INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Anti-bribery & corruption: the fight goes global

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National Report of Norway

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1. THE LEGAL FRAMEWORK

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offences;

Corruption is covered by the Norwegian General Civil Penal Code of 1902 (the "Penal Code") Chapter 26, sections 276a and 276b. These provisions were included in the Penal Code in 2003 in relation to the implementation of the Council of Europe's Criminal Law Convention on Corruption.

According to section 276a any person who:

a. for himself or other persons requests or received an improper advantage or accepts an offer thereof in connection with a position, office or assignment, or

b. gives or offers any person an improper advantage in connection with a position, office or assignment,

shall be liable for corruption.

"Position, office or assignment" also includes a position, office or assignment in a foreign country.

The preparatory works[1] to section 276a give guidance to the interpretation of the provision. The wording "position, office or assignment" includes any kind of employment or assignment, whether paid or unpaid, short or long term. The wording "in connection with" requires a connection between the improper advantage and the position, office or assignment, but the preparatory works explicitly state that there is no requirement that the bribe can be connected to a specific action or omission by the recipient. An "improper advantage" will normally have economic value and typically be money or items of a certain value. However there is no requirement that the item has an independent economic value. Anything that will give the recipient an advantage may be regarded as an improper advantage, for example a club membership or insider information.

What constitutes an "improper advantage" is to be decided on an overall evaluation in the specific case. It was stated in the preparatory works that no one should be rewarded for balancing on the edge of the law, but the advantage must be clearly reprehensible to be regarded as "improper".

[1] Ot.prp. nr. 78 (2002-2003) Amendments to the Penal Code etc. (provisions on corruption)

Section 276 b targets gross corruption and states that in deciding whether the corruption is gross, importance shall be attached to, inter alia, 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 by virtue of his position, office or assignment, whether it has resulted in a considerable economic advantage, whether there was any risk of considerable damage of an economic or other nature, or whether false accounting information has been recorded, or false accounting documents or false annual accounts have been prepared.

The list is not exhaustive and other elements may also be taken into account.

Section 276 c of the Penal Code covers so-called trading in influence and states that any person who:

a. for himself or other persons requests or received an improper advantage or accepts an offer thereof in return for influencing the conduct of any position, office or assignment, or

b. gives or offers any person an improper advantage in return for influencing the conduct of a position, office or assignment shall be liable to a penalty for trading in influence.

Position, office or assignment also includes a position, office or assignment in a foreign country.

c. any affirmative defences that are available; and

The only affirmative defence is a statute of limitations of five years for corruption and trading in influence and ten years for gross corruption.

d. the penalties that may be imposed upon offenders.

The penalties for corruption and trading in influence are fines or imprisonment for a term not exceeding three years. Any person who aids and abets such an office shall be liable to the same penalty. Gross corruption is punishable by imprisonment for a term not exceeding ten years. Any person who aids and abets such an offence shall be liable to the same penalty.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Both private and public corruption is covered by the Norwegian corruption provisions and there is no explicit distinction between the two. However whether the act was committed by or in relation to a public official is one of the circumstances which may lead to the offence being regarded as gross corruption.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

Yes, generally Norwegian criminal law is according to the Penal Code, Chapter 1 Section 12 applicable to acts committed in the Kingdom of Norway hereunder any installation place on the Norwegian continental shelf, any Norwegian vessel in open sea, any Norwegian aircraft outside such areas as are subject to the jurisdiction of any state and on any Norwegian vessel or aircraft wherever it may be, by a member of its crew or any other person travelling on the vessel or aircraft (the term vessel includes drilling platforms and similar mobile installations).

The Penal Code is also applicable to a number of acts committed abroad by any Norwegian national or a person domiciled in Norway, including acts covered by the sections on corruption.

