and 65 per cent of cases regarding economic crime. Representatives from the Police Districts and Økokrim agreed that co-operation between the two institutions was usually highly satisfactory.

The major concern of the lead examiners with regard to the structures supporting investigation and prosecution work is the issue of resources, which may appear as a possible hindrance in the efficient investigation and prosecution of bribery offences. Within Police Districts, the problem lies in the allocation of resources: the representatives of two police districts met by the examining team indicated that, although all police districts are now obliged to set up economic crime units, it was often the case that human and financial resources from these economic crime units were reallocated to other units whose work was felt to be more urgent. One local police prosecutor indicated that the issue of sufficient resources is even more relevant when the case to be opened is expected to involve potentially lengthy and costly investigation abroad. For this reason, such cases are often referred to Økokrim. Additionally, the broadening of reporting obligations within public institutions (for tax inspectors or the Office of the Auditor General, for instance) and under new money-laundering legislation is likely to increase the number of alleged offences reported both to Police Districts and Økokrim, and, to date, no increase in resources appears to have been planned by the Norwegian government. In the view of the lead examiners, closer attention should be paid to the availability of sufficient human and financial resources for the effective prosecution of bribery offences, as a growing dismissal of cases, as noted by one of the companies interviewed during the on-site visit, could undermine the deterrent effect of the harsher sanctions introduced by the new legislation (see below), and cause a decrease in reports, notably from the private sector. Norwegian authorities informed the examining team that ongoing work to address issues of resources, organisation and training in relation to economic crime will be addressed in the Governmental Action Plan against Economic Crime.

Means of investigation

Investigating tools

There are no specific provisions concerning investigative techniques in corruption cases in Norway's criminal procedure law. Therefore, the ordinary provisions regarding the investigation of criminal cases apply, as provided for under the Criminal Procedure Act. The range of investigative tools available include possibilities of arrest and remand in custody, search and seizure and concealed search and seizure, interception of communications, administration of the property of the person charged, ban on visits, tracing devices, undercover agents etc. Different investigating tools are however available depending on the seriousness of the offence, this seriousness being determined according to the sanctions provided for under the relevant Penal Code sections. Before the entry into force of the anti-corruption amendments to the Penal Code in July 2003, the full range of investigative tools could only be used when investigating bribery offences under the offence of aggravated breach of trust (Penal Code, section 276), since corruption offences as defined under section 128 only provided for a maximum of one year imprisonment.

With the introduction of the amendments to the Penal Code pertaining to corruption, the range of investigative tools available to law enforcement authorities when investigating alleged corruption cases have been broadened. Thus, whereas investigations of cases of basic corruption, which are punishable by up to three years' imprisonment (section 276a), only allow for the use of a limited range of investigative tools, investigations of cases of aggravated corruption, with penalties of up to ten years' imprisonment (section 276b), allow for the use of the full range of available investigative tools. Most notably, interception of telecommunications, which is not available for basic corruption, can be used when investigating cases of alleged aggravated corruption (Criminal Procedure Act, section 216a). Furthermore, broader possibilities are available to law enforcement authorities with respect to arrest and remand in custody (Criminal Procedure Act, section 172), as well as search and seizure (Criminal Procedure Act, section 194).

The lead examiners raised concerns regarding possibilities of using special investigative tools at the beginning of an investigation, when it may still be unclear whether a case will involve an offence of basic or aggravated corruption. In response to these concerns, representatives of the prosecution authority and a judge interviewed during the onsite visit explained that, when wishing to use special investigative tools available only under the offence of aggravated corruption, a request must be presented before the courts. If that request was granted, the evidence obtained through these special tools would be considered admissible in court in relation to that conduct, even if the offence were to be subsequently reclassified (either at the prosecution or trial stage) as basic corruption.

There was some concern on the part of lead examiners with certain provisions in the Criminal Procedure Act which may not comply with Article 5 of the OECD Convention. Section 117 of the Criminal Procedure Act provides, for instance, that evidence can be kept secret if it is in the interest of relations with a foreign state, and sections 124 and 204 allow for refusing testimony or the seizure of documents involving business or industry secrets. Representatives of Økokrim and Police Districts as well as magistrates explained that these provisions had not, to date, been used in bribery cases, and, with respect to section 117, could not recall any situation when this provision had been successfully invoked. With respect specifically to section 204, the lead examiners were informed that,

should a suspect claim that the documents to be seized by the police contained business secrets, these documents would nonetheless be seized, but would need to be sealed and submitted to a judge who would be responsible for deciding whether to accept these documents as evidence. On one occasion this requirement resulted in the termination of a case. This interpretation was corroborated by representatives of the legal profession interviewed during the onsite visit. Additional case law will provide further confirmation that such provisions will not be used to undermine effective prosecution and sanctioning of bribery offences.

Witness protection

The Norwegian legislation also provides for protection of witnesses. The use of anonymous witnesses before the court is regulated under section 130a of the Criminal Procedure Act, while the use of anonymous police sources and anonymous police questionings is regulated under section 234a. These provisions were recently introduced into the Criminal Procedure Act by Act No. 73 of 28 July 2000, which came into force on 1 August 2001. Additionally, national guidelines have been developed in 2002, providing for measures such as changing of identity, change of residence and alarms for use in cases of threats or incidents of violence.

These provisions or guidelines on protection of witnesses are not, however, applicable in corruption cases. When consulted on the draft legislation, Økokrim stated that, in their view, corruption cases, especially those relating to public officials, would be typical cases where there may be a great need for use of anonymous witnesses. The Ministry of Justice's decision, at this point, was to restrict application of these provisions to a limited number of offences, leaving open possibilities to apply these provisions more broadly after having seen how sections 130a and 234a will be used in practice.[31]

Representatives of Økokrim interviewed during the on-site visit reiterated the importance of making witness protection provisions available in corruption cases. They welcomed recent changes allowing them, as a first step, to deny access to defence counsels to parts of documents which could reveal a witness's identity, provided such information was not used by the prosecution as evidence in Court.[32] Section 242a is only applicable in cases regarding crimes that according to law can lead to more than 5 years of imprisonment. With this exception of availability of witness protection, representatives of Økokrim and economic units of the Police Districts expressed overall satisfaction at the array of investigative tools available to them in investigating corruption cases. They stated that the main issue now lay not in obtaining additional tools, but essentially in getting investigators to use them.

Commentary

The lead examiners note the high level of expertise and competence in Økokrim and economic sections of police districts. Nonetheless, in view of possible problems in allocation of resources within police districts and the overall broadening of sources of detection, they suggest that due attention continue to be paid to the issue of financial and human resources in order to retain the ability to carry out international investigations and secure cooperative attitude of private sector. Lead examiners were satisfied with the broad range of investigative tools available, notably for aggravated corruption, and encourage their broader use where appropriate. They recommend that availability of witness protection programmes be extended to bribery cases.

International co-operation

Participants interviewed by the examining team recognised the vital role of international cooperation in securing evidence of transnational economic crime and, in particular, the bribery of foreign public officials. Tracing the flow of money abroad, and, in some circumstances, extradition of the accused, are necessary measures in many cases of this type and Norway has received and sent several requests for mutual legal assistance (MLA) concerning foreign bribery cases. For instance, Norway has received two requests for MLA for the bribery of a foreign public official, one from Uganda and one from Finland, since the entry into force of the Convention. No request for extradition has neither yet been made nor received. The UNICEF case, prosecuted before the transnational bribery offence entered into force, involved 50 letters rogatory to 14 European and North American countries.

