

IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 4 REPORT: **Norway**

This Phase 4 Report on Norway by the OECD Working Group on Bribery evaluates and makes recommendations on Norway's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 14 June 2018.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Table of contents

EXECUTIVE SUMMARY	5
INTRODUCTION	6
Previous evaluations of Norway by the Working Group on Bribery	6
Phase 4 process and on-site visit	6
Norway's economic situation and foreign bribery risks.....	7
Foreign bribery cases.....	9
A. DETECTION OF THE FOREIGN BRIBERY OFFENCE	13
A.1. Self-reporting by companies	13
A.2. Detection through the media – the role of investigative journalism	14
A.3. Detection through whistleblowers.....	15
A.4. Detection through external auditors and accountants	16
A.5. Detection through government sources.....	18
A.6. Detection through international cooperation – a growing source of detection	20
B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE	21
B.1. The foreign bribery legal framework and interpretation.....	21
B.2. Jurisdiction	24
B.3. Norway's law enforcement institutions	27
B.4. Non-trial resolutions through penalty notices	30
B.5. Sanctions and confiscation.....	31
B.6. Debarment and loss of rights	39
B.7. Investigative tools	39
B.8. Mitigating factors.....	43
B.9. Mutual legal assistance	44
C. RESPONSIBILITY OF LEGAL PERSONS	46
C.1. Foreign bribery cases involving legal persons	46
C.2. Conditions for liability	47
C.3. Discretion to impose liability and sanctions	51
C.4. The predictability of the corporate liability framework	54
C.5. State-Owned Enterprises.....	55
C.6. Engagement with the business sector.....	58
D. OTHER ISSUES AFFECTING IMPLEMENTATION OF THE CONVENTION	60
D.1. Public procurement	60
D.2. Export credits	61
D.3. Official Development Assistance.....	62
D.4. Money laundering cases predicated on foreign bribery	65
E. CONCLUSIONS: RECOMMENDATIONS AND FOLLOW UP ISSUES	66
E.1. Positive Achievements and Good Practices	66
E.2. Recommendations of the Working Group	67
E.3. Follow-up by the Working Group.....	68
ANNEX 1: PHASE 3 RECOMMENDATIONS AS OF 2014 WRITTEN FOLLOW-UP.....	69
ANNEX 2: LIST OF PARTICIPANTS IN PHASE 4 ON-SITE VISIT TO NORWAY	71
ANNEX 3: EXCERPTS FROM LEGISLATION	73
ANNEX 4: LIST OF ABBREVIATIONS AND ACRONYMS	87

Tables

Table 1. Sanctions in Penal Code for Foreign Bribery and Related Offences	32
Table 2. Sanctions and confiscation imposed for foreign bribery and related offences	35

Table 3. Tools used in foreign bribery investigations.....	42
Table 4. Norway’s foreign bribery enforcement actions against legal persons	47

Figures

Figure 1. Norway’s Implementation of its Phase 3 Recommendations	6
Figure 2. Comparison of Norway’s economic data against Working Group average	8
Figure 3. Norway’s handling of foreign bribery allegations (February 1999 – May 2018).....	10
Figure 4. Detection sources for foreign bribery cases.....	13
Figure 5. Top 10 recipients of ODA from Norway.....	63
Figure 6. Norway’s ODA by Sector.....	63

Boxes

Box 1. Prior WGB evaluations of Norway	6
--	---

EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery evaluates and makes recommendations to improve Norway's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details Norway's achievements and challenges in this regard, in particular, developments that have arisen since Norway's Phase 3 evaluation in 2011.

Overall, Norway has a robust legal framework that has supported active anti-bribery enforcement. Since the Phase 3 evaluation, however, Norway has made some significant amendments that could weaken enforcement. Notably, the new Penal Code narrows Norway's jurisdiction over criminal offences committed abroad, *inter alia* potentially limiting nationality jurisdiction over foreign bribery to acts that are "also punishable under the law of the country in which they are committed." The Working Group is concerned that uncertainty about whether this requirement would apply to foreign bribery offences could undermine Norway's ability to effectively enforce its law. The jurisdictional issue is compounded by the fact that bribery offences committed within a foreign subsidiary's operations would be attributed back to the Norwegian parent company only if one or more natural persons involved were acting on the parent company's behalf.

Norway has actively enforced its foreign bribery laws, particularly relative to the size of its population and economy. The National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) has proactively investigated and prosecuted foreign bribery cases, using the wide array of investigative tools available to it. Out of 23 foreign bribery allegations that have arisen since the Anti-Bribery Convention entered into force on 15 February 1999, Norway has opened 10 investigations. Of these, 2 are ongoing, 3 were discontinued and 5 resulted in sanctions being imposed against at least one defendant. Of the completed cases, 4 involved the "aggravated corruption" offence and 1 was based on "trading in influence." In total, 4 natural persons and 4 legal persons were sanctioned, while 6 natural persons and 1 legal person were acquitted. In one case, the 3 natural persons involved received a decision of non-indictment (*påtaleunntatelse*).

The recommendations in this report identify steps that Norway should take to address potential obstacles to enforcement. In particular, the Working Group recommends that Norway ensure that it can effectively assert nationality jurisdiction over foreign bribery offences committed abroad. It also recommends that Norway clarify various aspects of its legal framework for foreign bribery enforcement. High priority should be attached to clarifying the application of penalty notices, the use of mitigating factors, as well as the scope of corporate liability for offences committed within the operations of related entities (*e.g.* subsidiaries or joint ventures). Although the Director of Public Prosecutions has issued useful guidance, more effort is needed to increase the predictability of these aspects of foreign bribery enforcement. Norway should use any appropriate means at its disposal to enhance such predictability. The lack of clarity hinders the business community's ability to fully understand their obligations under the law. Even more troubling for the Working Group is the risk that the legal uncertainty – given the resources available – might chill enforcement of foreign bribery as prosecutors shift their focus to other offences that are easier to investigate and prove.

The report and its recommendations reflect the findings of experts from the Czech Republic and Denmark and were adopted by the Working Group in June 2018. The report is based on legislation and other materials provided by Norway as well as the evaluation team's own research. The report is also based on information that the team obtained during its on-site visit to Oslo in January 2018. During this visit, the team met with representatives of Norway's public and private sectors, media, and civil society. Norway will submit a written report to the Working Group in June 2020 on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In June 2018, the Working Group on Bribery in International Business Transactions (Working Group or WGB) discussed its fourth evaluation of Norway's implementation of the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (the Convention), the [2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#) (2009 Recommendation) and related instruments.

Previous evaluations of Norway by the Working Group on Bribery

2. The WGB monitors the implementation and enforcement of the Convention and related instruments through successive phases of a rigorous peer-review evaluation and monitoring system. This monitoring process is compulsory for all Parties. Beginning with the Phase 2 evaluation, this process also includes an on-site visit to obtain insights from governmental and non-government actors in the evaluated country. After discussing and revising the draft evaluation report during its plenary meeting, the WGB adopts the report and recommendations. Following its "consensus minus one" approach, the evaluated country can comment on the draft evaluation report and recommendations, but cannot block them from being adopted. The main evaluation and follow-up monitoring reports adopted by the WGB are systematically published on the OECD website.

Box 1. Prior WGB evaluations of Norway	
2013	Phase 3 Follow-up
2011	Phase 3 Report
2007	Phase 2 Follow-up
2004	Phase 2 Report
1999	Phase 1 Report

3. Norway's previous full WGB evaluation during Phase 3 dates back to June 2011. The Working Group assessed Norway's level of implementation of its eight Phase 3 recommendations in 2013. At that time, the Working Group concluded that Norway had fully implemented five recommendations, partially implemented two, and not implemented one.¹ (See Figure 1). The WGB's previous evaluation and monitoring of Norway in Phases 1–3 can be found in the accompanying box.

Figure 1. Norway's Implementation of its Phase 3 Recommendations

(WGB assessment as of Norway's 2013 Phase 3 Two-Year Written Follow-up Report)



Phase 4 process and on-site visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection and corporate liability – while also addressing progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic

¹ See Annex 1 for a list of Norway's Phase 3 recommendations and the Working Group's assessment of their implementation, based on Norway's Phase 3 Follow-up Report.

legislation or the institutional framework.² Phase 4 takes a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements. For this reason, issues that were not deemed problematic in previous phases are not revisited in this report if there have not been substantive changes affecting them.

5. The evaluation team for this Phase 4 evaluation of Norway was composed of lead examiners from the Czech Republic and Denmark, as well as members of the OECD Anti-Corruption Division.³ Pursuant to the Phase 4 process, after receiving Norway's responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Oslo from 29 January to 1 February 2018. During the on-site visit, the team met with representatives of the Norwegian government, law enforcement authorities and the judiciary, the private sector (*e.g.*, business associations, companies, banks, lawyers, and external auditors), as well as civil society (*e.g.*, non-governmental organisations, academia and the media).⁴ The evaluation team expresses its appreciation to all the participants for their contributions to these discussions.

Norway's economic situation and foreign bribery risks

6. Business dynamism and sound management of natural resources wealth have helped propel Norway to having one of the highest levels of GDP per capita in the world⁵. This, combined with its "Nordic model" of inclusiveness and low inequality, allows Norway's 5.2 million people to benefit from high levels of wellbeing. Norway is above the OECD average in all dimensions of the OECD Better Lives Index and ranks first among 188 countries based on the 2016 Human Development Index.⁶

7. However, in terms of volumes of total GDP, outward FDI stock and total exports, Norway is a relatively small actor in the world economy – it is well below the Working Group average in all three economic aggregates (Figure 2).

² See WGB Phase 4 evaluation procedures.

³ The Czech Republic was represented by Lenka Mlynařík Habrnálová, Head of International Organizations Unit, International Cooperation Department, Ministry of Justice and by Jana Ružarovská, Referent, Legal Department, Financial Analytical Office. Denmark was represented by Flemming Christian Denker, Consultant, Council of Europe and, formerly, Deputy State Prosecutor at the State Prosecutor for Serious Economic and International Crime; and Kurt Jakob Willaredt, Deputy Chief Prosecutor, Office of the Director of Public Prosecution. The OECD was represented by Kathryn Gordon, Coordinator of the Phase 4 Evaluation of Norway and Senior Economist, Elisabeth Danon, Legal Analyst, and Brooks Hickman, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

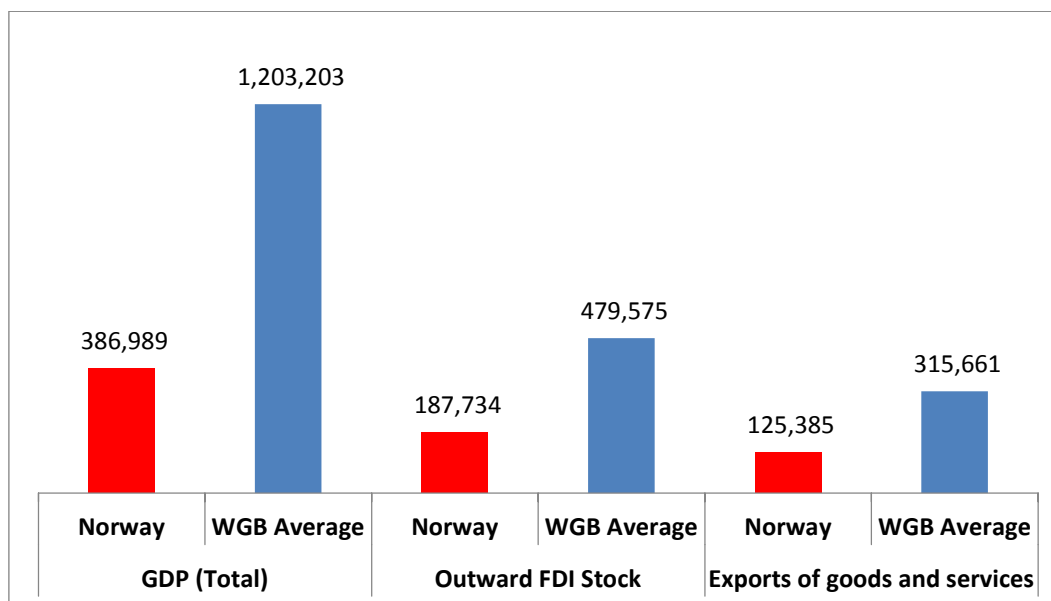
⁴ See Annex 2 for a list of participants in the on-site visit discussions.