Last, but not least, Norwegian criminal law is applicable to acts committed abroad by foreigners if the act are covered by certain sections in the Penal Code, including the sections on corruption. In such cases prosecution can only be instituted when the King in Council (i.e. the government) decides.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

There are no exemptions or "safe harbours" in relation to bribes in the Norwegian legislation. The preparatory works[2] explicitly include facilitation payments, but state that some facilitation payment, as paying to get your passport back to leave a country, would not be punishable. It is emphasized that the matter must be evaluated from case to case with specific regard to the value of the advantage.

[2] Ot.prp. nr. 78 (2002-2003) Amendments to the Penal Code etc. (provisions on corruption)

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

There are no laws or regulations for banks and financial institutions that directly address bribery and corruption.

The Norwegian Money Laundering Act of 2009 implements the third EU Money Laundering Directive (Directive 2005/60/EC). Although not a member of the EU, Norway is obligated to implement such directives under the EEA Agreement. Although the act targets money laundering, section 1 of the Money Laundering Act has a more general wording and states that the purpose of the act "is to prevent and discover transactions with connection to proceeds from criminal acts or with connection to terrorist acts."

Under the money laundering legislation all entities with a reporting obligation are obliged to request proof of identity when a customer relationship is established, to investigate any transaction that appears suspicious and to report the transaction to Økokrim[3] if investigation fails to disprove the suspicion.

Entities with a reporting obligation include a wide range of businesses including inter alia financial institutions, investment firms, lawyers, accountants, insurance companies, real estate brokers, securities registers and security funds.

The money laundering legislation can be divided into three main themes:

a. The obligation of reporting entities to request customers to provide proof of identity when establishing a customer relationship and when carrying out certain transactions, and the obligation of institutions to retain a copy of identity documents along with transaction data.

b. The obligation to investigate suspicious transactions, and to report to Økokrim should suspicion not be disproved by investigation.

[3] Økokrim is the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime and is both a police specialist agency and public prosecutors office with national authority.

c. The obligation of reporting entities to establish routines, initiate training programmes and nominate a money laundering officer – i.e. senior manager with responsibility for dealing with cases of money laundering and terrorist financing.

2. CORPORATE CRIMINAL LIABILITY

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Norwegian law recognises the concept of corporate criminal liability. Corporate criminal liability is governed by the Penal Code chapter 3 sections 48a and 48b.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

According to section 48a a corporation may be liable to a penalty when a penal provision is contravened by a person who has acted on behalf of a corporation. This applies even if no individual person may be punished for the contravention. Thus the corporation is liable for anonymous as well as cumulative offences.

Corporation includes a company, society or other association, one-man corporation, foundation, estate or public corporation.

Even if the conditions for liability are fulfilled the penalty for the corporation is not compulsory. It is the prosecuting authority in the first instance (and in the end the courts) that decide whether a penalty shall be imposed on a corporation. According to established case law there is no general assumption that a corporation shall incur a penalty even if the conditions are fulfilled.

Whether a penalty shall be imposed or not will depend on a case by case assessment. According to section 48b of the Penal Code particular consideration shall be paid to:

a. the preventive effect of the penalty;
b. the seriousness of the offence;
c. whether the corporation could by guidelines, instruction, training, control or other measures have prevented the offence;
d. whether the offence has been committed in order to promote the interests of the corporation;

e. whether the corporation has had or could have obtained any advantage by the offence;

f. the corporation's economic capacity; and

g. whether other sanctions have as a consequence of the offence been imposed on the corporation or on any person who has acted on its behalf, including whether a penalty has been imposed on any individual person.

This list is not exhaustive. Other elements may also be taken into consideration. The penalty shall be a fine. The corporation may also by a court judgment be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms.

Other sanctions that may be imposed on the corporation include being rejected from public contracts. The Norwegian Act on Public Procurement of 1999 implements Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts".

The Norwegian Regulation on Public Procurement of 2006 section 20-12 states that the contracting authority shall reject operators who by a final judgment are convicted for participation in a criminal organisation or found guilty of corruption, fraud or money laundering.