In the Finnish case, Økokrim received a request for MLA directly from the Finnish criminal police regarding an alleged aggravated bribery of officials of the Finnish Maritime Administration by a Norwegian company. Økokrim assisted Finnish police in interrogating the representative of the Norwegian company and in collecting documentation from the Norwegian company, banks and credit card companies through ordering disclosure. In the Uganda case, co-operation has involved the exchange of information/documents, interviews of witnesses as well as the presence of Ugandan investigators in Oslo.

The Norwegian authorities did not mention any impediment to cooperation in these two cases. There are no time limits to respond to an extradition or MLA request, but the Norwegian authorities indicate that they always attempt to reply promptly. As a requesting country, Norway sent two requests for MLA regarding the bribery of a foreign public official and received a reply almost immediately, largely due to good communication with the authorities in the OECD requested country. However, Norway reported the usual problems of lengthy replies and procedural complications when requesting MLA.

The authority acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance between State parties to the OECD Convention, is the corruption unit at Økokrim. Special rules also apply in the framework of the Schengen Agreement and Nordic cooperation.[33] For countries outside these three networks – and whether or not Norway has a MLA agreement with that country[34] – requests are received and made first through the Ministry of Justice or diplomatic channels, with subsequent contacts directly with Økokrim. Similarly, both incoming and outgoing requests for extradition shall, as a main rule, be sent through the Ministry of Justice.[35]

Concerning the extradition of nationals, in the Finnish case, the Norwegian authorities decided to wait for the outcome of the Finnish investigation before launching investigations in Norway.[36] This is because the acts took place before the entry into force of the offence of bribery of a foreign public official and some other offences would have been statute-barred. In any case, section 2 of the Extradition Act forbids the extradition of Norwegian nationals (except to other Nordic countries), so in similar cases in the future, the lead examiners are of the opinion that Norway should not wait for the results of the foreign investigation before launching its own investigation for two reasons: (i) the statute of limitation is not interrupted by investigations abroad, and (ii) article 10.3 of the Convention requires that “a Party which declines a request to extradite a person for

bribery of a foreign public official solely on the grounds that the person is its national shall submit the case to its competent authorities for the purpose of prosecution."

Prosecution

Prosecutorial discretion

Investigation and prosecution of offences of bribery of foreign public officials follow the general rules for criminal investigation and prosecution. The prosecuting authority is headed by the Director of Public Prosecutions, who has supreme national responsibility for the public prosecution. At the time of the on-site visit in Norway, there were, under the responsibility of the Director of Public Prosecutions, ten regional prosecutors (also referred to as public prosecutors), and police prosecutors in the 27 local police districts. The King in Council (i.e. the whole cabinet of ministers) may provide general directives to the prosecuting authority, but can not interfere in individual cases.[37] The prosecuting authority retains discretion to initiate, suspend and terminate an investigation or prosecution.[38] An investigation can be initiated where there are reasonable grounds to inquire whether a crime has been committed, and normally will be terminated or suspended where there is a lack of sufficient proof to indict.

Decisions of the prosecuting authority not to prosecute can be appealed by way of complaint to the immediately superior prosecuting authority by persons presenting a legal interest.[39] According to the Director of Public Prosecutions, the courts would have much discretion in appreciating the scope of persons with a legal interest, which would include, for instance, persons who reported the offence. To date, there is no case law providing indication of how broadly a legal interest would be appreciated in bribery cases, and especially in cases of foreign bribery.

To complement provisions in the Criminal Procedure Act relating to prosecutorial discretion, several instructions and guidelines have been issued by the Director of Public Prosecutions. Prosecutors interviewed during the on-site visit indicated that, although serious economic crimes have been a long standing priority, to date, no instructions had been circulated concerning the specific investigation and prosecution of foreign bribery offences, but that they expect such instructions will be issued at a later stage.

With respect to reasons justifying decisions not to prosecute, the lead examiners expressed some concern regarding certain sections of the Criminal Procedure Act which appear to provide for broad prosecutorial discretion in certain situations, possibly contradicting the provisions under Article 5 of the OECD Convention. Discussions with prosecutorial authorities, magistrates and lawyers during the on-site visit, as well as case law, do indicate, however, that these provisions are very seldom used in practice. For instance, section 69 of the Criminal Procedure Act provides that prosecution may be waived if there are "weighty reasons" for not prosecuting the act; although broadly written, the use of this provision has declined over the years in Norwegian case law, has never been applied in corruption cases, and is only used for elderly or young offenders in minor matters. Similarly, section 64 provides that an authorisation from the King is necessary to prosecute officials appointed by him; however, it has never been refused in practice. Representatives of both the prosecution and private legal counsel confirmed that the existence of such provisions has not been an impediment in prosecuting corruption offences and economic crime at large.

Pre-trial optional fine or confiscation

Another application of Norway's prosecutorial discretion principles is the possibility for the prosecutor to propose to the accused, if the case is simple and constitutes a minor violation of the law, a pre-trial fine or confiscation, or both, in lieu of an indictment.[40] Section 255 of the Criminal Procedure Act provides the prosecuting authority with the power to issue a writ giving an option to this effect in lieu of an indictment. The writ may also provide that the person charged will financially compensate the victim, as well as costs to the State. There is no upper financial limit for the optional fine in Norway, but imprisonment is not possible under these provisions. If the person charged accepts the optional fine or confiscation, he endorses the writ. Acceptance of the option has the effect of a judgement.

This option tends to be used on a regular basis in Norway in cases where guilt of the person charged is clearly established, and a quick procedure is in the interest of all parties. In 2002, the prosecuting authority in Økokrim issued a writ for an optional fine in over 50 per cent of prosecuted cases. With respect to legal persons, out of the 1516 fines imposed between 1997 and 2002, over 94 per cent constituted optional fines. These optional fines were accepted by the charged individuals or companies in approximately 97 per cent of cases, representing nearly 60 per cent of all final decisions following prosecution by Økokrim.[41] The Norwegian authorities indicated that optional fines are often higher than fines imposed by courts. Thus, they expressed the view that these figures indicate that companies will often be prepared to accept a fine, rather than have a full hearing in court, not because they hope to be less severely sanctioned, but because of the risk to their reputation that a court case may involve, due to, for instance, media attention. Similarly, a defence lawyer interviewed by the lead examiners indicated that a company will usually prefer an out of court settlement through an optional fine (even a high one) in cases where the alleged offence committed by the company has not been published in the media, as there are high expectations of social responsibility of companies in Norway; if, on the other hand, the allegations have already been made public, then the company will tend to prefer a full hearing in court to ensure that its defence arguments are also made public. As concerns the level of fines, information was not provided comparing the fines imposed under the pre-trial procedure and the courts.