⁵ Unless otherwise indicated, this section's description of Norway's economic structure, trade and investment is based on the OECD (2017), *Economic Survey of Norway 2017*, page 6 et seq. Data on the OECD 'Better Lives Index' is for 2015.

⁶ See UNDP Human Development Report 2016. The Human Development Index is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living.

Figure 2. Comparison of Norway's economic data against Working Group average

(2016 data; millions of current USD)



Source: UNCTAD.

Economic structure and international trade and investment

8. According to the 2017 OECD Economic Survey of Norway, the structure of Norwegian economic activity is expected to shift away from petroleum-related activities. Even though Norway remains the 14th largest global producer of petroleum, domestic production is already declining.⁷ Norway also has long-established non-oil sectors (*e.g.* shipping), as well as activities that harness Norway's substantial sources of hydropower (*e.g.* aluminium smelting and fertiliser production). As in other advanced economies, Norway's economy is dominated by a wide range of service sectors, including banking, insurance, engineering, transport and communications.

9. Over the 2014-2016 period, trade generated 34% of GDP, compared with an OECD average of 28%.⁸ Norway is a member of the European Economic Area, but voted against joining the European Union in referenda held in 1972 and 1994. Norway's exports of goods and services destinations have become increasingly global, even though they remain strongly focused on European markets. Norwegian mainland exports (*i.e.* goods and services exports, excluding oil and gas) are destined primarily for markets in Europe (67% of goods exports go to European destinations and 50% of services exports). Asia accounts for a total of 19% of mainland goods exports, including 5% for the People's Republic of China). Some of these export destinations would seem to entail non-negligible risks of foreign bribery.

10. Norway's export markets are focused on several moderate- to high-risk sectors. Foremost among these are energy and metals exports (54% of Norway's goods and services exports). As discussed later in this report, two of Norway's five cases that were concluded with sanctions for foreign bribery or related offences involved the oil and gas sector. For non-oil "product" exports, machinery and equipment account for 8% of goods and services exports, chemicals for 4% and professional services and transport were responsible for 12% each. Thus, Norway's non-oil export

⁷ See United States, Energy Information Agency ranking for 2016.

⁸ OECD (2017), Trade and Investment: Statistical Note.

sector entails non-negligible foreign bribery risks that are broadly comparable to those faced by other advanced economies with large machinery, engineering and service exports.⁹

11. Norway's outward FDI stock represented 43% of GDP at the end of 2015, which is above the world average of 33% but well below the EU average of 60%. OECD statistics on Norway's outward FDI position show that the main destinations were the Netherlands (17%), Sweden (14%), the United States (13%), the United Kingdom (9%), Denmark (7%) and Singapore (7%). The sectoral composition of outward investment stock includes: oil and gas and mining (27.5%), manufacturing (27.5%), finance and insurance, telecommunications (5.6%) and transport and storage (5.3%).¹⁰ Again, some of these sectoral destinations would seem to entail non-negligible risks of foreign bribery.

The policy framework for business, trade and investment

12. The regulatory environment in Norway is broadly supportive of business. The country ranks 8 out of 190 countries in the World Bank's 2018 "Doing Business" index,¹¹ and 19 out of 127 economies in the ranking based on the Global Innovation Index.¹²

13. State-owned enterprises (SOEs) are a pervasive feature of the Norwegian economy. The Norwegian government is the largest shareowner in Norway, with ownership stakes in a range of key sectors (e.g. energy, transportation, finance, and communications). About 70 SOEs are supervised directly by the relevant ministries, and approximately 35% of the stock exchange's capitalization is in government hands. According to the 2017 OECD Economic Survey of Norway, the administration of SOEs is "in many respects exemplary".¹³ For instance, governance guidelines generally follow accepted good practice. Despite this exemplary governance, several state-owned enterprises have been sanctioned for foreign bribery in Norway, as well as in foreign jurisdictions. (See Section C.5. below).

Foreign bribery cases

14. Norway has actively enforced its foreign bribery laws, especially relative to its size. The flow chart in Figure 3 shows how Norway has addressed all of the known potential foreign bribery cases that have arisen since the Convention came into force in 1999. It shows that Norway investigated a little under half of all known allegations (i.e. ten investigations, including six that arose after Phase 3).¹⁴ These ten investigations led to prosecutions or resolutions for foreign bribery in four cases and for trading in influence in one case.¹⁵ After a full investigation, Norway decided it did not have grounds to prosecute in three cases. In one of these three cases, Norway is now

⁹ The source for the data in this paragraph is the 2016 Economic Survey of Norway, page 21.

¹⁰ OECD Investment Division calculations based on OECD Foreign Direct Investment Statistics. Sectoral composition data are for 2016.

¹¹ World Bank Group, "Doing Business 2018: Reforming to Create Jobs".

¹² The Global Innovation Index (GII) provides tools that can assist in tailoring policies to promote innovation, long-term output growth, improved productivity, and job growth. See 2017 report on <https://www.globalinnovationindex.org/gii-2017-report>.

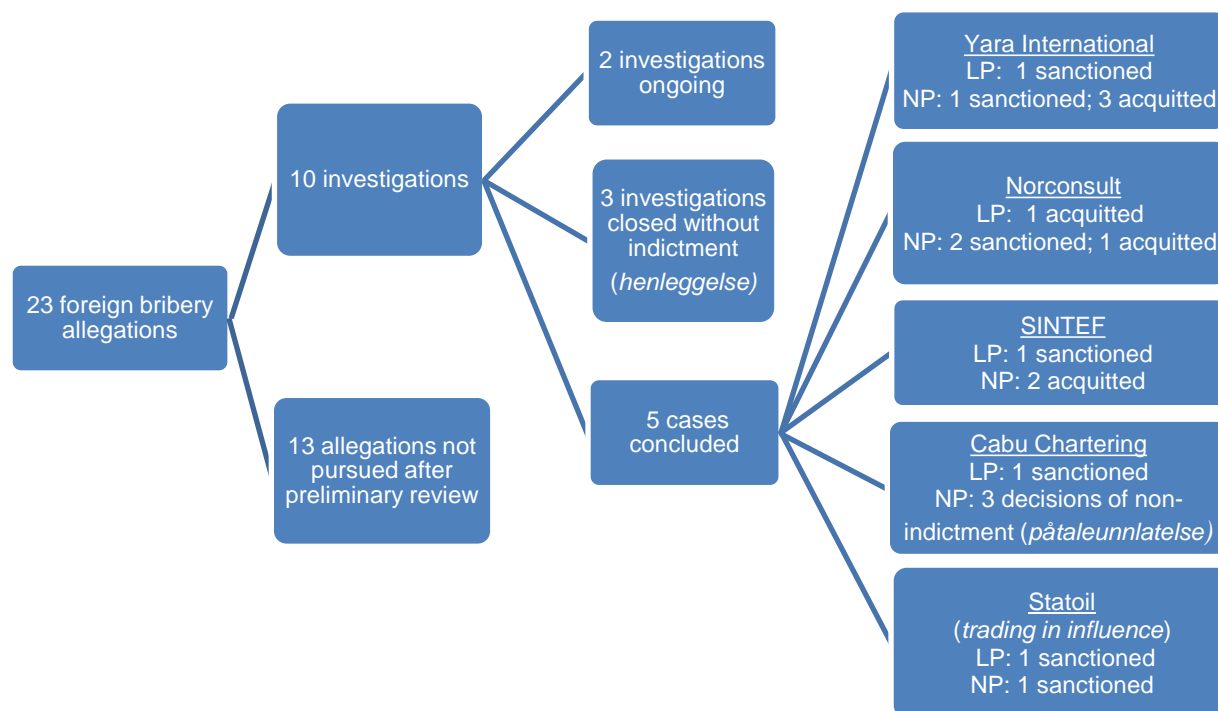
¹³ OECD (2017), OECD Economic Survey Norway 2017, page 34.

¹⁴ Following prior Phase 4 reviews, the allegations used in this evaluation come from the Matrix, a collection of foreign bribery allegations prepared by the OECD Secretariat using public sources, such as the media. The inclusion of allegations in the Matrix does not prejudice the issue of whether the allegations are, in fact, an offence under any applicable law.

¹⁵ Three of these five resolutions were concluded after Phase 3.

prosecuting a natural person for other offences, including money laundering, tax evasion, and breach of trust. Two cases are still under investigation.

Figure 3. Norway's handling of foreign bribery allegations (February 1999 – May 2018)



Note: In this Figure, “LP” refers to “legal persons”, while “NP” refers to “natural persons”.

Source: Secretariat research and information provided by Norway during the Phase 4 evaluation.

15. The ten investigations resulted in sanctions for four natural persons and four legal persons in five concluded cases. Six natural persons were acquitted. Three natural persons received a decision of non-indictment (*påtaleunntatelse*, further explained under para. 18). The concluded foreign bribery cases since Phase 3 are described below.