Cases of corporate criminal liability have been tried before the Norwegian Supreme Court several times. The Supreme Court has stated that the concept of corporate criminal liability is particularly suited to fight corruption. Considering how harmful it is to the society, corruption is right in the heart of where corporate criminal liability should be imposed. The main argument for corporate criminal liability is to avoid pulverisation of liability and to give the corporations an inducement to stop crimes from being committed. There is no requirement that the offence has been committed by someone at a management level.[4]

Økokrim gave a presentation in 2013[5] where they presented a list of nine checkpoints which corporations in their opinion should follow to avoid corporate criminal liability and which Økokrim takes into consideration when deciding whether to start an investigation and taking out an indictment.

1. Organisation, training, follow up and control suited for the corporation, business operations and risk of corruption;
2. General instructions and guidelines;
3. Whether corruption has been explicitly addressed in the ethical guidelines;

[4] The Norconsult case HR-2013-01394-A, Rt. 2013.1025

[5] The list was presented in the Norwegian financial newspaper Dagens Næringsliv12 March, 2013.

4. Routines for handling questions related to corruption;
5. Good manuals are not sufficient, compliance is crucial;
6. Identification of specific elements of risk;
7. Ongoing follow up of specific questions on how operations involving risk are actually performed;
8. Indoctrinate the leaders of their responsibilities as leaders and role models, both with regarding to following the rules and to report deviations; and
9. Regular tightening-up and updating of routines.

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

We are not aware of any pending or expected changes regarding corporate criminal liability in Norway.

MUTUAL LEGAL ASSISTANCE / CO-OPERATION

2.4 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

Norway has ratified the following treaties relating to bribery and corruption:

a. Council of Europe Criminal Law Convention on Corruption of 1999;
b. OECD Convention of Combating Bribery of Foreign Public Officials in International Business Transactions of 1997; and
c. United Nations Convention against Corruption of 2003.

2.5 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

Økokrim participates in the following co-operation arrangements:

a. Interpol
b. OECD Working Group for corruption questions

c. GRECO (Groups of States against Corruption)

d. CARIN (The Camden Assets Recovery Interagency Network)

e. Økokrim is the central unit for processing request for assistance on the basis of the Council of Europe's Money Laundering Convention

f. FATF (Financial Action Task Force)

In December 2014 FATF completed its assessment of Norway's anti-money laundering and counter-terrorist financing (AML/CFT) system. The assessment was published in a mutual evaluation report "Anti-money laundering and counter terrorist financing measures – Norway".

The report sets out how well Norway has implemented the technical requirements of the FATF Recommendations and how effective its AML/CFT system is. The report presents the key findings of the assessment team and the priority actions for Norway to improve its AML/CFT system.

The report states that Norway has taken some good initiatives to combat money laundering and terrorist financing, but needs to establish overarching policies and strategies, and address significant weaknesses in a number of key areas.

Norway's evaluation is the first comprehensive review of a country's anti money laundering and terrorist financing system and the first to be completed using the revised FATF Recommendations adopted in 2012.[6]

3. CASES

3.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

c. penalties were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

[6] FATF web-site 18th December 2014

The details of the case descriptions vary as some cases on corporate criminal liability are settled out of court as the corporation accepts the fine issued by Økokrim. In such cases it is mostly details from articles in the press or brief press releases from the companies or Økokrim that are available.

1. The Horton Case

Statoil ASA is Norway's largest energy company, with business in 36 countries.

In 2002 they hired the services of Horton Investments, an Iranian consultancy firm owned by Mehdi Hashemi Rafsanjani, son of former Iranian President Hashemi Rafsanjani. The agreement was that Horton Investments was to be paid USD 15,2 million over a period of 11 years by Statoil to influence important political figures in Iran to grant oil contracts to Statoil. The matter was uncovered by the Norwegian financial newspaper Dagens Næringsliv on 3 September, 2003.

On 29 June, 2004 Økokrim issued a fine in the amount of NOK 20 million (about EUR 2, 4 million) against Statoil. This was at the time the largest fine issued in Norwegian legal history. The Director for international operations Richard John Hubbard was also ordered to pay NOK 200,000 (about EUR 24,000) in fines for his involvement in the case. Both Statoil and Hubbard agreed to pay the fines, but insisted that this did not imply any admittance of guilt on their part.