An extended statute of limitations

Until the July 2003 law amending the Penal Code provisions on bribery, the statute of limitation on public proceedings for the offence of active bribery of a foreign public official was of 2 years. It has been modified with the enactment of the new sections 276a and 276b, increasing to 5 and 10 years respectively, for both natural and legal persons.[42] At the time of the Phase 1 evaluation of Norway, the Working Group noted that the two-year limitation period in Norway for bribery of foreign public officials under section 128 did not comply with article 6 of the Convention, which requires that there be an adequate period of time for investigation and prosecution. At that time Norway had assured the Working Group that a proposal to increase the statute of limitations would be presented to Parliament (via an increase of the sanctions). All experts interviewed during the on-site visit admitted that the short statute of limitations was one of the reasons why the offence of breach of trust had been used to cover acts of bribery, as the limitation period is 5 years for breach of trust (section 275) and 10 years for aggravated breach of trust (section 276). In the past, Norway also had to renounce prosecution of Norwegian nationals for bribery committed abroad, because knowledge of the offence had occurred 5 years after its commission.[43]

The different statutory periods for basic bribery and aggravated bribery gave the examining team cause for some concern however. This difference can indeed be particularly acute, where the acts of bribery are discovered five to ten years after the acts have ceased. In such case, the offence of basic bribery would be time-barred (section 276a) but not the offence of aggravated bribery (section 276b). In such a situation if the prosecutor indicts the briber for aggravated bribery, but at the trial the judges consider that only basic bribery has been committed, the facts are statute-barred and no conviction is possible. Thus, the law enforcement authorities must assess beforehand whether the case is serious enough to be prosecuted as an aggravated bribery offence or close the case. In the view of the lead examiners, this practical threshold of about 12,000 euros for aggravated economic offences, would most likely provide the Norwegian authorities with sufficient certainty in their investigation and prosecution of bribery cases.

The fact that "the running of the period of limitation is interrupted by any legal proceeding entailing that the suspect is given the status of a person charged" (Section 69(1) of the Penal Code) raised questions from the examining team, as a mere investigation does not interrupt the statute of limitations, nor does a charge in a foreign country, even if this did not result so far in the non-prosecution of a case of bribery. As to legal persons, section 69(2), which provides that "If the running of the period of limitation is interrupted in relation to any person who has acted on behalf of an enterprise, such interruption also applies to the enterprise", raised concerns that the offence may become statute-barred after investigations started, because of the inability of the law enforcement authorities to identify an individual responsible for the acts within the enterprise. In response to these specific concerns, the lead examiners were told by representatives of the Ministry of Justice that, although this issue has not yet been answered by case law, if no natural person could be identified, charges against the legal person itself would interrupt the statute of limitations.

The statute of limitations for the enforcement of fines and for confiscation has not been modified by the offences introduced in 2003.[44] However, it was modified as to imprisonment sentences: pursuant to section 71, the period of limitation depends on the length of the sentence. Thus two different statutes of limitations can apply to basic bribery and four different statutes of limitations can apply to aggravated bribery, depending on the sentence[45]: "A custodial sentence shall cease to apply after the expiry of the following periods of limitation: 5 years for imprisonment for a term not exceeding one year, (basic or aggravated bribery); 10 years for imprisonment for a term exceeding one year but not exceeding four years (basic or aggravated bribery); 15 years for imprisonment for a term exceeding four years but not exceeding eight years (aggravated bribery); 20 years for imprisonment for a specified period exceeding eight years but not exceeding 20 years (aggravated bribery) (…)".

Commentary

The lead examiners welcome the extension of the statute of limitations for the offences of active bribery of a foreign public official, as recommended by the Working Group after the Phase 1 evaluation. They recommend that Norway reports on the application in practice of the possibilities of interruption of the statue of limitation in foreign bribery cases.

Jurisdiction

The field of action of Norwegian law enforcement authorities is important, deriving from the very broad jurisdiction given by Norwegian law over the foreign bribery offence

committed in Norway or abroad, by a national or foreigner, working for a Norwegian or a foreign company.[46] Pursuant to section 12(1)(1) of the Penal Code, Norway exercises jurisdiction over all acts committed in the realm (including dependencies). In addition, pursuant to section 12(1)(3)(a), Norway has jurisdiction over "nationals or any persons domiciled in Norway" who have committed the offence of bribery of a foreign public official as provided for in sections 276a and 276b abroad. Furthermore, under section 12(1)(4)(a), Norway may establish jurisdiction over a foreigner who has committed the offence abroad, upon the King's use of his discretion. Compared to the Convention, which only requires jurisdiction based on active nationality and territoriality, the Norwegian jurisdiction is more far reaching.

In practice, both territorial and nationality-based jurisdictions have been established over cases of transnational bribery, respectively in the Swedish case concerning a sailing ship's certificate and in the UNICEF case.[47] On the other hand, the Norwegian authorities explained that universal jurisdiction has only rarely been exercised (twice since 1975; but never in bribery cases), this provision being very theoretical, used in exceptional cases, and not representing ground for "aggressive" prosecution of foreign offences in practice.

As to jurisdiction in respect of offences committed by legal persons, the Norwegian authorities indicated that Norway can establish it as long as it establishes jurisdiction over the natural person(s) involved. The lead examiners noted that if no (Norwegian or foreign) individual having bribed a foreign public official on behalf of a Norwegian (or foreign) enterprise can be identified, Norway could face legal obstacles to establish its jurisdiction over the enterprise. Yet, although Norwegian courts have not had the opportunity to decide on jurisdiction over legal persons so far for a bribery offence, investigations are ongoing against legal persons.

The concerns of the lead examiners are thus less at the theoretical level than at the practical level and look to the circumstances under which Norway will decide to exercise or not its broad jurisdiction over specific cases, pursuant to prosecutorial discretion. Indeed, it would appear that a prosecutor would weigh the interest of the Norwegian criminal system (i.e. if the case is of concern to the Norwegian justice) before deciding to investigate and prosecute a foreigner having bribed a foreign public official abroad. Otherwise, Norway could arguably prosecute all cases of bribery committed in the world, thanks to its universal jurisdiction over transnational bribery acts. The issue of discretionary prosecution may arise, for instance, in respect of foreign legal persons in a case where a Norwegian (or foreign) employee bribes a foreign public official in Norway or through the Norwegian banking system. The same question arises in respect of the prosecution of a Norwegian legal person because a foreigner (non-national) working for the legal person committed a criminal offence abroad. Another type of question concerns the case where the briber is hiding abroad, such a situation leading possibly to time-consuming mutual legal assistance or extradition procedures, which Norway could avoid by simply dropping the case.

One way of rationalising the use of discretionary prosecution over cases on which Norway can theoretically establish its jurisdiction is through consultation with other countries having jurisdiction over the same case, even where there are no legal instruments requiring consultation, and eventually transferring of a case to another Party.[48] This kind of consultations has already taken place in the above-mentioned ongoing Swedish case. In their response to the phase 2 questionnaire, the Norwegian authorities indicated that there has been little delay in that case (case concerning a sailing

ship's certificates): the question was whether this part of the case should be prosecuted together with the Norwegian case and led to the transfer of the case from Sweden to Norway. In their response to the phase 2 questionnaire, the Norwegian authorities deemed that more efficient procedures related to the transfer of cases for prosecution between Nordic countries could be established. The lead examiners encourage the relevant authorities to consider this matter and possible improvements.

Commentary

The lead examiners note the very broad jurisdiction of Norway over active bribery of foreign public officials. In view of available case law, the lead examiners are of the opinion that the basis for jurisdiction over natural persons conforms to the requirements of Convention. The lead examiners encourage Norwegian authorities to report to the Working Group on development of cases involving legal persons, including the exercise of discretion powers.

Sanctioning the offence of active bribery of foreign public officials

As mentioned earlier in the present report, since the entry into force of the implementing legislation in Norway in January 1999, there has been no conviction for bribery of a foreign public official. However, Norway already issued a conviction for acts of bribery of a foreign public official committed before the entry into force of the implementing legislation, under the alternative qualification of breach of trust (the UNICEF case). Moreover, by the time of the on-site visit, Norway was investigating three cases of bribery of a foreign public official: two under section 128 of the Penal Code (the Swedish and Uganda cases)[49] and one under both section 128 and the new sections 276a and 276b, depending on the dates of the acts (the Statoil case).