16. *Norconsult*.¹⁶ This case arose when Norconsult, a major Norwegian construction and consulting firm, obtained a contract through a joint venture to upgrade a municipal water-sewage system in Tanzania. Before concluding the joint venture agreement, Norconsult’s representative learned that the joint venture partners had promised bribes to obtain the contract. Nonetheless, Norconsult and its employees continued with the joint venture agreement and participated in the improper scheme. ØKOKRIM charged three natural persons and issued a penalty notice to the company for aggravated corruption. Norconsult rejected the penalty notice, thus beginning Norway’s first prosecution of a company for aggravated corruption predicated on foreign bribery. The trial against the company and three individuals began in the Oslo District Court in May 2011. The legal person was acquitted and the three individuals were convicted. Two of the natural persons accepted their convictions and (conditional) prison terms, but ØKOKRIM and the third natural person filed appeals. The Court of Appeals acquitted the third natural person, but convicted Norconsult and imposed a NOK 4 million fine (approx. EUR 400 000) on the company. Ultimately, the Supreme Court overturned the company’s conviction in 2017. While the Supreme Court

¹⁶

In Phase 3, the *Norconsult* case was referred to as the “Consulting Company” case.

majority considered several factors, it primarily justified its decision by the length of time taken to prosecute Norconsult. Among the other considerations, it also observed that the company had already been sanctioned for the conduct because it had been provisionally debarred by the World Bank in 2011. In 2014, the World Bank ultimately confirmed a six-month debarment but gave retroactive credit for the time that Norconsult had spent on the provisional debarment list.¹⁷

17. *Cabu Chartering*.¹⁸ This case involved the use of an intermediary to pay bribes to officials in Bahrain in order to obtain an aluminium shipping contract. After hiring a law firm to investigate, the shipping company self-reported to ØKOKRIM, and handed over documents from the investigation. In 2014, Cabu accepted a penalty notice, paying a fine of NOK 20 million (approx. EUR 2 million) and forfeiting NOK 12 million in unlawful proceeds (approx. EUR 1.2 million). Although ØKOKRIM investigated three Norwegian nationals, the cases against them were discontinued with a decision of non-indictment (*påtaleunntatelse*). Under this procedure, which is regulated by sections 69 and 70 of the Criminal Procedure Act (CPA), the prosecution may decide that other factors weigh against prosecuting a suspect whose guilt could be legally established. In the *Cabu Chartering* case, the prosecution concluded, after considering the totality of the circumstances, that the natural persons would likely only receive conditional sentences if convicted. The prosecution decided to resolve the matter through a *påtaleunntatelse*, after weighing the limited preventive effect of conditional sentences against the resources needed for a trial.

18. *Yara International*.¹⁹ This case involved bribery of Indian and Libyan public officials, the purpose of which was to facilitate entry into these countries' fertiliser markets through joint ventures with local partners. (A third part of the case involved a private-to-private bribery scheme in Russia). The agreed bribe amounts totalled USD 3 million in India and USD 5 million in Libya. Yara belatedly reported the offence to Norwegian authorities, once journalists began reporting on the case. The company, however, cooperated with the ØKOKRIM investigation. In addition to waiving privilege,²⁰ Yara timed its internal investigation in a way that enabled ØKOKRIM to interview relevant witnesses first. The case against the company was resolved in 2014 when the company accepted a penalty notice imposing a record-breaking corporate fine of NOK 270 million (approx. EUR 27 million). In addition, four executives were charged with foreign bribery. Although the District Court convicted all four executives, three were acquitted on appeal by the jury, which under Norwegian law was not required to provide its reasoning. In 2017, the Supreme Court affirmed a seven-year term of imprisonment imposed on the fourth executive.

19. Three investigations were completed under the *henleggelse*²¹ procedure with a decision that there were no grounds for indictments based on foreign bribery. These three cases concerned:

a) *VimpelCom executive*. This case arose when VimpelCom made payments of more than USD 114 million to Uzbek government officials between 2006 and 2012 in order to enter and continue operating on the Uzbek telecommunication market. The payments were channelled through

¹⁷ See Bjørn H Amland, "Norconsult re-enters World Bank market", *Development Today* (15 Feb. 2014). For an analysis of the Supreme Court's Norconsult decision, see Section C.3.2 below.

¹⁸ In Phase 3, the Cabu Chartering case was referred to as the "Shipping Company" case.

¹⁹ In Phase 3, the Yara case was referred to as the "Fertilizer Company" case.

²⁰ According to Norway, legal privilege can protect qualified corporate communications with both external and in-house counsel. Nonetheless, Norwegian law enforcement officials reported that Norwegian companies sometimes choose to waive legal privilege as a sign of cooperation.

²¹ The competent prosecution authority can resort to the *henleggelse* procedure as regulated in CPA sections 72-74. Unlike *påtaleunntatelse*, where prosecution finds that there are reasons not to indict even though it concludes guilt to be proved, *henleggelse* can be used to discontinue a case, for example, when evidence is insufficient.

Takilant, a company controlled by the daughter of the former Uzbek president, and disguised as legitimate business transactions. In November 2015, Norway detained a former VimpelCom CEO (a Norwegian citizen) on suspicions of foreign bribery connected with this corruption scheme. The case was discontinued in 2017 because ØKOKRIM believed that it could not prove the subjective (*mens rea*) element of the offence, given that the executive had relied on a US law firm's (limited) FCPA review concluding that the transaction was compliant.

b) *Kongsberg Gruppen*. In 2014, ØKOKRIM raided this defence/technology company, which was 50% Norwegian SOE at the time, and charged it with corruption connected with communications equipment deliveries in Romania between 1999 and 2008. In 2016, the charges were discontinued against the company because Norway found insufficient grounds for prosecution. ØKOKRIM instead indicted a former employee who had been dismissed for reasons related to this case. This former employee was charged with money laundering, tax evasion, and breach of trust and was convicted at trial in October 2017. The trial court sentenced the defendant to 4.5 years imprisonment (with 2 years suspended) and confiscation. Both the defendant and ØKOKRIM have appealed the decision, and a hearing has been scheduled for late November 2018.

c) *Sevan Marine ASA / Sevan Drilling ASA*. ØKOKRIM began an investigation of suspected bribery in Brazil in 2015. The investigation focused on payments related to consultancy agreements with agents connected to the company's contracts with the Brazilian oil company Petrobras. In summer 2017, ØKOKRIM decided not to indict a former CEO of Sevan Marine ASA. The investigation involved considerable international cooperation, both concerning account information and interrogations. Based on an overall assessment of the evidentiary material, ØKOKRIM concluded in May 2018 that there were no grounds for indicting any of the remaining suspects.

Commentary

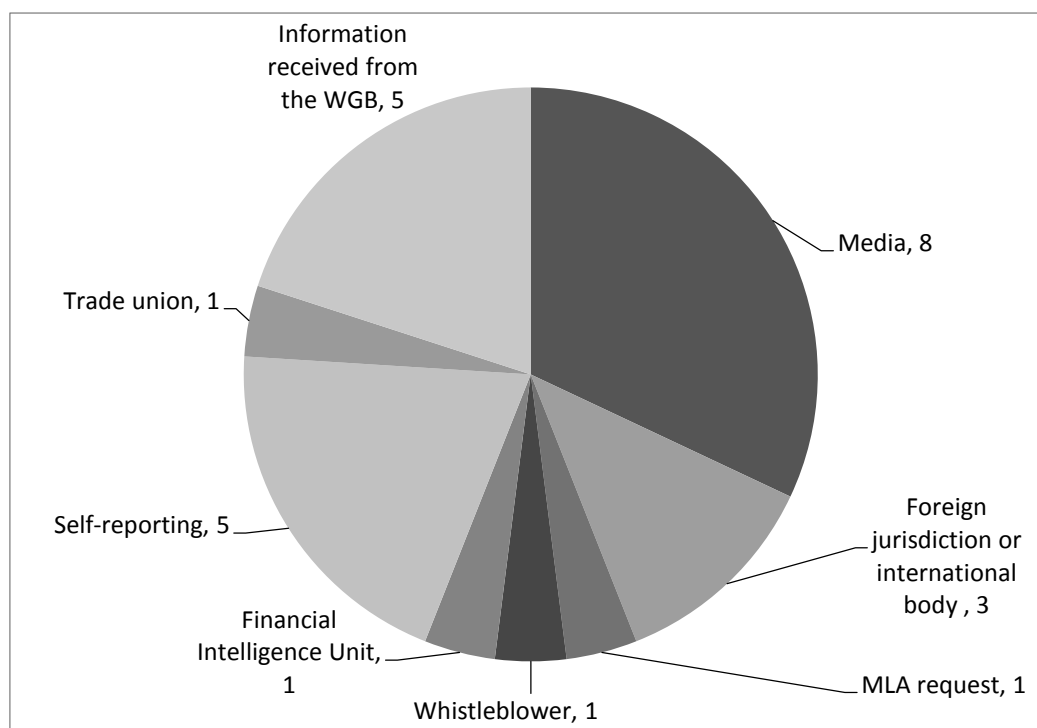
The lead examiners commend Norway for its active enforcement of its foreign bribery laws since Phase 3. They urge Norway to take all necessary measures to ensure that its track record of successfully prosecuting foreign bribery cases is extended into the future.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

20. Norway uses a range of sources to detect foreign bribery. Figure 4 shows detection sources for 20 of the 23 cases (allegations, investigations, and cases that were discontinued, concluded through non-trial resolutions or in court). The sources of detection for the three other cases are not known. Several of the cases were detected through more than one source.

Figure 4. Detection sources for foreign bribery cases

(Cases include allegations, ongoing investigations and terminated cases*)



*Note: "Terminated cases" include both cases that were concluded either in court or through penalty notices, as well as investigations discontinued at an advanced stage.

A.1. Self-reporting by companies

21. Self-reporting by companies is an important source of detection of foreign bribery in Norway. It was a source in 5 out of the 20 cases covered in Figure 4, including three of the four cases that resulted in sanctions for legal persons. Thus, self-reporting is not only numerically important, it also appears to generate reliable information about possible foreign bribery cases. A number of competing considerations influence companies' decision to self-report a potential corruption offence.

22. *Mitigating factors for sanctions.* Penal Code section 78 provides a list of factors that can reduce the sentence imposed, including that "the offender has made an unreserved confession, or contributed significantly to solving other offences". (See Section B.8 below). This text provides the legal basis that permits judges and prosecutors to reduce sanctions in recognition of self-reporting. The Director of Public Prosecutions guidance on such reductions (RA-2007-3) states the following: "All factors must then be taken into account in the determination of the size of the discount, but the various grounds should not be added up. A total evaluation must be made. A discount of between one fourth and one third is considered generally appropriate."

23. *Other sanctions such as debarment.* While self-reporting can reduce the level of sanctions, it does not do away with other sanctions such as debarment from government contracting and exclusions from public advantages (see Section B.6 below). According to on-site participants, companies whose business depends on public procurement would, for this reason, be more reluctant to self-report.

24. *Other concerns.* According to some on-site participants, including corporate compliance professionals, companies in Norway that self-report are motivated by market considerations (*e.g.*, reputational concerns among customers or the desire to resolve the allegations rapidly). On-site participants also identified the lack of predictability in the outcomes of self-reporting as a potential obstacle to self-reporting. Companies were concerned about a perceived lack of clarity in the value of the “discount” that is available for self-reporting. Although the Director of Public Prosecution’s guidance calls for a sentencing discount of “between one fourth and one third”, the companies noted that, since there is some uncertainty about how the base level of the fine is set, they could not determine the discount they would obtain if they made a self-report. Legal practitioners at the on-site visit were confident that self-reporting would influence the final sanction, but stated that they could not predict by how much.

25. Norwegian law enforcement authorities seemed to be aware of this need for more predictability from companies and legal experts. They explained that clarity should typically come from jurisprudence, of which, for the time being, there is very little. That said, some expressed reluctance to fully articulate how the fine would be calculated to avoid companies from deciding that the sanction imposed is merely the cost of doing (unlawful) business. Shortly before the June plenary, Norway also reported that the Ministry of Justice has appointed a leading Norwegian corporate liability expert to propose possible legislative amendments concerning, *inter alia*, how corporate fines are set, including the relevance of self-reporting and cooperation.

Commentary

Self-reporting is already an important source of detection in Norway but could become even more so. An adequate legal framework for self-reporting is already in place and the Director of Public Prosecutions has issued useful guidance in this area. However, the lack of predictability in procedures and outcomes is an issue. Perfect predictability in this area will never be attainable, but Norway should seek to use any appropriate means at its disposal to clarify the meaning and application of outcomes and procedures for self-reporting in the context of foreign bribery.