Statoil was also until 12 October 2006 under investigation by US authorities for suspicion of violation of the Foreign Corrupt Practices Act.

In October 2006, Statoil entered into settlements with the US the Department of Justice and the Securities and Exchange Commission. Statoil acknowledged having violated the US Foreign Corrupt Practices Act (FCPA). The Settlements included a monetary component consisting of a fine of USD 10.5 million and the confiscation of benefits gained by the violations of the FCPA payments of USD 10.5 million. The Norwegian fine was deducted from the US fine. In addition, Statoil also undertook to retain and fully cooperate with an external Compliance Consultant for three years. The settlements also stipulated that no Statoil employee or representative for the company could make any statements to the media that contradicted the verdict for the next three years.

The Horton case was finally closed by the US authorities on 19 November 2009 after Statoil had successfully fulfilled its obligations under the settlements.

No verdict has been reported from Iran regarding Mehdi Hashemi Rafsanjani's bribery case.

2. The Norconsult Case

Norconsult is Norway's largest consulting firm within community planning and projecting. The company's main activities are in Norway, but they also have a number of international assignments.

Up until 2008 Norconsult had a subsidiary in Tanzania, Norconsult Tanzania Limited, with head offices in Dar es Salaam. The background for the case is that the Dar es Salaam Water and Sewerage Authority (hereinafter "DAWASA") in 2003 started a project for development of the water and sewer system in the city. Norconsult entered into a cooperation with a Dutch registered company called Elmcrest Group (hereinafter "Elmcrest") and MMK Project Services Limited (hereinafter "MMK"). "A" was the owner of Elmcrest and "B" was the majority owner of MMK. The parties agreed to submit an offer to DAWASA and the offer documents were prepared by A and B. The project was mainly financed by the World Bank.

The cooperation between the three companies was organized through a joint venture. The joint venture was assigned the project and the agreement with DAWASA was entered into on 31 July 2013. The joint venture agreement was signed on 31 October 3013. The board consisted of "C" from Norconsult, A from Elmcrest and B from MMK. They set up a project office to complete the assignment. The office kept the accounts and invoiced DAWASA. From 2006 "D" from Norconsult took over as office manager. Norconsult's accounting department was treasurer and kept the office accounts. These tasks were performed by "E" in Norconsult.

On 16 November 2009 Økokrim took out an indictment against C, D and E from Norconsult for gross corruption and issued a fine against Norconsult in the amount of NOK 4 million (about EUR 470,000) in accordance with Section 48a on Corporate Criminal Liability. The background for the prosecution was that the World Bank in 2006 had initiated investigations against the joint venture.

Norconsult did not accept the fine, and the matter was referred to court together with the case against C, E and D. In the court of first instance C, D and E were all found guilty of breach of Section 276a and 276b (gross corruption), C was sentenced to 6 months imprisonment. E was sentenced to 60 days imprisonment and D was sentenced to 90 days imprisonment. Norconsult was found not guilty.

Økokrim and D appealed the judgment. In the court of appeal D was found not guilty while Norconsult was found guilty of breach of Sections 276a and 276b (gross corruption) and ordered to pay a fine of NOK 4 million. Cases in the court of appeal are held before a jury. The jury does not need to give an explanation for their judgment so we do not know why D was found not guilty.

Norconsult appealed to the Supreme Court who, on 28 June 2013, found the company not guilty. The Supreme Court agreed that general deterrent effect of a conviction, the severity of the acts and lack of general guidelines, instructions, training and control within the company called for a judgment on corporate criminal liability. However, (i) the considerable time that had passed since the acts were committed, without sufficient reason; (ii) the extensive reactions from the World Bank Norconsult had been faced with; (iii) that the employees had been sentenced for the acts; and (iv) the risk that the company would be further rejected in contracts of public procurement, all spoke in favour of not imposing corporate criminal liability on the company.