Applicable sanctions

At the time of Phase 1, the penalty of deprivation of liberty was imprisonment for a term not exceeding one year. The Working Group thus considered that this failed to meet the standard under the Convention that the penalty is "effective, proportionate and dissuasive". Moreover, there was concern that the low, maximum sentence could be a potential problem for extradition. Norway assured the Working Group that a proposal to increase the maximum term of imprisonment to 6 years would be submitted to Parliament. The Working Group strongly supported this initiative.

Sanctions applicable to individuals for the active bribery of domestic or foreign public officials have been increased under the 2003 Amendments Act: Section 276a provides for "fines or imprisonment for a term not exceeding 3 years", and section 276b for "imprisonment for a term not exceeding 10 years" (the minimum sanction remains unchanged to 14 days, pursuant to section 17 of the Penal Code). As with section 128, there is no upper limit to the amount of the fine. On the other hand, as prior to the 2003 amendments, companies and other legal persons are, pursuant to section 48a of the Penal Code, liable to a fine with no upper limit and subject to prohibitions, deprivations of rights and professional disqualifications.[50]

Questioned about the availability of additional civil or administrative sanctions to a person guilty of bribery of a foreign public official[51] during the on-site visit, the Norwegian authorities indicated that they can emphasise a conviction for bribery of a foreign public official when allocating state aid or to the authorities in charge of awarding public contracts. In the area of public procurement, a vendor who has committed bribery

may be excluded from participating in the bid for a contract. However, no routine has been established to ensure that public entities can receive information about a particular party convicted of bribery. Discussions are ongoing within the Ministry of Foreign Affairs on whether such parties should be listed in an official register. For the time being, some legal issues remain to be solved before a decision can be taken.

Availability of confiscation

A potentially stronger deterrent to the bribery of foreign public officials is the availability of confiscation under various legal provisions (for both natural and legal persons). Sections 34 to 37d of the Penal Code were amended in 1999, after the Phase 1 examination.[52] In particular, section 34 now provides for mandatory confiscation of the "gains accrued from a criminal act", while section 35 still provides for the discretionary confiscation of "objects that have been produced by or have been the subject of a criminal act" and of "objects that have been used or intended to be used in a criminal act". Confiscation of an amount corresponding to the bribe or the proceeds is available.

Sections 34, 37a and 317 provide for the confiscation from a third party as well.[53] Section 37a provides for confiscation of advantage transferred *subsequently* to the offence, and covers the case where a bribe is paid (or the proceeds transferred) directly to the third party if the receiver understood or should have understood the link between the criminal act and the transferred object, or irrespective of the bona fides of the receiver, if the transferred object is a gift (i.e. the receiver has not given anything in exchange). Furthermore, it is possible to confiscate "any gain" from a third party if he/she is an accomplice or if he/she commits, intentionally or negligently, a money laundering offence (section 317 on receiving the proceeds of a crime), or from "the person to whom the gain has directly accrued as a result of the act" (presumed to be the offender, section 34(4); however, it can also be a third person).

A significant feature of the Norwegian system is that, under section 36(1) of the Penal Code, "confiscation of section 35 may be effected from the guilty person or from the person on whose behalf he has acted". Such confiscation provision has already been applied to legal persons in cases of illegal price fixing and environmental crimes, and could be used to confiscate the proceeds of active bribery where the enterprise has not been prosecuted or convicted but its employee has been convicted. Another feature is that confiscation can be imposed whether or not it is requested by the prosecutor, and courts can exceed the prosecutor's demand as regards the extent of the confiscation.[54]

Bribes can be confiscated pursuant to section 35 as objects (including money) that have been used in a criminal act. As concerns the proceeds of active bribery, they could be confiscated pursuant to sections 34 and 35. The Norwegian authorities indicated that this would cover all things or services that represent an economic value for the briber. A judge has indicated that in the case of a contract obtained through the giving of a bribe but that is otherwise legal, it may be difficult to determine the part of the benefit constituting the proceeds of bribery. However, pursuant to section 34(2) of the Penal Code, where the exact value of the gain cannot be established, the court is entitled to discretionarily determine the amount to be confiscated.

In addition to this, a new section 34a provides for extended (full or partial) confiscation of all capital assets belonging to the offender who cannot prove the legal origin of his properties, and not only of the gains derived directly or indirectly from a specific offence for which the criminal liability of the offender is established. Such kind of confiscation could be available in case of aggravated bribery or even recidivist basic

bribery, where considerable gain may have accrued from the offence. The preparatory works indicate that this new provision targets offenders with "a criminal lifestyle", which can be inferred from criteria such as previous convictions for profit-motivated offences or the comparison between the current financial status and information about legal income. A first application concerned a drug trafficker. The Norwegian authorities indicated that extended full or partial confiscation was possible for enterprises in cases where some or all assets of the enterprise are derived from criminal activities.

The penalties actually imposed by courts

Three main observations emerged from an analysis of the judgements of Norwegian courts. The first observation is that all convictions led to imprisonment sentences against the bribers (whatever the qualification of the offence: bribery or complicity to breach of trust).[55] Sanctions range from 90 days to 2 years, a portion of which is often conditional. In most cases, the convicted person is a company manager.

As to determination of the severity of the penalty, in the UNICEF case (complicity of breach of trust covering acts of bribery), the Court considered several facts in determining the level of the imprisonment sanction pronounced against the briber: the absence of a criminal record, the large earnings resulting from his collaboration with the principal offender (i.e. the corrupted official), and the tax penalties already imposed on him personally and on his company. This resulted in a 2-year imprisonment sentence. As to the determination of the level of the sanction towards the corrupted official, the Court of Appeals indicated that the lack of control from his superiors could not be seen as a mitigating circumstance. However, the Norwegian judicial authorities indicated concerning the briber that a general atmosphere of corruption in a foreign administration could not be relevant as concerns his culpability, but could be taken into account as a mitigating circumstance in determining the level of the sanction.

In a case of domestic bribery in the private sector sanctioned as a breach of trust offence, the court refused to take into account the media coverage of the case as a mitigating factor. In addition, the briber had pleaded that he felt pressured by the corrupted person, and feared that his company would not otherwise be able to compete on an equal footing with other companies. Here again the court rejected the argument as no evidence was found that the corrupted person exerted any pressure on the briber, or that the company was less favoured than others. The court also relied on precedent cases of similar offences to determine the severity of the penalty. For instance, it noted that corruption must be more severely punished than embezzlement and that the briber should not deserve a milder penalty than the corrupted person where surrounding circumstances are equal (Supreme Court decision, 13 February 2001).

The second observation is that those imprisonment sentences have never been accompanied by fines. The lead examiners were of the view that this could be due to the alternative possibilities provided for under former section 128 and new section 276a, pursuant to which fines *or* imprisonment may be imposed.[56] A prosecutor stated that even if fines have not yet been imposed under section 128, it is still possible to apply fines together with imprisonment, pursuant to section 26a of the Penal Code.[57]

In practice, where economic sanctions have been applied in cases of bribery, it has been essentially against the corrupted person, in the forms of confiscation and compensation to the victim, confiscation being usually used to pay compensation (fines against the corrupted official are rarely imposed). The rationale of the courts has been to deprive the corrupted official from the received bribe and to compensate for the resulting

financial loss suffered by his/her employer due to the bribery or breach of trust. Hence the confiscated assets usually go towards covering the damages awarded to the employer, and the briber receives no economic sanction.