A.2. Detection through the media – the role of investigative journalism

26. The media constitute a significant source of detection of potential foreign bribery cases in Norway. Overall, the media played a role in 8 out of the 20 cases shown in Figure 4. Moreover, the media helped to uncover at least 2 of the 10 cases that progressed to the investigation stage and 1 case that ended in sanctions.²² In this last case, the media played a central role, as the company decided to self-report to ØKOKRIM only after journalists had started reporting on its business dealings in Libya.

27. At the on-site visit, both civil society and government representatives acknowledged the important role that the Norwegian media have played in uncovering economic crimes in general and foreign bribery in particular. They explained that investigative journalists are held in high esteem in Norway, and that journalists can protect the confidentiality of their sources under Norwegian law. Civil society representatives stressed the importance of preserving the integrity of investigative journalism so that the media can maintain its watchdog role and remain an important source for

²² The lead examiners have information on the source of detection for eight of the ten allegations formally investigated.

detecting foreign bribery. Nonetheless, they voiced concerns that investigative journalists are under increasing pressure, because of the industry's shrinking profit margins.

28. During the on-site visit, the evaluation team learned that ØKOKRIM liaises with journalists who are reporting on scandals, such as the Panama Papers revelations, in order to explore whether they could give rise to formal investigations in Norway. As part of this effort, it has hired a former journalist to foster engagement with the media. The ØKOKRIM Anti-Corruption Team has also shown creative use of media sources to foster international legal assistance. When the Petrobras scandal came to light in the media, Norway compiled a list of Norwegian entities that reportedly had contracts with Petrobras. ØKOKRIM spontaneously provided this list to Brazilian law enforcement authorities and offered to provide further assistance as needed.

Commentary

The lead examiners commend ØKOKRIM for its pro-active use of media sources and, in particular, its use of media for both its own investigations and to support investigations underway in other countries. Notably, journalists reported that ØKOKRIM had engaged with them to learn about potential scandals, such as the Panama Papers revelations. Further, the lead examiners were impressed by the ØKOKRIM Anti-Corruption Team's initiative in compiling media references of Norwegian companies that were potentially implicated in the Petrobras scandal and sending them to Brazilian authorities to offer assistance as needed.

A.3. Detection through whistleblowers

29. Norway has a robust legal framework for whistleblowing and whistleblower protection, whose provisions are found under Chapter 2.A of the Working Environment Act (WEA). Several elements of the whistleblowing regime reflect recognised good practices²³. In particular, the WEA's protections apply to whistleblowers who report "any censurable condition" in both the public and private sectors. Whistleblowers are protected from retaliation, whether they choose to report to outside authorities or to report within their organisation. The burden of proof is on the employer to show that retribution did not take place.

30. The latest amendments to the WEA came into force on 1 July 2017. Under the new provisions, institutions that employ five or more people are required to have an internal whistleblowing channel. The Norwegian Labour Inspection Authority monitors the implementation of this rule by companies.

31. Despite these protective measures, whistleblowing remains a limited source of detection of bribery, and economic crimes in general. None of the cases that ended in sanctions for foreign bribery were detected through whistleblower reports. Whistleblowing was, however, the source of detection in one case, in which the investigation was ultimately discontinued.

32. During the on-site visit, participants expressed the view that Norwegian work culture was the main reason why whistleblowing does not play a major role in detecting foreign bribery cases. They explained that Norway's social and professional culture tends to see whistleblowing as an act of disloyalty or betrayal. Participants during the on-site visit also alluded to cases that did not involve foreign bribery, where whistleblowers paid a high price for their actions.

33. Law enforcement authorities who met with the evaluation team largely agreed with the other participants' view of the current state of affairs. Norway's robust legal framework for protections

²³ See Council of Europe, "[Protection of Whistleblowers: A Brief Guide for Implementing a National Framework](#)" (2015), page 9. This guidance document mentions in particular Norway's broad definition of the scope of subjects that may be reported by whistleblowers covered by the WEA protections.

thus is not yet supported in practice by societal norms that value and protect whistleblowers. However, these authorities also noted that the new protections under the 2017 amendments have not yet been tested in courts. Norway is also continuing to seek ways to improve in this area. At the time of the on-site visit, a commission was preparing a White Paper on Whistleblower Protection,²⁴ which was published on 15 March 2018. The White Paper proposes *inter alia* the clarification of elements of the existing framework, including the types of norm violations that are covered by the concept of “censurable conditions”, the types of behaviour that constitute retaliation and clarification of the employer’s duty of care to the whistleblower. It also recommends establishing an ombudsman for whistleblowing, a specialised commission, training and guidelines.

Commentary

The legislative framework for whistleblower protection in Norway is robust and embodies elements that are considered to be good practices under international standards. However, the on-site visit revealed that, in practice, these de jure protections may not translate into effective protections for whistleblowers in real workplace situations. The lead examiners note the recent publication of the White Paper and encourage Norway to continue its efforts in this area. They wish to follow up on further developments, both because there is apparently a need for continued progress and because elements of Norway’s existing whistleblower protection framework could serve as a model for other countries.

A.4. Detection through external auditors and accountants

A.4.1. External accountants’ and auditors’ limited role in detection

34. None of Norway’s foreign bribery cases were detected through direct reports from external auditors and accountants.²⁵ Nevertheless, external auditors and accountants do have various legal obligations which are defined by auditing standards and by specific legislation. The legal obligations are found mainly in the Norwegian Money Laundering Act, under which external auditors are obligated entities. New guidance issued in April 2017 explicitly states that the auditor has a duty to inspect and report circumstances that may indicate that funds could be connected with criminal activities, including terror financing. According to Norway’s written submission, the “duty to report such suspicious transactions arises when such suspicion cannot be disproved”.

35. Other legal obligations arise under the Auditing Act, which defines the reporting duties of external auditors. The Act has not been amended since Phase 3, but is currently under review with a view to transposing 2014 EU Auditing reforms.²⁶

36. External auditors are also subject to professional standards that require them to strike a balance between protecting their clients’ confidential information and fulfilling a duty to report crimes. These non-binding standards create a framework to guide auditors and accountants in what actions to take when they become aware of potential illegal acts by a client or employer.

²⁴ See <https://www.okokrim.no/korrupsjon.422251.no.html>

²⁵ It should be noted that neither the 2014 OECD [Foreign Bribery Report](#) nor the 2017 WGB publication, [The Detection of Foreign Bribery](#), have external auditors as a source in any of the statistics presented on sources. This may indicate that external auditors are not, statistically speaking, an important source of detection in concluded cases to date for all WGB countries.

²⁶ These are the EU Audit Reform (EAR) Directive 2014/56/EC and Regulation 537/2014.

International accounting standards provide guidance on when external auditors can or are required to report suspicions of fraud or other crimes.²⁷

37. Auditors participating in the on-site visit were well aware of these obligations. They nevertheless stated that, although they can identify and report suspicious transactions based on the distinctive characteristics of the transactions themselves, it is not usually possible for auditors to infer that they involve foreign bribery in particular. They also noted that when they suspect that they have detected criminal activity in the scope of an auditing assignment, they will try to convince the client to contact the enforcement authorities on their own. They stated that they have done this on occasion. Other options include resigning from the assignment and making their own report to an external authority. This last option is reportedly quite rare, except for Suspicious Transaction Reports (STRs).

Commentary

The lead examiners appreciated hearing that representatives of the external accounting and auditing profession are aware of and act on their obligations to report material wrongdoing to their clients. Moreover, they encourage their clients to report to the authorities and will, if necessary, resign from an assignment or make their own report to law enforcement authorities. They also seemed to be well aware of their reporting obligations under the Money Laundering Act. Yet, external auditors and accountants have not yet played a role in detecting foreign bribery in Norway. Thus, the lead examiners encourage Norway to identify good practices on how external accountants and auditors should respond when management itself appears to be involved in foreign bribery or if a client does not satisfactorily address the concerns of their external accountants and auditors. The lead examiners also recommend that Norway consider including an explicit requirement to report to law enforcement authorities, when appropriate, in the draft amendment to the Auditing Act.

A.4.2. Obligations of external auditors to report to Boards – Phase 3 recommendation 4(a)

38. Phase 3 recommendation 4(a) asked Norway to “expand the reporting obligations under the Auditing Act to require auditors to also report to management circumstances that may trigger the liability of the legal person (and not only the natural persons at senior management level).” This recommendation was judged to be “not implemented” at Norway’s two-year Phase 3 follow-up evaluation.

39. External auditors report material issues to the Audit Committee (and, by implication the Board) in order to assure the quality of company information reported to financial markets, including possible about criminal liabilities. The WGB recommendation quoted above asks Norway to create broader obligations for auditors reporting to their client companies’ Audit Committees. Specifically, they are asked to report any circumstance that may trigger corporate liability and not just liability of individuals at the senior management levels.

40. Currently, Norway only explicitly requires reporting on liabilities created for senior management and Board members. Nevertheless, auditors and accountants at the on-site visit indicated that, under their professional standards,²⁸ they are already required to report all matters that

²⁷ See International Federation of Accountants’ (IFACs) [Responding to Non-Compliance with Laws and Regulations](#). See also IFAC’s standard ([The Auditor’s Responsibility in Relation to Fraud in an Audit of Financial Statements: ISA 240](#)).

²⁸ See, for example, paragraph 42 of the Internal Federation of Accountant’s International Standard on Auditing ([The Auditor’s Responsibility in Relation to Fraud in an Audit of Financial Statements: ISA 240](#)) states the following: ‘The auditor shall communicate with

could have a material impact on their clients' financial statements. In their view, this would effectively require them to report any matters contemplated by the Phase 3 recommendation.

41. As an update, Norway reported that a group of experts has developed a draft for an amended Audit Act, motivated in large part by a broader need to implement EU rules. The group of experts proposes a new approach to auditors' reporting obligations, which would explicitly require auditors to report all material matters to the Board under Norwegian law. Thus, the main impact of the proposed amendments to the draft bill will be to make existing professional standards and practices explicit in Norway's Auditing Act and to give them the force of law. Participants in the on-site visit were confident that the proposed amendments to the Act would be enacted, but were not sure when this would happen.

Commentary

The lead examiners are of the view that Norway has made progress in enacting the legislation called for in Phase 3 Recommendation 4(a). The expert group has completed its work on the proposed amendments and the draft law was submitted for public consultation, which has now been concluded. However, the draft law has not been enacted and no firm date is set for its enactment. Therefore, the lead examiners reiterate Recommendation 4(a).

A.5. Detection through government sources

42. Generally, detection through information from other government sources is of minor importance in Norway. Some examples include:

A.5.1. Financial intelligence unit (FIU)

43. Norway's FIU, which is a special unit within ØKOKRIM, has not been a substantial source of foreign bribery detection in Norway. Norway reports that "some, but few" STRs are related to possible corruption offences, including foreign bribery. A potential foreign bribery case was detected in the defence industry through an STR, which Norway's FIU then referred to ØKOKRIM's anti-corruption team for further investigation.²⁹ Based on statistics provided in the WGB's 2017 detection study³⁰ the FIU's relatively small role in the detection of foreign bribery cases may not be significantly different than the situation found in many other WGB countries.