Norconsult was temporarily debarred by the World Bank in September 2011. The company appealed the decision. The final decision was made by the World Bank Sanction Board in January 2014 which gave Norconsult a six month debarment. The decision was made retroactive so the time had already elapsed. Mr. Steven Nederhorst and any entity that is an affiliate directly or indirectly controlled by him, including Elmcrest Group Limited was in November 2014 debarred for a period of six years. MMK Project Services Limited was debarred for a period of 5,5 years.

The matter was investigated by Tanzanian authorities but no verdict has been reported from Tanzania regarding the DAWASA employees.

3. The Yara Case

The Norwegian company Yara International ASA ("Yara") is involved in agriculture development (the world's largest producer of nitrogen based fertilizers) and industrial solutions. The company has operations and offices in more than 50 countries and sales to more than 150 countries.

In the period from 2004 to 2009 Yara negotiated with Libya's state owned oil company (NOC). Around 2007 representatives from the management in Yara is said to have entered into an agreement for the payment of USD 5 million to the son of the minister of oil and chairman of the board of NOC at the time. Part of the payment is said to have been transferred through Yara's partly owned subsidiary in Switzerland.

The second matter is that Yara between 2006 and 2008 negotiated about a joint venture cooperation with the state controlled Krishak Bharati Cooperative Limited in India. Representatives from the management in Yara is said to have agreed to transfer USD 250,000 as well as USD 0,50 per ton of fertilizer that Yara would sell to India, to the son of Dr. Jivtesh Singh Maini. He was both director of Krishak Bharati and Additional Secretary and Financial Adviser in India's Ministry of Chemicals and Fertilizers. This ministry had a 67 per cent ownership share in the Indian company. Later the lump sum was increased from USD 250,000 to USD 3 million.

The third matter is that Yara Norge AS in 2004 and 2007 entered into agreements with the Russian company OJSC Apatit. The negotiations between Yara and OJSC were conducted through an affiliate JSC Phosagro. In 2004, Yara Norge is said to have paid USD 2,8 million to Stanislav Pomytkin, the vice president of JSC. In 2007 Yara Norge agreed to pay money to Vasily Loinov, the head of sales and foreign affiars in JSC. He is said to have received USD 1,14 million.

In April 2011 Yara initiated an external investigation upon becoming suspicious of possible criminal acts in relation to the above. In May 2011 Yara informed Økokrim of their suspicions. Based on the information from Yara Økokrim took out an indictment against the company.

The external investigation report was delivered in June 2012 and showed that irregular payment had been made. The report was shared with Økokrim.

On 15 January 2014 Økokrim announced that they had given Yara a fine in the amount of NOK 270 million and confiscation of NOK 25 million (in total about EUR 35,600,000) for three cases of gross corruption. Yara pleaded guilty and the fine was accepted. This is the largest fine in Norwegian legal history. The previous largest fine was in the amount of NOK 20,000,000 (about EUR 2,400,000) which was given in the Horton Case. The case was that Yara had participated in the bribery of high ranking civil servants in Libya and India and a Russian supplier.

Despite the size of the fine, Økokrim stated that they had taken into consideration that Yara themselves had contacted Økokrim and the good cooperation with Yara during the investigation, inter alia in providing documentation, when determining the size of the fine.

For the same incidents Økokrim has also taken out indictments for gross corruption against the former CEO and three other directors in Yara. One of the directors is only indicted for the affairs in Libya.

According to Økokrim they requested assistance from 12 countries in this case and with the exception of Lebanon they have all co-operated. Økokrim has received considerable assistance from Swiss, French and US authorities. One of the defendants, the former legal director Kendrick Wallace is an American citizen and representatives from FBI and the American Justice Department participated in the interrogation of Wallace.

The case, which is regarded as the largest corruption case in Norwegian history, started on 4 January, 2015 and is expected to take three months.

These cases will be discussed in greater detail during the workshop in London.