Section 27 of the Penal Code provides guidelines for the imposition of fines (including optional fines): "when a fine is imposed, consideration should be given not only to the nature of the offence but also especially to the financial position of the convicted person and to what he can presumably afford to pay in his circumstances." As confiscation and compensation to the victim are given precedence over the payment of fines, the financial position of the convicted, once confiscation and compensation have been deducted therefrom, is often not good enough to justify fines. Indeed, since the Court of Appeals in the UNICEF case repealed the sanction of payment of the court costs because of other sanctions that had already been imposed, had the court of first instance also imposed fines, the Court of Appeals likely would have also repealed the fines.

In the lead examiners' opinion, this balance in the financial penalties may have proven to be satisfactory in cases of domestic bribery, but the same could be not effective in cases of bribery of a foreign public official. Indeed, the Norwegian courts, most of the time, will not be able to sanction the public official together with the briber, and thus the usual balance of confiscation of the bribe and compensation to the employer (here a foreign state, state agency, or international organisation) would be inoperative. It is, in particular, uncertain whether the Norwegian court would impose compensation on the briber rather than on the public official, as it could be argued that the victim can claim damages before the foreign court against the corrupted public official. Nevertheless, in the event the foreign country claims damages before a Norwegian court against the briber, it would have to substantiate and prove the losses it suffered because of the bribery. A prosecutor indicated that in the event the country of the corrupted public official would appear to be somewhat negligent on the control it should exercise on the probity of its officials, he could consider asking the courts to impose a fine on the briber instead of compensation. In response to additional concerns expressed by the examining team about third parties, a judge held the view that a competitor having lost a bid because of corruption could claim compensation for the loss suffered; however, he considered that compensation could be claimed directly from the employer of the corrupted official rather than from the briber.

The third observation is that, to date, only individuals have been held responsible for the offence of bribery, despite the fact that some of the cases brought before the courts were concerned with acts involving companies. The total number of fines (conviction or optional fines) imposed on enterprises in Norway was 1516 from 1997 to 2002, most of them applying to misdemeanours. 51 of these fines amounted to more than NOK 500,000. In the three convictions of legal persons decided by the Supreme Court, sanctions involved fines, compensation and confiscation. The deprivation of the right to carry on business in whole or in a certain form is very rarely used. The level of fines applied to enterprises varies a lot, ranging from NOK 5000 to NOK 15 million. The Norwegian authorities indicated that the amount of the fine is calculated in order to be higher than the gain obtained from the offence, and taking into account the consequences of the fine on the company, notably on its ability to continue to carry out its activities. The maximum fine that has been applied by courts is NOK 5.5 million (approximately 664,000 euros) for a case of illegal price fixing, and the maximum optional fine is NOK 15 million.

Regarding assessment of the penalty, the non-exhaustive list of factors enumerated in section 48b must be considered in addition to guidelines provided for under section 27 of

the Penal Code concerning fines. In the Supreme Court decision of 18 December 2000 concerned with an environmental offence (destruction of cultural heritage), the fine imposed on the company was determined in relation to the amount of the confiscation. In the Supreme Court decision of 18 December 1995 (illegal price fixing), the companies' turnover, the practice within the EU, the length of the offence, and the sophistication of the offence were taken into account to determine the level of the fine.

Commentary

The lead examiners commend the Norwegian authorities for having raised the level of imprisonment penalty applicable to the bribery offence, thus solving potential problems linked to extradition and statute of limitations. However, as economic sanctions are a fundamental deterrent for economic offences such as bribery of foreign public officials in the conduct of international business transactions, attention will need to be paid to the level of these, as the balance between confiscation, compensation and fines may in practice differ from domestic cases. The lead examiners are of the opinion that in view of the particular circumstances surrounding cases of active bribery of foreign public officials, attention of the investigating, prosecutorial and judicial authorities will need to be drawn to the imposition of economic sanctions on the bribers.

Notes

1. Other bribers were identified in that case in other countries (Denmark, Iceland, Sweden, the United-Kingdom and the United-States). Because bribery of a foreign public official was not an offence at the time of the acts in Denmark and Iceland, bribers have not been sanctioned for that offence. Nevertheless, in Denmark, the briber has been sanctioned for fiscal offences.

2. Investigation was opened in August 2001. The official charges were first issued on the 11th of September 2001 and the indictment by the public prosecutor on the 23rd of May 2002. At the time of the on-site visit, the case was pending after the prosecution had been delayed once due to the merging of the Norwegian and the Swedish case.

3. Since the on site visit, the case has been dismissed.

4. A new paragraph 2 extended the active bribery offence to foreign public officials.

5. The background of those amendments is provided for by the Penal Code Council's report on the new general provision on corruption, NOU2002:22.

6. The phase 1 evaluation of the 1998 Norwegian implementing legislation focused *inter alia* on the definition of foreign public officials and the coverage of bribes given to third parties; the Working Group decided to follow-up on these questions during the phase 2 of the evaluation process, because of the absence of supporting case law to confirm the interpretation presented by the Norwegian authorities. Thus, no amendments were requested at that time. As regards sanctions and statute of limitations, the Working Group welcomed the intention of Norway to raise sanctions and to prolong the period of limitations.

7. Section 276a, first paragraph (a) is directed against passive bribery, whereas section 276a, first paragraph (b) applies to active bribery.

8. Translation of extracts were provided to the examining team and annexed to the Responses by Norway to the Phase 2 Questionnaire.

9. The scope of the presumption principle has been discussed by the Norwegian Supreme Court in several judgments, inter alia the Finanger judgement (full chamber, 16 November 2000) by referring to the preparatory documents of the Act 27 November 1992 no. 109 transposing the Main Part of the EEA Agreement into Norwegian law, which contains the description of the principle. Case law from the Supreme Court and Courts of Appeal refer to international conventions as source of law.

10. Section 40(1): "The penal provisions of this code are not applicable to any person who has acted unintentionally unless it is expressly provided or unambiguously implied that a negligent act is also punishable." Sections 276a and 276b do not refer to negligence.

11. Section 47 of the Penal Code: "no person may be punishable for any act committed in order to save someone's person or property from an otherwise unavoidable danger when the circumstances justified him/her in regarding this danger as particularly significant in relation to the damage that might be caused by his/her act".

12. The Norwegian authorities further indicated that this defence was applied in approximately 15 criminal cases tried by the Supreme Court, where the ignorance has been qualified as "excusable" because of special extenuating circumstances.

13. Supreme Court decision, 13 February 2001. Section 275 on breach of trust, as with section 276a, is silent on the use of intermediaries. Section 275 provides: "Any person who, for the purpose of obtaining for himself or another an unlawful gain or inflicting damage, neglects another person's affairs which he manages or supervises or acts against the other person's interests shall be guilty of breach of trust."

14. Based on reports of Aftenposten, the Horton Investments is a small firm registered in Turks & Caicos.

15. The Norwegian authorities had explained that there was nothing in the wording of section 128 that limited its application to favours accepted by the foreign public official himself/herself. In addition, Norway had drawn attention to the "passive" bribery offence in section 112, which established criminal liability for the receiving of bribes by a public servant "for himself or another". Thus it was clear for the Norwegian authorities that it was the intent that section 128 applied where the favour was meant for a third party.

16. Section 49 of the Penal Code: "When a felony is not completed, but an act has been done whereby the commission of the felony is intended to begin, this constitutes a punishable attempt." Section 51: "An attempt shall be punished by a milder penalty than a completed felony. The penalty may be reduced to less than the minimum provided for such felony and to a milder form of punishment. The maximum penalty provided for the completed felony may be applied if the attempt has led to any such result as, if it had been intended by the offender, could have justified the application of so high a penalty."