44. Norwegian authorities acknowledge that Norway has been a destination for funds tainted by corruption and is making efforts to improve its ability to collect information through STRs. In recent years, the number of STRs that have been received has increased dramatically.³¹ Norway reports that the number reflects better organisation and reporting by obligated entities. In addition, the FIU

those charged with governance any other matters related to fraud that are, in the auditor's judgment, relevant to their responsibilities". Fraud is defined in paragraph 11 as 'an intentional act ... involving the use of deception to obtain an unjust or illegal advantage'.

²⁹ Ultimately, the anti-corruption team did not find enough evidence to indict the legal person for foreign bribery in this case, but was able to prosecute the natural person allegedly involved for other criminal offences.

³⁰ The WGB's 2017 publication, '[The Detection of Foreign Bribery](#)', shows that FIUs contributed to detection in two percent of the foreign bribery cases that ended with sanctions (see page 10). Thus, the frequency of FIU detection of foreign bribery may not be significantly different than that of many other WGB countries.

³¹ For the 2016-2017 period, ØKOKRIM reported receiving an average of 8,443 STRs per year, which amounts to a nearly 85% increase from the yearly average received during the 2011-2015 period.

reports that the quality has improved in part thanks to a concerted effort by the FIU to engage with banks and other reporting entities. That said, the actual impact of Norway's enhanced STR system on foreign bribery impacts remains to be seen.

A.5.2. Supervisory Ministries for SOEs

45. During the on-site visit, representatives of the Supervisory Ministries stated that they encourage their SOEs to report directly to law enforcement authorities, if they are implicated in foreign bribery allegations. However, the Supervisory Ministries sometimes provide information directly to law enforcement authorities. For example, the Ministry of Trade, Industries and Fisheries (MITOF) supplied information to law enforcement authorities in the *VimpelCom* case. (Telenor, a Norwegian listed SOE was a shareholder of VimpelCom, now Veon). Concerning this case, Norway reported that, in 2015, the Ministry informed ØKOKRIM of allegations from a whistleblower. The information was also provided to the SOE itself at "about the same time" as ØKOKRIM. The Ministry reportedly found it appropriate to inform the SOE, given its role as a majority shareholder in the company. The handling of sensitive information about potential foreign bribery cases needs to be evaluated in light of the impact it may have on any subsequent ØKOKRIM investigations.³² For more information on Norway's policies on managing corruption risks associated with its SOE portfolio, see section C.5.

A.5.3. Official Development Assistance (ODA) and export credit agencies

46. ODA institutions have not been a source of detection for any of Norway's foreign bribery cases. In the *Norconsult* case, after the company had already informed ØKOKRIM about suspicions connected with a joint venture project in Tanzania, the Norwegian Agency for Development Cooperation (Norad), one of Norway's ODA institutions, independently provided ØKOKRIM with information that it had detected through its own channels. Viewed as a whole, Norway's ODA institutions have implemented extensive anti-corruption programmes for both grant managers and grant recipients, including obligations to report to law enforcement authorities when suspicions arise. For more information on management of corruption risks in the context of ODA, see Section D.3.

47. Although Norway's export credit agencies have elaborate corruption risk management system, no cases have yet been detected through information provided by these agencies. See Section D.2 below for more information about these agencies' corruption management programmes.

A.5.4. Ministry of Foreign Affairs and tax authorities

48. Norway resembles many other WGB members in that its Ministry of Foreign Affairs (MOFA) and tax authorities have played only a small role in detecting foreign bribery cases.³³ In Norway, no foreign bribery cases have been detected via embassies and other MOFA agencies. The fact that no cases have been reported through these channels may be an indication that there is room for raising more awareness amongst MOFA personnel about the role that they can play in detecting potential foreign bribery cases. Similarly, even though tax authorities have detected domestic corruption, they have not yet detected a case of foreign bribery. This may also indicate that efforts to use tax authorities as a source information can be enhanced.

³² See Section C.5 below for a more in-depth discussion of how Norway is addressing corruption issues related to SOEs.

³³ In the WGB 2017 publication, [The Detection of Foreign Bribery](#), embassies and tax authorities each played a role in only one percent of the foreign bribery cases that ended with sanctions (page 10). Thus, the relatively low frequency of detection by these two institutions of foreign bribery cases in Norway may not be significantly different than that of many other WGB countries.

A.6. Detection through international cooperation – a growing source of detection

49. For Phase 4, Norway reported that “referrals from foreign law enforcement authorities seem to be the one [detection] source that has increased the most.” As shown in Figure 4, one case was detected through a mutual legal assistance (MLA) request, while 3 others were detected either fully or in part through information obtained from a foreign jurisdiction or an international organisation. See Section B.9 for more information on Norway’s approach to international cooperation and MLA.

50. As noted in Section A.2 above, ØKOKRIM’s Anti-Corruption Team took the initiative of spontaneously providing Brazilian law enforcement authorities with a list of Norwegian entities that had contracts with Petrobras. Norway reports that such spontaneous contacts, whether initiated by Norway or by other enforcement authorities, sometimes prompt foreign bribery investigations. For example, Norway has on several occasions been alerted by Swiss authorities about possible cases involving Norway. Similarly, in the *Kongsberg* case, the Romanian National Anticorruption Directorate (DNA) was alerted by the Romanian Embassy in Norway that ØKOKRIM had opened an investigation. The DNA spontaneously offered assistance in the case as well as subsequently opening its own investigation in Romania. ØKOKRIM also reports that the informal network of law enforcement officials that are hosted by the WGB, as well as other forums such as Eurojust, facilitate spontaneous cooperation between jurisdictions.

Commentary

The lead examiners’ overall assessment is that Norway has shown that it can actively draw on multiple sources of detection. Self-reporting and the media have been the main sources to date, but international cooperation has also played a role in detection. Other sources of detection (e.g. other parts of government) remain largely untapped.

While the lead examiners recognise that several parts of the government have provided information to law enforcement about allegations of corruption, government sources of detections remain marginal. They recommend that Norway consider further developing guidelines for relevant government officials. In addition, they recommend that Norway raise awareness of its embassy staff of foreign bribery and their role in detecting foreign bribery (e.g. searching foreign media sources) and reporting allegations to the appropriate authorities.

The lead examiners also recommend that Norway clarify whether and how a Supervisory Ministry should report foreign bribery allegations involving an SOE when the SOE in question does not fully and promptly disclose relevant information to law enforcement authorities. It should also clarify procedures on how such reporting is to take place so as to preserve the integrity of any subsequent law enforcement proceedings.

Finally, the lead examiners consider that ØKOKRIM should reinforce its efforts to review STRs for matters potentially related to foreign bribery. In addition, Norway should take steps to provide feedback and guidance to help reporting entities better identify suspicious transactions that potentially could be tied to foreign bribery.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. The foreign bribery legal framework and interpretation

51. During Norway's Phase 3 evaluation, the Working Group decided to follow up on how Norway's corruption offences were applied in foreign bribery cases as litigation develops. In particular, the WGB wanted to explore (i) the application of the "improper advantage" element; (ii) the application of the trading in influence offence in foreign bribery cases; as well as (iii) the coverage of bribes paid to third parties and through the use of intermediaries.³⁴ Since Phase 3, Norway has concluded additional foreign bribery cases, which further clarify the issues identified by the Working Group.

52. In another major development, Norway adopted a new Penal Code, which entered into force on 1 October 2015.³⁵ The new corruption, aggravated corruption and trading in influence offences are now codified in sections 387-389. The legislative history indicates that this recodification was not intended to make any substantive changes.³⁶ Thus, case law interpreting the prior provisions will remain relevant. At the same time, the new Penal Code does make substantial changes to Norway's jurisdictional provisions, while also modifying Norway's corporate liability provisions. These changes are discussed in Sections B.2, C.2 and C.3 below.

B.1.1. *Improper advantage*

53. Norway's corruption offence applicable for foreign bribery, now codified as Penal Code section 387(b), prohibits the giving or offering of an "improper advantage" to any person "in connection with the conduct of a position, an office or performance of an assignment". As in Phases 2 and 3, Norway maintains that foreign bribery cases will be investigated and prosecuted under its aggravated corruption offence, now codified as Penal Code section 388. This is because one aggravating factor is whether the corrupt conduct was "carried out by or toward a civil servant or any other person by violating the special trust attached to his position". Norway's recent cases up through Phase 4 confirm this approach.

54. As analysed in Phases 2 and 3, Norway's corruption offences prohibit the giving or offering of an "improper advantage". According to the legislative history, the meaning of "improper" will change over time, reflecting the "dominant moral and ethical views of society". As under the old law, "improper" is understood to mean that an act will only give rise to liability when it is "clearly blameworthy". Since Phase 3, two corruption cases, one involving foreign bribery, help clarify how Norwegian courts assess this issue.

55. During the *Yara* proceedings against the executives charged for aggravated corruption, the District Court assessed whether the consultancy arrangements used to funnel payments to the children of officials in Libya and India constituted "improper" advantages to those foreign public

³⁴ See Norway Phase 3 Report page 14 & Follow-up Issue 7(a).

³⁵ The general part of the new Penal Code was adopted in 2005. The special part, containing the specific offences, was adopted in the 2008-2009 parliamentary session. In addition, minor amendments were also made before the new Penal Code entered into force on 1 October 2015.

³⁶ Norwegian court practice already provides some evidence of this continuity, as the new Penal Code entered into force between the trial court and appellate court rulings involving the four *Yara* executives charged for corruption. Nonetheless, both the Court of Appeals and the Supreme Court continued to apply the aggravated corruption offence under section 276b of the General Civil Penal Code, which was in force at the time of the underlying events. This suggests that the corruption offences in the new Penal Code are, at the very least, not seen as more favourable to the accused than the prior law.

officials. Following the legislative history, the District Court considered a number of factors to make this determination.³⁷ First, it observed that the children did not have any special competence or experience befitting the services mentioned in the draft consultancy contracts. This suggested that Yara's purpose for the consultancies was to improperly obtain the fathers' assistance in their capacity as foreign public officials. Second, the size of the consultancy fees (USD 3 and 4.5 million, respectively) indicated that the advantages were "improper", especially as the fees were disproportionate to the consultant's purported services. Third, the lack of openness about the arrangements, which were never formally concluded in writing and were not disclosed to Yara's actual counterparties, also indicated that the arrangements were "improper". In this regard, the District Court also observed that Yara attempted to conceal the payments using convoluted transactions. Fourth, the payments violated Yara's own ethical guidelines, further cementing the finding of impropriety. In light of these various factors, District Court concluded that Yara had offered or given "improper advantage[s]" to the public officials. Notably, the District Court observed that the alleged prevalence of corruption in Libya and India would have no bearing on this finding, as this was precisely the situation that the OECD Convention, the UN Convention Against Corruption, and Norwegian law intended to combat. The Court of Appeal and the Supreme Court likewise concluded that the payments were improper.

56. The Supreme Court, in a domestic corruption case, also helped identify the minimum threshold needed to conclude that an advantage is "improper". In this case, a manager of a Norwegian municipal SOE, who played a role in procuring public transport vehicles, was charged with corruption (under the former penal code section 276a) for accepting three dinners from a vehicle manufacturer over a two-year period. The manager was first convicted in the District Court and then acquitted by the Court of Appeal. The Supreme Court affirmed. It conducted its analysis with reference to the factors in Norway's aggravated corruption offence because it considered the SOE manager to be, in effect, a public official. It observed that only "clearly blameworthy action" will trigger liability as corruption. Ultimately, the Supreme Court found that these dinners were not improper, in part, because they were not arranged with any intent to obtain favours or seek the manager's influence over a specific deal.³⁸ Furthermore, the dinners were not lavish and appeared to be general attempts at building customer relationships. Thus, even if the manager may have violated his company's ethical guidelines, his conduct was not so clearly blameworthy to constitute a criminal violation.³⁹

B.1.2. Trading in Influence

57. During Norway's Phase 2 Follow-Up Report, the WGB observed that Norway had relied on the trading in influence offence to resolve its case against Statoil. As trading in influence, which is now codified as Penal Code section 389, carries a lower sentence than the aggravated corruption offence, the WGB decided to follow up to see which offence Norway would use in foreign bribery cases. In Phase 3, the WGB was satisfied that Norway had not needed to resort to the trading in influence offence to handle foreign bribery cases.⁴⁰ The Phase 4 evaluation confirms that Norway

³⁷ These factors are already described in Norway Phase 3 Report paras. 22-23.

³⁸ See Supreme Court, Rt-2014-786, para. 35 (stressing that it is unlikely that an advantage will be "improper" when there is no element of influence involved).

³⁹ Notably, the Yara executives sought to rely on this line of Supreme Court cases to claim that there was no proof that the consultancies influenced the final agreement that Yara reached with the foreign SOEs. The Yara District Court rejected the argument, holding that even assuming Yara did not obtain a better deal than it would have gotten otherwise, it was clear that Yara "expected to get something in return" from its arrangement with the public official's son.

⁴⁰ See Norway Phase 3 Report, para. 30 & Follow-up Issue 7(a).

has continued to charge and resolve foreign bribery cases using Norway’s aggravated corruption offence.

58. Indeed, in the case against the Yara executives, the defence argued that the case should be tried on a theory of trading in influence because the contested payments were given under purported consultancy arrangements to the children of foreign public officials rather than to the officials themselves.⁴¹ The District Court rejected this argument, concluding that the payments were made to obtain information and advice from the public officials on how to obtain business in Libya and India. Furthermore, at least one official purportedly told the Yara officials to “sort it out with my son”.⁴² Thus, the Court concluded that the public officials were complicit in the arrangements, and that Yara’s improper payments were in reality bribes directed at those public officials.⁴³ The Court of Appeals and the Supreme Court upheld the conviction of Yara’s former legal counsel for aggravated corruption.⁴⁴

B.1.3. Third parties and intermediaries

59. Finally, whether through court decisions or penalty notices, Norway now has examples where companies and individuals have been held liable for committing bribery involving either third parties or intermediaries. In the *Yara* case involving the executives discussed above, the children of the public officials were deemed to have received payments that were made either on the fathers’ behalf or at the fathers’ direction. Under the former interpretation, the children would be intermediaries used to channel the bribes to the fathers; under the latter interpretation, the children would be third-party beneficiaries designated by their fathers. Either way, Norway was able to impose liability on both the company and to convict its former chief legal counsel for aggravated corruption connected with bribing foreign public officials.

60. For the Libyan portion of the scheme, Yara also used an unrelated Swiss company to advance the improper payment to the consultant’s bank account. Yara then used its own Swiss subsidiary to reimburse the unaffiliated intermediary by paying inflated invoices for ammonia deliveries. In the *Cabu Chartering* case, the company also disguised the bribes as consultancy payments, which it made to the Swiss bank account of a BVI company owned by a natural person domiciled in London. This intermediary then arranged to transfer money from other bank accounts to bank accounts controlled by the foreign public official. These cases demonstrate that bribes paid to third parties or by intermediaries will not constitute a problem in foreign bribery cases at least when pursuing natural persons, so long as Norway can tie the funds to the individual holding the “position” in question (*i.e.* the public official).

⁴¹ See Oslo District Court, *Yara*, 14-022670, Part VI.

⁴² See Oslo District Court, *Yara*, 14-022670, Part IV.

⁴³ In reaching this conclusion, the District Court analysed several international instruments, including the OECD Anti-Bribery Convention. It also reviewed the WGB’s Phase 2 and Phase 3 evaluations of Norway plus the OECD Foreign Bribery Report.

⁴⁴ See *e.g.*, Supreme Court, *Yara*, HR-2017-1776-A, para. 15 (“The conviction is based on an assessment that Wallace, by agreeing future pay-outs of USD 4.5 million to [the consultant son], in reality was offering [the consultant’s] father [as chair of the Libyan state-owned oil company] an undue advantage); see also *id.* at para. 15 (“The conviction is based on an assessment that Wallace, by agreeing future pay-outs of USD 3 million to [the consultant son], in reality was offering [the consultant’s] father [as a high-ranking Indian official and board member of an Indian SOE] an undue advantage).

Commentary

The lead examiners welcome Norway’s continued enforcement of its corruption offences in foreign bribery cases. Notably, Norway’s case law has further elaborated the notion of “improper advantage” in foreign bribery cases, while its domestic corruption cases suggest that even minor benefits, such as ordinary dinners at a restaurant, could constitute an improper advantage if given with intent to influence an official. Also, Norway’s prosecution of the executives in the Yara case has helped clarify the different scopes of Norway’s aggravated corruption and trading in influence offences in cases involving allegations of foreign bribery. Finally, the lead examiners are pleased to confirm that Norway has been able to successfully prosecute complex foreign bribery cases involving third-party beneficiaries, various intermediary arrangements, and convoluted financial transactions. Nonetheless, the lead examiners also note that the exact extent to which companies will be held liable for the acts of intermediaries, including offences committed on behalf of related entities such as foreign subsidiaries, still could be further clarified as further discussed in Section C.2.4 below.

B.2. Jurisdiction

61. In Phase 3, the WGB found that Norway had “extremely broad jurisdiction over foreign bribery offences”.⁴⁵ As required under the Convention, Norway could assert jurisdiction over corruption committed in Norway. In line with the Convention, Norway also had jurisdiction over corruption offences committed abroad by Norwegian nationals and residents.⁴⁶ Additionally, Norway could even exercise “universal jurisdiction” over corruption offences committed by foreigners abroad, if the King gave his consent.⁴⁷ With these multiple bases for jurisdiction, the WGB recognised that Norway exceeded the Convention’s requirements.⁴⁸

62. With its new Penal Code, Norway has narrowed its jurisdiction over the corruption offences that would apply to foreign bribery.⁴⁹ Norway eliminated its “universal jurisdiction” over offences committed by foreigners abroad. While Norway rarely used this jurisdictional basis,⁵⁰ ØKOKRIM had in fact obtained the King’s consent under the old penal code to prosecute a French citizen for aggravated corruption in the *Yara* case. Although that defendant was convicted at the trial court level in July 2015 under the old law, he was ultimately acquitted in January 2017 by the jury on appeal after the new Penal Code entered into force. As jury verdicts do not provide reasons, several on-site participants queried whether the amended jurisdictional provisions may have affected the outcome.

63. Turning to the jurisdictional bases covered in the Convention, Norway maintains its territorial jurisdiction. Specifically, Norway can assert jurisdiction over foreign bribery acts that occur in Norway, its dependencies, and other specified places, such as its Exclusive Economic Zone

⁴⁵ Norway Phase 3 Report para. 65; *see also* Norway Phase 2 Report, para. 140.

⁴⁶ *See* 1902 Penal Code, sections 12(1) & 12(3)(a).

⁴⁷ *See* 1902 Penal Code, sections 12(4)(a) & 13; *see also* Norway Phase 2 Report, para. 140.

⁴⁸ *See* Norway Phase 3 Report, para. 65; *see also* Norway Phase 2 Report, para. 140; *cf.* Convention, arts. 4(1)-4(2) (envisioning territoriality and, potentially, nationality jurisdiction).

⁴⁹ As the legislative history acknowledges, this decision “entails a certain element of decriminalisation.”

⁵⁰ *See* Norway Phase 3 Report, para. 65.

and Norwegian vessels.⁵¹ In the *Yara* proceedings, the Court of Appeal ruled that territorial jurisdiction could be based on any act committed on Norwegian territory; provided that the territorial link was proven beyond a reasonable doubt.

64. As for nationality jurisdiction, section 5 of the Penal Code permits Norway to assert jurisdiction over offences committed abroad by natural and legal persons “having a sufficient connection” with Norway. For natural persons, this includes Norwegian nationals and residents at the time of the offence, as well as those who become so after committing an offence.⁵² For legal persons, Norway has jurisdiction over any acts committed “on behalf of an enterprise registered in Norway.”⁵³ It can even retroactively assert jurisdiction over acts committed “on behalf of a foreign enterprise that after the time of the act has transferred its entire operation to an enterprise registered in Norway.”⁵⁴

65. In contrast to prior law, Norway’s nationality jurisdiction for corruption offences may now be limited to acts that are “also punishable under the law of the country in which they are committed”.⁵⁵ As the legislative history makes clear, “punishable” means that not only must the act be unlawful in the place where it was committed, but the offender must also still be subject to punishment in that jurisdiction. Thus, for example, if the other country’s statute of limitations period has expired, Norway could not prosecute its own national for foreign bribery. This requirement thus might prevent Norway from prosecuting a defendant who could assert a defence that is permitted in the foreign jurisdiction, even though the defence is not recognised in Norwegian law. It is not clear whether case law under the current or prior penal code fully resolves this issue.⁵⁶

66. In other peer-review evaluations, the WGB has expressed concern that so-called “dual criminality” conditions, which require that an act also be illegal in the place where it was committed, may hinder the effectiveness of a Party’s nationality jurisdiction.⁵⁷ As a policy matter, such restrictions potentially create unjustified loopholes in anti-corruption laws. For example, if a

⁵¹ See PC, section 4.

⁵² PC section 5, paras. 1(a)-(b) & 2(a). In addition, Norway can prosecute nationals or residents of other Nordic countries, if the individual is found on Norwegian territory. See PC, Section 5, para. 2(b).

⁵³ PC section 5, para. 1. See Section C.2 below, discussing when an act will be considered to be committed “on behalf of” an enterprise under Penal Code section 27. The legislative history explains that “registered” refers to entities “registered in the Register of Business Enterprise in Norway.”

⁵⁴ PC Section 5, para. 2(c). Likewise, Norway can retroactively assert jurisdiction over offences that are committed by natural persons who subsequently become Norwegian nationals or residents.

⁵⁵ PC, Section 5, para.1(1).

⁵⁶ Participants at the on-site believed that Norwegian courts would not require that the other country also have a foreign bribery offence so long as the conduct was punishable in some form (e.g., as a domestic bribery offence). The new provision is, however, untested. Likewise, it is not clear whether prosecution of a Norwegian company for foreign bribery committed abroad would depend on whether the country where the offence occurred also could impose criminal liability on legal persons.