17. In addition, the preparatory works indicate that ex-post corruption may be covered by the new section 276a, as "the alternative 'offers' is applicable when the active party to bribery offers anyone an advantage in return for specific conduct, but also when he/she offers anyone an advantage in return for an act or omission that has already taken place."

18. According to Norway, the words "seek to induce" had been included in section 128 in order to indicate that there is no stage of attempt in the act of bribing a domestic or foreign public servant.

19. It should be noted that section 276a first paragraph (a) on passive bribery expressly covers the reverse situation, since a public official who "requests", "receives" or "*accepts*" an offer is punishable.

20. Translation of extracts were provided to the examining team and annexed to the Responses by Norway to the Phase 2 Questionnaire.

21. The Working Group was satisfied with Norway's assurances that a foreign public official would be understood in the same manner as a domestic public official as described in section 128 of the Penal Code. Additionally Norway had affirmed that (foreign) public official would be interpreted to mean any person exercising a public function either appointed or elected.

22. " 'foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation".

23. Article 1 of the 1999 Council of Europe Criminal Law Convention on Corruption provides: "a) "public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law; b) the term "judge" referred to in sub-paragraph a above shall include prosecutors and holders of judicial offices; c) in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law".

24. The preparatory works also mention as examples "posts, offices or commissions in foreign and international courts and arbitration tribunals, in foreign and international parliamentary assemblies."

25. In phase 1, it was explained that Norway intended section 128 to be a limited breach of duty concept, thus applicable only where the foreign public official would have acted in breach of duty, including the case where, for instance, the foreign public servant would not have exercised judgement or discretion impartially, would have accelerated the mode of treatment or performed an act outside his or her authority (see Commentary 3 to the Convention). Indeed, a Supreme Court decision from 1993 established that section 128 also covers instances where the favour is given in order to influence a public official to make a particular decision when choosing between several possible options that are all by themselves legal.

26. The preparatory works to the 2003 Amending Act indicate that there is no need to amend the rules on liability for enterprises in case of bribery, because it is not always desirable to impose criminal liability on the company (Ot.prp.nr.78 (2002-2003), section 5.3.8 page 37). The Norwegian authorities indicated that in most cases it would be desirable to investigate the liability of the enterprise in case of active bribery, and most probably not desirable in case of passive bribery. This awareness of the law enforcement authorities has been confirmed by the lawyers met.

27. Section 48a(1) of the Penal Code: "When a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person may be punished for the contravention."

28. In total 1516 fines (conviction or optional fines) were imposed on enterprises in Norway from 1997 to 2002, most of them for misdemeanours. The number of fines for felonies represents a small proportion of all fines, amounting to 68 since the liability of legal persons has been established under Norwegian law: none in 1991, 1992 and 1993, one in 1994, two in 1995, nine in 1996, none in 1997, three in 1998, seven in 1999, four in 2000, twenty-two in 2001, and 20 in 2002. (Bribery offences are felonies, i.e. criminal acts punishable by imprisonment for more than 3 months, detention for more than 6 months or dismissal from public office as the main penalty. Misdemeanours are the other criminal acts, section 2 of the Penal Code.) The felonies were 20 criminal offences (vandalism, forgery of documents, false statement, receiving proceeds from a criminal offence, public safety offences, defamation, narcotic traffic, pornography, aggravated theft, etc.); but also 3 tax and 10 custom offences, 35 other felonies.

29. Criminal Procedure Act, section 224.

30. Section 35-4 on Areas on Competence, in the Official Prosecution Instructions.

31. See the Preparatory Works for Act No 73 of 28 July 2000, Ot.prp.nr.40 (1999-2000) section 5.5.6.

32. See new section 242a of the Criminal Procedure Act. This section 242a is only applicable in cases regarding crimes that according to law can lead to more than 5 years of imprisonment; thus it can only be used in cases of aggravated corruption.

33. Within the framework of the Schengen Agreement, the public prosecutors are competent to forward and receive requests for mutual legal assistance, and within the Nordic cooperation, the Chiefs of Police are also competent.

34. After 1999, Norway became a Party to the following Conventions: the 1999 UN Convention for the Suppression of the Financing of Terrorism; certain provisions of the 2000 EU Convention on Mutual Legal Assistance and its 2001 Protocol which develops the *Schengen acquis*, by virtue of an Agreement between the Council of the European Union, Iceland and Norway.

35. Special rules apply within the Nordic cooperation, where requests may be forwarded by the Chiefs of Police.

36. Extradition of Norwegian nationals may, on certain conditions, be granted to other Nordic Countries, according to the Nordic Extradition Act.

37. Section 56 of the Criminal Procedure Act.

38. See sections 72 to 75 of the Criminal Procedure Act for regulating decisions to dismiss a case.

39. Section 59a of the Criminal Procedure Act.

40. Optional fines and confiscation are regulated under Chapter 20 of the Criminal Procedure Act.

41. Source: Økostraff (Økokrim database) 2002 statistics.

42. In Norway the statute of limitation depends upon the length of the maximum imprisonment prescribed by law (section 67 of the Penal Code). A maximum sanction of 1 year imprisonment entails a statute of limitation of 2 years (former section 128), a sanction of 3 years entails a statute of limitations of 5 years (new section 276a) and a sanction of 10 years entails a statute of limitation of 10 years (new section 276b). As concerns legal persons, section 67(5) provides that "the period of limitation of criminal liability applicable to enterprises shall be calculated on the basis of the penalty scale for individual persons in the penal provision that has been contravened".

43. In that case, a Norwegian company had bribed senior officials of the Finnish Maritime Administration (*Sjøfartsverket*) in relation to the construction and lease of ice-breakers. The representative of the Norwegian company was under investigation in Finland but not convicted. The Finnish public officials were convicted on appeal. The acts took place before the entry into force of the implementing legislation.

44. Section 74 of the Penal Code: "A fine imposed is time-barred three years after the decision becomes final. For fines exceeding NOK 3000 the period of limitation is five years." Section 70: "The periods of limitation prescribed in section 67 shall apply to confiscation, but in such a way that the period shall in no case be less than five years, and for confiscation of gains not less than 10 years."

45. "If the custodial sentence has been shortened by release on probation, the period of limitation shall be calculated on the basis of the period of imprisonment remaining. The same applies when the execution is interrupted in any other way."

46. The 2003 amendments to the offence of bribery do not affect the rules governing jurisdiction over the offence as discussed in the Phase 1 report (i.e. section 128 of the Penal Code).

47. In the UNICEF case, Norway tried the Norwegian UNICEF official on the basis of section 12 item 3 litrae a, as a Norwegian national who had committed the offence of breach of trust (sections 275 and 276) towards his employer, UNICEF in Denmark, while he was residing in Denmark. The Norwegian company's Norwegian manager, who had bribed the UNICEF official, was convicted as an accomplice to the official.

48. It was indicated during phase 1 that Norway is a party to the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No 73). Furthermore, it can consult with parties outside this convention regarding the transfer of a case, even if no specific treaty exists between the parties.

49. The case has been dismissed after the on site visit.

50. Section 29: "When it is so required in the public interest, any person who is found guilty of a criminal act may be sentenced to: 1) Loss of any public office that the offender has by the criminal act shown himself to be unfit for or unworthy of. 2) Loss for a specific period not exceeding five years or forever of the right to hold office or to carry out any activity or occupation that the offender has by the criminal act shown himself to be unfit for or might conceivably misuse, or for which a high degree of public confidence is required. Any person thus deprived of the right to carry on any activity may not conduct such activity on behalf of another person either. He may be ordered to surrender any document or other object that has served as evidence of the said right."