⁵⁷ The WGB has made recommendations to other countries concerning laws requiring that the act giving rise to the foreign bribery offence must also be “punishable” in the foreign country. See, e.g., Belgium Phase 2 Report, page 34 commentary; Denmark Phase 2 Report, para 189; Finland Phase 2 Report, page 25, n.29; France Phase 3 Report, page 19 (Commentary) & Recommendation 1(b). It is not clear, however, whether these laws contained a requirement similar to Norway’s that the offence must also still be subject to prosecution in the place where the offence committed.

Norwegian national bribed a foreign public official from country X by making a payment in country Y, Norway potentially could not prosecute its own citizen unless country Y also had a foreign bribery offence.

67. As a legal matter, the Convention does not prohibit such conditions, provided that they are part of the evaluated country's principles governing nationality jurisdiction.⁵⁸ It is not clear, however, that this is the case in Norway. While the new Penal Code exempts certain offences from the "also punishable" requirement,⁵⁹ the legislative history does not explain why corruption offences were not likewise exempted as in Norway's previous penal code. To this extent, the general conditions on nationality jurisdiction in Penal Code section 5 appear to raise concerns.⁶⁰

68. During the on-site visit, Norwegian officials observed that Penal Code section 6 could potentially solve this problem. This provision purports to grant jurisdiction over an offence if "Norway has a right or obligation to prosecute pursuant to agreements with foreign states". According to the legislative history, this provision is intended to grant jurisdiction even "where the double punishability requirement [of section 5] has not been met". However, participants were not certain whether this provision would be effective, as there is no case law yet applying it. As the legislative history for section 6 does not expressly reference the OECD Anti-Bribery Convention, Norwegian courts would presumably have to interpret whether it creates a "right or obligation to prosecute" a defendant in a specific case in order to establish jurisdiction. During prior evaluations, such general jurisdictional provisions referring to international treaties have not prevented the WGB from recommending other countries to explicitly clarify the extent of their nationality jurisdiction.⁶¹

69. Finally, when nationality jurisdiction is based on Penal Code section 5, that provision specifies that any penalty imposed "may not exceed the maximum statutory penalty for a corresponding act in the country in which it has been committed". Leaving aside the question whether Norway would characterise the "corresponding act" as the other country's domestic or foreign bribery offence, this limitation means that Norway's fines (or other "penalties") can only be as effective, proportionate and dissuasive as permitted by the other country's law. It is also not clear what would happen if a Norwegian company were prosecuted for an offence that occurred in a jurisdiction that does not impose criminal liability on legal persons. In such cases, Norway's decision to tie its sanctions to those permitted by another country could potentially raise issues under Article 3 of the Convention.⁶²

⁵⁸ Cf. Commentary 26 to the Anti-Bribery Convention ("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.").

⁵⁹ For example, some of the exempted crimes are *ius cogens* offences (e.g. war crimes, genocide, and crimes against humanity), others involve offences against children (forced marriage, genital mutilation), the Norwegian state (e.g. an attack on Norwegian military forces), as well as miscellaneous offences (e.g. human trafficking, sex crimes, child pornography, incest, and prostitution).

⁶⁰ In May 2018, Norway provided an update to the evaluation team that the Ministry of Justice has plans to hold a public consultation on a proposed amendment to Penal Code section 5 that would expressly exempt corruption offences from the "also punishable" requirement. Following the Working Group's practice, this report analyses the law as it exists at the time of the evaluation.

⁶¹ See, e.g., Chile Phase 2 Report, paras. 155 *et seq.* & page 39 (Commentary).

⁶² See, e.g., Denmark Phase 2 Report, para. 190 (limiting punishment to the sanction imposed in the jurisdiction where the act committed is "likely to diminish the effectiveness, proportionality and dissuasiveness of the sanctions for foreign bribery offences committed wholly abroad"); Israel Phase 3 Report, para. 39 & Recommendation 2(a); and Israel Phase 2 Report, para. 165.

Commentary

As a policy matter, the lead examiners regret that Norway has narrowed the scope of its jurisdiction over its corruption offences applicable to foreign bribery. While they recognise that the Convention does not require Parties to exercise the extensive jurisdiction that Norway could previously assert over foreign nationals for acts committed wholly outside its territory, Norway’s decision to limit such jurisdiction make it more likely that certain offences may go unpunished.

Furthermore, Norway’s decision to condition its ability to assert nationality jurisdiction over corruption offences (including those applicable to foreign bribery) by insisting that the act is “also punishable” in the country where it was committed may have a chilling effect on prosecution. As this condition does not seem to be compelled by Norway’s “general principles” for asserting nationality jurisdiction, the lead examiners recommend that Norway amend the Penal Code to ensure that it can prosecute foreign bribery offences committed by its nationals abroad without regard to whether the act was unlawful or “punishable” in the jurisdiction where it was committed.

Finally, the lead examiners call on Norway to modify the Penal Code’s current provisions limiting sanctions for foreign bribery offences committed abroad to those that would be available in the jurisdiction where the crime occurred. Such restrictions potentially limit Norway’s ability to ensure that it can impose effective, proportionate and dissuasive sanctions on its own citizens and companies.

B.3. Norway’s law enforcement institutions

70. At a general level, Norway’s institutional framework for investigating and prosecuting foreign bribery remains unchanged since Phase 3. As before, the National Authority for the Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM) plays a central role in investigating and prosecuting large, complex corruption cases, including those involving foreign bribery.⁶³ Similarly, the Norwegian Police Service, which operates under the Ministry of Justice and Public Security, has a broad responsibility to prevent and investigate crimes, including corruption offences. Within this continuity, however, Norway has embarked on an ambitious reform of its police service to increase its capacity to investigate crimes, including economic crime. This reform will require sustained attention and resources to complete. As part of the effort to make Norway’s police service more efficient, a separate proposal was made to abolish ØKOKRIM. For these reasons, the evaluation team inquired during the on-site visit about the ongoing police reform and its potential impact on Norway’s ability to investigate and prosecute foreign bribery cases.

B.3.1. Ongoing reform of Norwegian Police Service

71. The Norwegian Police Service continues to operate under the supervision of the Police Department within the Ministry of Justice and Public Security. The Police Service consists of a central authority, known as the Directorate of the Police, as well as local police districts. A distinctive feature of Norway’s approach to fighting crime is that the police and prosecution services are partially intertwined, even though they report to separate hierarchies. Thus, the lowest-level prosecutors, known as “police prosecutors”, are embedded in local police districts, notably in the

⁶³

The anti-corruption teams in ØKOKRIM also handle large domestic bribery cases, such as the case involving CAS Global, whereby a company affiliated with a former Nigerian warlord acquired decommissioned Norwegian naval vessels. One Norwegian official was convicted in May 2017 of receiving bribes from a UK company that obtained the necessary export approvals from Norway (and subsequently also from the United Kingdom).

multidisciplinary economic crime sections that were created in July 2005.⁶⁴ While local districts can investigate corruption offences, Norway confirms that serious cases with an international character, including corruption offences, should be referred to and handled by ØKOKRIM under existing prosecution regulations.

72. In 2015, Norway decided to reform the Police Service by reducing the number of local districts from 27 to 12, in line with a proposal from an expert commission.⁶⁵ According to on-site participants, the idea behind the reform is that the larger police districts will reduce overhead and improve capacity to investigate crime. In addition, larger districts will enable officers to further specialise in particular areas, including economic crime. Administratively, the police reform became effective 1 January 2016 and was expected to be completed shortly before the WGB's June plenary. It will take years, however, to see exactly what impact the reforms will have on Norway's capacity to investigate economic crimes.

73. Most on-site participants from the government and civil society agreed that it will still take several years to know whether the police reform will actually improve capacity for investigating complex economic crimes. Most participants expected that ØKOKRIM will continue taking the lead in the "largest and most difficult" economic cases, including foreign bribery cases, in line with Norway's existing prosecution regulations concerning referrals to ØKOKRIM. While it is far too early to determine what impact these reforms may have for future investigations and prosecutions of foreign bribery, the ongoing police reform will certainly require attention and resources from Norway's law enforcement community in the short term.

B.3.2. Proposed reforms of ØKOKRIM

74. ØKOKRIM is a specialised, multidisciplinary agency that brings together prosecutors as well as police and financial investigators to tackle economic and environmental crimes. While some local police districts have investigated transnational bribery cases in the past,⁶⁶ it was confirmed during the on-site visit that ØKOKRIM has handled every case concerning the bribery of foreign public officials falling under the scope of the Convention. As noted in Phase 3, ØKOKRIM has two teams that handle corruption cases, with one team exclusively working on such cases. These teams, which are composed of 9 or 10 members, are headed by a Senior Public Prosecutor, who is supported by a combination of public prosecutors, police prosecutors, police officers and investigators with financial or accounting expertise.⁶⁷ The teams report that they work closely together and benefit from the close interaction of investigators and prosecutors at every stage of case development.

75. ØKOKRIM has been under public scrutiny after the prosecution of a complex tax case collapsed in early 2016, following a ten-year investigation.⁶⁸ That same year, a commission was

⁶⁴ See Norway Phase 3 Report, para. 61; Norway Phase 2 Written Follow-up Report, page 20.

⁶⁵ The expert commission was tasked with suggesting reforms for the Norwegian Police Service in the aftermath of the 2011 terrorist attacks in Norway. See generally Tom Christensen, Per Læg Reid, Lise H. Rykkja, "[Reforming the Norwegian Police Between Structure and Culture](#)", Uni Research Working Paper (Oct. 2016). Norway conducted a similar reform before its Phase 2 evaluation, shrinking the number of police districts from 54 to 27. See Norway Phase 2 Report, para. 114.

⁶⁶ See, e.g., Norway Phase 3 Report, paras. 18, 62 & n.49 (discussing the "Boat Certificate" case, in which Norwegian nationals bribed a foreign official to obtain sailing licenses for non-commercial, recreational use).

⁶⁷ Thus, these teams are slightly larger than the seven-member teams that existed during the prior WGB evaluation. See Norway Phase 3 Report para. 62.

⁶⁸ See Waithera Junghae, "Future of Økokrim hangs in the balance," *Global Investigations Review* (7 July 2017).

formed to examine whether Norway's specialised investigative bodies, including ØKOKRIM, should also be reformed. Among other recommendations, the Commission proposed merging ØKOKRIM into another specialised agency, Norway's National Crime Investigation Service (KRIPOS). KRIPOS, unlike ØKOKRIM, only investigates cases, so it must refer completed cases to the general prosecution authority for trial. Although the Commission specified that such a reorganisation should not be used to reduce funding for fighting corruption, civil society participants expressed concern that this could be the result. Ultimately, the Ministry of Justice decided to "suspend" consideration of the proposal until the ongoing reform of the local police districts is complete. Thus, ØKOKRIM will continue as an independent, multidisciplinary body for the foreseeable future.

76. When asked at the on-site visit, participants stated that they had a largely positive impression of ØKOKRIM. Civil society representatives expressed appreciation for ØKOKRIM's work in the corruption sphere, although recognising that such cases are difficult to prove. Legal practitioners and journalists reported positive experiences interacting with ØKOKRIM, which was praised for being more transparent and cooperative than some other law enforcement bodies. However, some civil society representatives expressed concern that ØKOKRIM as a whole may have difficulty retaining staff, which could impact its ability to manage cases. Similarly, an on-site participant opined that ØKOKRIM was a "very competent organisation", but believed that it could use more resources to avoid delays in proceedings. Both governmental and non-governmental participants believed that Norway may not devote sufficient resources to fighting economic crime because of other priorities, such as combating narcotics crimes. In this view, resource constraints could hinder or perhaps even prevent ØKOKRIM from satisfactorily handling cases.