51. Commentary 24 to the Convention: "Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order".

52. The Norwegian authorities indicated that a handbook will be released in January 2004 to help the investigating and prosecutorial authorities to effectively implement the new provisions on confiscation.

53. "When a gain or an object mentioned in section 34 or 35 is after the commission of the offence transferred from a person from whom confiscation may be effected, the object transferred or its value may be confiscated from the receiver if the transfer has occurred as a gift or if the receiver understood or should have understood the connection between the criminal act and the object transferred to him. The same applies to a right to an object that is, after the commission of the offence, established by a person from whom confiscation may be effected."

54. In such a case, the indicted person must – under any circumstance - be given the opportunity to prepare his defence. If the court finds it desirable, a suitable adjournment can be granted.

55. The maximum penalty was 1 year for bribery, and 3 or 10 years for complicity to basic or aggravated breach of trust.

56. In comparison, section 275 provides that "the penalty for breach of trust is imprisonment for a term not exceeding three years. Fines may be imposed *in addition to* a sentence of imprisonment."

57. Section 26a of the Penal Code provides that "in addition to a custodial sentence the court may impose a fine. This applies even though fines are not prescribed as a penalty for the offence. In assessing a custodial sentence the fact that a fine is also imposed shall be taken into account. The power to combine a custodial sentence with a fine derived from this section is of no significance in relation to statutory provisions that give legal effect to the penalty scale."

Recommendations

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Norway, the Working Group (i) makes the recommendations to Norway and (ii) will follow-up the issues when there has been sufficient practice in Norway in respect of cases involving the bribery of foreign public officials.

Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

With respect to awareness raising, the Working Group recommends that Norway:

1. Pursue existing efforts undertaken to raise awareness of the offence of bribery in international business transactions, in particular where small and medium size enterprises are concerned (Revised Recommendation, Article I);

2. Communicate to the business sector that, under the new legislation, facilitation payments are not allowed (Revised Recommendation, Article I);

3. Undertake further actions through institutions which are in a position to have privileged contacts with Norwegian enterprises exporting abroad, such as GIEK (the Norwegian export credit agency) or the Ministry of Foreign Affairs, notably through its diplomatic missions abroad (Revised Recommendation, Article I);

4. Consider, in this context, establishing a coordinating body to oversee awareness raising activities undertaken by Norwegian public authorities and relating to bribery of foreign public officials (Revised Recommendation, Article I).

With respect to detection, the Working Group recommends that Norway:

5. Pursue its efforts to develop further cooperation between the public institutions which could usefully contribute to the detection of the offence of bribery of foreign public officials and the law enforcement authorities (Revised Recommendation, Article I);

6. Consider the introduction of a general obligation for staff of public institutions to report suspicions of corruption by Norwegian companies to the competent authorities (Revised Recommendation, Article I);

7. Bearing in mind the vital role of auditors in uncovering and reporting bribery offences, raise awareness concerning the obligation for auditors to report any suspect activity that would indicate an unlawful act of bribery to law enforcement authorities (Convention, Article 8; Revised Recommendation, Article V.B.iv);

8. Continue ongoing reflection undertaken by several public bodies in Norway on the issue of whistleblower protection, with a view to introducing measures to ensure adequate protection against sanctions to employees who report suspected cases of bribery of foreign public officials (Revised Recommendation, Article I).

Recommendations for ensuring effective prosecution and sanctioning of bribery of foreign public officials

With respect to prosecution, the Working Group recommends that Norway:

9. Ensure that sufficient financial and human resources continue to be allocated to Økokrim and economic sections of police districts in order to retain full ability to carry out international investigations in cases of transnational bribery (Convention, Article 5; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraph 6);

10. Given the recently introduced distinction between basic and aggravated bribery, ensure that law enforcement authorities are fully aware of the range of investigative tools available, and have sufficient expertise to make broad use of these, where appropriate; and consider extending the availability of witness protection programmes to foreign bribery cases (Revised Recommendation, Article I);

11. Draw attention of the law enforcement and judicial authorities to the importance of making full use of the various economic sanctions available on the bribers, taking into account the particular circumstances surrounding cases of transnational bribery (Convention Article 3).

Follow-up by the Working Group

In light of the recent amendment to the offence of domestic and transnational bribery introduced in Norwegian law, and in the absence of definitive case law concerning bribery of foreign public officials, the Working Group will follow up:

12. The application of the new offence in practice as litigation of the bribery offence develops, in particular the notion of impropriety of the advantage (Convention, Article 1.1);

13. The criminal liability of legal persons, to ascertain that the bribery offence is effectively applied to legal persons, either through court decisions or optional fines and confiscation (Convention, Articles 2 and 4);

14. The consequences of the distinction between basic and aggravated bribery in terms of the length of the limitation period, and in terms of whether different modalities of interruption adequately suspend the operation of the statute of limitation, especially where legal persons are involved (Convention, Articles 1.1, 6);

15. The application of sanctions, notably the practice with regard to confiscation of both the instruments and the proceeds, in order to determine whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of active bribery of foreign public officials (Convention, Article 3).

ANNEX 1

Comparative Table of the New and Previous Provisions against Bribery of Foreign Public Officials

New provisions – 4th July 2003	Previous provisions – 1999 – Phase 1
SECTION 276a Any person shall be liable to a penalty for corruption who a) for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in connection with a post, office or commission, or b) gives or offers anyone an improper advantage in connection with a post, office or commission. By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country. The penalty for corruption shall be fines or imprisonment for a term not exceeding three years. Complicity is punishable in the same manner.	Active bribery § 128. Any person who by threats or by granting or promising a favour seeks to induce a public servant illegally to perform or omit to perform an official act, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. The term public servant in the first paragraph also includes foreign public servants and servants of public international organisations. The provisions of the previous section, third paragraph, shall apply correspondingly.[1] Passive bribery § 112. A public servant who for the performance or omission of an official act demands or receives for himself or another any unlawful favour or promise thereof, knowing that this is given or promised to influence his conduct in his official capacity, shall be liable to fines, loss of office, or imprisonment for a term not exceeding six months.
SECTION 276b Gross corruption is punishable by imprisonment for a term not exceeding 10 years. Complicity is punishable in the same manner. In deciding whether the corruption is gross, special regard shall inter alia be paid to whether the act has been committed by or in relation to a public official or any other person in breach of the special confidence placed in him as a consequence of his post, office or commission, whether it has resulted in a considerable economic advantage, whether there was a risk of significant economic or other damage or whether false accounting information has been recorded or false accounting documents or false annual accounts have been prepared.	§ 113. If the act or omission referred to in section 112 for which the favour was received or promised was in breach of duty, or if the public servant has refused to perform an official act in order to extort such a favour for himself or another, he shall be liable to imprisonment for a term not exceeding five years. The same penalty shall apply to any person who receives a favour knowing that it is given to him in return for having performed an official act in breach of his duty. § 114. If a judge, juror, assessor, or expert demands or receives for himself or another any unlawful favour or the promise thereof for acting or having acted in such capacity for or against the interests of any of the parties to a legal dispute, he shall be liable to imprisonment for a term not exceeding eight years. These provisions also apply to arbitrators if the arbitration award has the force of a court judgment.

1. §127.3: “Railway employees, military guardsmen, and any person who in the course of duty or on request assists a public servant shall be regarded as public servants”.

SECTION 276c Any person shall be liable to a penalty for trading in influence who a) for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in return for influencing the performance of a post, office or commission, or b) gives or offers anyone an improper advantage in return for influencing the performance of a post, office or commission. By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country. The penalty for trading in influence shall be fines or imprisonment for a term not exceeding three years. Complicity is punishable in the same manner.	

APPENDIX 1

Evaluation of Norway by the OECD Working Group (April 1999)

Legal Framework

Evaluation of Norway[1]

General Remarks

The Working Group compliments the Norwegian authorities for their rapid ratification and implementation of the Convention into Norwegian legislation. It also appreciates Norway's thorough responses to the questions raised in the evaluation process. The Norwegian authorities have chosen a simple approach to incorporate the implementing legislation into the Norwegian Penal Code. This has resulted in comprehensive legislation.

Specific issues

Definition of foreign public official

The Norwegian Penal Code does not contain a definition of "foreign public official". However the Working Group is satisfied with Norway's assurances that a foreign public official is understood in the same manner as a domestic public official as described in section 128 of the Penal Code. Additionally Norway interprets (foreign) public official to mean any person exercising a public function either appointed or elected.

Due to the lack of supporting case law at this time, it would be prudent to follow up the development of any case law in this regard in the context of the Phase 2 evaluation process.

Third persons

In the English translation of the legislation it is unclear whether section 128 of the Penal Code also applies to cases where a third party receives the benefit. The Norwegian authorities explained that there is nothing in the wording of section 128 that limits its application to favours accepted by the foreign public official himself/herself. In addition, Norway drew attention to the "passive" bribery offence in section 112, which establishes criminal liability for the receiving of bribes by a public servant "for himself or another". Thus it is clear that it is the intent that section 128 apply where the favour is meant for a third party.

It would be advisable to re-examine this issue in Phase 2 of the evaluation process to establish whether the actual practice reflects the intent in this regard.

1. This evaluation was completed by the Working Group on bribery in April 1999.

Corporate liability

The liability of an enterprise is discretionary pursuant to section 48a of the Penal Code, which states that "when a provision is contravened by a person who has acted on behalf of an enterprise the enterprise may be punished for the contravention". This is followed by section 48b, which states that in exercising the prosecutorial discretion granted by section 48a and in assessing a penalty, particular consideration must be paid to the considerations listed therein. Thus, article 48b legally codifies guidelines of how the discretion should be used. Norway assured the Working Group that according to its existing law and guidelines they would fulfill their international obligations deriving from the Convention.

The issue of prosecutorial discretion could be revisited in Phase 2 of the Evaluation process. At that time it would be advisable to assess how, in practice, the guidelines codified in section 48b are applied to foreign bribery cases.

Sanctions and statute of limitations

At this moment the maximum sanction is imprisonment for a term not exceeding one year. This does not meet the standard set by the Convention that the penalty be "effective, proportionate and dissuasive". Moreover, the concern was raised that the low maximum sentence could be a potential problem for extradition, because the Extradition Act states that extradition may only take place with respect to offences that are punishable under Norwegian law by imprisonment for more than one year. The Extradition Act states that the King-in-Council may enter into an agreement with a foreign state on extradition with respect to offences that do not carry a maximum punishment of more than one year. The Norwegian authorities confirm that the Convention is considered one of those agreements. Norway assured the Working Group that a proposal to increase the maximum term of imprisonment to 6 years would be submitted to Parliament.

The same can be said for the statute of limitations, which is currently 2 years. As a consequence of the changes to the maximum sanction, Norway has assured the Working Group that it will be increased to 10 years. The Working Group strongly supports this initiative and agreed that as soon as this has been done, Norway would satisfy the requirements of the Convention.

APPENDIX 2

Principal Legal Provisions

Anti-Corruption provisions of the Penal Code introduced by the Act n°79 amending the Penal Code adopted by Parliament on 10 June 2003 and entered into force on 4 July 2003

Section 276a

Any person shall be liable to a penalty for corruption who

a) for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in connection with a post, office or commission, or
b) gives or offers anyone an improper advantage in connection with a post, office or commission.

By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country.

The penalty for corruption shall be fines or imprisonment for a term not exceeding three years. Complicity is punishable in the same manner.

Section 276b

Gross corruption is punishable by imprisonment for a term not exceeding 10 years. Complicity is punishable in the same manner.

In deciding whether the corruption is gross, special regard shall inter alia be paid to whether the act has been committed by or in relation to a public official or any other person in breach of the special confidence placed in him as a consequence of his post, office or commission, whether it has resulted in a considerable economic advantage, whether there was a risk of significant economic or other damage or whether false accounting information has been recorded or false accounting documents or false annual accounts have been prepared.

Section 276c

Any person shall be liable to a penalty for trading in influence who

a) for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in return for influencing the performance of a post, office or commission, or
b) gives or offers anyone an improper advantage in return for influencing the performance of a post, office or commission.

By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country.

The penalty for trading in influence shall be fines or imprisonment for a term not exceeding three years. Complicity is punishable in the same manner.

APPENDIX 3

Suggested Further Reading

(1) Phase 1 Report, Review of Implementation of the OECD Anti-Bribery Convention and 1997 Recommendation (1999): www.oecd.org/dataoecd/15/35/2389183.pdf

(2) Other implementation laws and regulations

The preparatory works to the 2003 amending Act, Ot.prp. nr. 78 (2002-2003), in Norwegian: http://odin.dep.no/jd/norsk/publ/otprp/012001-050066/index-ind001-b-f-a.html

The General Civil Penal Code, English translation as of 1 July 1994: www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.doc

The Criminal Procedure Act, English translation as of 17 July 1998: www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.doc

For more information on legal texts, please consult the joint database of the Norwegian Ministry of justice and the University of Oslo, which provides information of certain legal texts. www.lovdata.no/info/lawdata.html

(3) Other materials

- Norwegian authorities: information on the fight against corruption by Norway is available on the websites of the Ministry of Justice and the Police (http://odin.dep.no/jd/norsk/bn.html, mainly in Norwegian) and of ØKOKRIM, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (www.okokrim.no/, mainly in Norwegian).
- OECD, Anti-Corruption Division (www.oecd.org/daf/nocorruption): The Anti-Corruption Division serves as the focal point within the OECD Secretariat to support the work of the OECD in the fight against bribery in international business through the implementation of the OECD Anti-Bribery Convention. Its web pages offer information about the implementing mechanisms of the Convention as well as information on its other activities.
- Group of States against Corruption (www.greco.coe.int): GRECO evaluates through a process of peer pressure, the compliance with undertakings contained in the legal instruments of the Council of Europe to fighting against corruption.
  - Evaluation Report on Norway – First Round (2002) www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep(2002)3E-Norway.pdf
  - Evaluation Report on Norway – First Round, Compliance report (2004) www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2004)9E-Norway.pdf
  - Evaluation Report on Norway – Second Round (2004) www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep(2004)3E-Norway.pdf
- Financial Action Task Force (www.fatf-gafi.org): The FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing.
  - Executive Summaries of the First and Second Mutual Evaluation of Norway are available in the FATF Annual Reports 1993-1994 and 1997-1998.

APPENDIX 4

i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Annex
Agreed Common Elements of Criminal Legislation and Related Action

iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

   a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

   b) "foreign country" includes all levels and subdivisions of government, from national to local;

   c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex

Statistics on OECD Exports

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	**1 459 148**	**81,0%**	**100%**
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	**1 801 661**	**100%**	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.,*

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: "that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) **RECOMMENDS:**

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[1]

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[2]

International Co-operation

VII) **RECOMMENDS** that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the member countries;

ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
- a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION

Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia	6 September 2001
35.	Ireland	22 September 2003
36.	Estonia	23 November 2004

* In order of ratification/accession received by the Secretary General.