77. Norway reports that foreign bribery cases are given "high priority" befitting Norway's international obligations, including those under the Convention. Specifically, Norway reported that ØKOKRIM's two anti-corruption teams receive "fairly substantial" resources for their cases. During the on-site visit, members of these teams confirmed that resources have been made available for major cases in the past. Despite the general policy of fiscal restraint in the police sector,⁶⁹ they were also confident that they would have resources if another major foreign bribery case arose in the future.

78. The lead examiners recognise that law enforcement resources are necessarily limited, requiring the prioritisation of cases. That said, the lead examiners had some concern after the on-site visit that resource considerations might discourage the investigation and prosecution of foreign bribery cases, particularly given that certain jurisdictional and substantive aspects of Norway's criminal law are not clear. (*See, e.g.*, the discussions of jurisdictional limits (Section B.2 above) and scope of corporate liability for offences committed within a subsidiary (Section C.2.4 below)). Non-governmental participants met during the on-site visit shared this concern about enforcement chill. Implicitly, ØKOKRIM representatives also acknowledged that resource considerations might affect the way certain foreign bribery allegations are handled. Norway also reports that ØKOKRIM's resources and overall capacity have recently become an issue of some public debate.

⁶⁹ During the on-site, the lead examiners learned that ØKOKRIM's resources ultimately come from the Ministry of Justice and Public Security but are in practice distributed via the Norwegian Police Directorate. Thus, ØKOKRIM does not necessarily receive additional resources even when extra resources are made available to the law enforcement community. As it would stand to reason that the ongoing police reform would attract a certain level of resources, the lead examiners believe it is especially important for Norway to dedicate adequate resources for investigating foreign bribery.

Commentary

The lead examiners welcome the news that the Ministry of Justice and Public Security has “suspended” consideration of the proposal to merge ØKOKRIM into another body. In their view, ØKOKRIM’s anti-corruption teams have demonstrated that they can effectively prosecute complex foreign bribery cases. Norway should ensure that ØKOKRIM’s anti-corruption teams continue to have sufficient resources to maintain and further develop the professionalism and expertise that they have acquired and to investigate and prosecute foreign bribery.

The lead examiners also recognise the importance of reforming Norway’s police service to bolster its competence and capacity. In the long run, such reforms could help ØKOKRIM to focus on the most serious and complex foreign bribery cases. At the same time, the lead examiners wish to stress that Norway must ensure that the police reforms do not divert resources from ØKOKRIM so that the anti-corruption teams can, when reasonable suspicions arise, investigate potential foreign bribery allegations and to resolve cases, whether through penalty notices or trials. In this way, Norway can further clarify the application of its corruption laws in foreign bribery cases.

B.4. Non-trial resolutions through penalty notices

79. Penalty notices (also known as optional penalty writs) allow the prosecutor, under certain circumstances, to resolve a case without going to trial, with the agreement of the accused. During Phase 3, the WGB made the use of penalty notices, particularly the development of guidance, a follow-up issue.⁷⁰

80. The CPA provisions regulating penalty notices have not been amended since Phase 3. CPA Section 255 provides that “[i]f the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect ... instead of preferring an indictment.” If the penalty notice is rejected, it will serve as the indictment to launch court proceedings against the accused.

81. Penalty notices can be used for both legal and natural persons in cases where the prosecution decides that the penalty shall be a fine and not imprisonment.⁷¹ Norway explained in its written submission that the prosecution typically would not resort to a penalty notice for natural persons in foreign bribery cases because the Penal Code mainly envisions imprisonment for aggravated corruption. For this reason, Norway has resolved only one of its foreign bribery allegations against a natural person with a penalty notice. This was the 2004 *Statoil* case, which was ultimately resolved as a case of trading in influence.⁷² The other three cases that resulted in sanctions for natural persons were decided in court.⁷³

82. Penalty notices are the predominant enforcement vehicle used for foreign bribery cases involving legal persons. Since Norway’s adoption of the Convention, penalty notices were issued in all four cases that resulted in sanctions against legal persons, although the penalty notice issued to

⁷⁰ Norway Phase 3 Follow-up Issue 7(c).

⁷¹ The legislative history for Criminal Code section 80 clarifies that it is what the prosecution decides to charge, rather than not what is provided in the statute, that determines whether the penalty notice can be used.

⁷² Under the penal code at the time, trading in influence was punishable by a fine or up to three years’ imprisonment. See Norway Phase 3 Report, para. 30.

⁷³ These are Norconsult (2 persons) were given prison sentences and Yara International (1 person given prison sentence which is confirmed in 2017 Supreme Court decision).

Statoil was based on trading in influence. In the fifth case, Norconsult rejected the penalty notice, thus initiating Norway's first trial against a legal person for foreign bribery. Ultimately, the company was acquitted by the Supreme Court.

83. CPA section 258 states that "acceptance of the option has the effect of a judgment." Under Norwegian law and practice, it is clear that the penalty notice is tantamount to a conviction in terms of enforceability of the sanctions imposed. Formally, there is no requirement that the defendant admit guilt in order to accept a penalty notice. The discussion at the on-site, however, revealed either confusion or disagreement amongst business representatives and legal practitioners about the exact consequences of a penalty notice.

84. During the Phase 3 evaluation, ØKOKRIM representatives were asked whether they had considered taking a foreign bribery case to trial to allow the courts to apply the law and to "set the benchmark on sanctions". In response, ØKOKRIM representatives explained that they preferred using penalty notices because such trials are "usually long and place a large burden on law enforcement resources".⁷⁴ Since then, ØKOKRIM has brought several foreign bribery cases to trial, but businesses and legal practitioners continue to ask for greater predictability, especially to understand when a company will be held liable for foreign bribery. They cited the UK guidance on the 2010 Bribery Act and the US guidance on enforcement of the Foreign Corrupt Practice Act, noting that they already use these guidance documents. It is also worth recalling that the Norway Phase 3 report highlighted the importance of guidance on penalty notices and flagged it as a follow-up issue.

85. Norwegian law enforcement authorities recognised that lawyers can face challenges advising clients about potential corruption issues, given the lack of case law assessing corporate liability for foreign bribery. The Director of Public Prosecutions has issued guidance documents for prosecutors, but these are addressed to prosecutors, rather than to managers and legal counsel. ØKOKRIM has started including more information in press releases to inform the public about the factors that it considers when determining the sanctions imposed in the penalty notices. (The penalty notices themselves are only available to the public if an interested individual asks for them). The authorities seem to be aware that further guidance on penalty notices could be useful.

Commentary

The lead examiners encourage Norway to continue its efforts to enhance the predictability of penalty notices as a way of resolving foreign bribery cases. The Director of Public Prosecutions has issued useful guidance documents addressed to prosecutors. Other types of guidance on penalty notice procedures and the range of possible outcomes, however, are needed. Guidance that is specifically addressed to business managers, legal practitioners and others interested parties would be particularly helpful. In this regard, the lead examiners welcomed the Ministry of Justice's May 2018 appointment of an expert with a mandate to consider the need for clarification in this area. The lead examiners nonetheless recommend that Norway make public, where appropriate and in conformity with applicable law, as much information as possible about accepted penalty notices.

B.5. Sanctions and confiscation

86. Because Norway has concluded a number of cases, it is worth exploring whether the combined effects of the sanctions and confiscation measures⁷⁵ handed down in these cases are

⁷⁴ Norway Phase 3 Report, para. 64.

⁷⁵ As will be described below, confiscation is not a sanction under Norwegian confiscation practices because it is not intended to be punitive. It aims to take away any economic benefits that the offender may have obtained as a result of the offence.

“effective, proportionate and dissuasive,” as required under Article 3 of the Convention. In Phase 3, the WGB noted Norway’s view that “where fines have been sought, the sanctions imposed have been effective, proportionate and dissuasive,”⁷⁶ but did not make a formal assessment.

87. In what follows, the primary focus will be on the word “dissuasive”. The Convention and its commentary do not explicitly define this term, but it can be construed to mean that combination of the prison terms and monetary payments associated with the resolution of foreign bribery cases provide compelling disincentives to offer bribes to foreign public officials for all the relevant actors (both natural and legal persons).

88. Although Norway has a large number of cases relative to its size, the small absolute number of foreign bribery cases concluded to date means that any analysis of the dissuasiveness of sanctions combined with confiscation is necessarily preliminary. In addition, the WGB has only considered the issue of dissuasive sanctions within the context of individual country reviews, and not as a horizontal issue drawing on the law and practice of all WGB members.⁷⁷ The present analysis provides an overview of Norway’s sanctions and confiscation regime and raises issues for both Norway and the WGB’s consideration in future monitoring.

B.5.1. Sanctions in the penal code – are they dissuasive?

89. The new Penal Code sets sanctions for foreign bribery and other offences in the provisions relating to those offences, while also defining mitigating and aggravating circumstance in chapter 14. The new Penal Code’s provisions on corruption cover bribery of both domestic and foreign public officials under the aggravated bribery offence (see Section B.1 above). This section will first describe provisions on prison terms and then will turn to monetary sanctions and confiscation for natural and legal persons. The provisions for setting sanctions are summarised in Table 1 below.

Table 1. Sanctions in Penal Code for Foreign Bribery and Related Offences

Offence	Natural Persons	Legal Persons
Aggravated corruption	Up to 10 years’ imprisonment	No limit to monetary fines
	(Additional fine possible under PC section 54)	
Non-aggravated corruption and trading in influence	A fine (no maximum) and/or up to 3 years’ imprisonment.	No limit to monetary fines

B.5.2. Prison terms

90. The Penal Code’s provisions on prison terms stipulate maximum sentences for each offence. For aggravated bribery PC section 388 sets a maximum prison term of ten years and, for non-aggravated corruption, three years. This ten-year maximum term is in the high range relative to those of other jurisdictions that have sanctioned a natural person for foreign bribery: in those countries, the maximum prison terms range from five years (Japan, the United States) to ten years

⁷⁶ Norway Phase 3 Report, para. 55.

⁷⁷ The joint OECD/StAR publication, [IDENTIFICATION AND QUANTIFICATION OF THE PROCEEDS OF BRIBERY](#) (2012), examines the specific issue of confiscation rules in this context. Chapters 1 and 2 provide a general overview of legal issues and valuation techniques, while Chapter 3 provides case summaries.

(Germany, Norway, and the United Kingdom).⁷⁸ Furthermore, where an offender has committed multiple offences, section 79 of the Penal code provides that the prison sentences may (at most) be doubled in length, but not by more than six years and never beyond 21 years.

91. Moreover, the ten-year maximum appears to be in line with maximum terms established for other offences in Norway. To take some examples from Norway's new Penal Code, the maximum prison term for homicide is 21 years, while serious environmental crime carries a maximum of 15 years. The maxima for aggravated forms of other economic crimes include 10 years for currency counterfeiting and six years for theft and embezzlement. Thus, the maximum prison term is about half of that of what could be considered to be the most serious crime (homicide) and above the maxima for other serious crimes (aggravated embezzlement and theft).

B.5.3. Fines for natural persons

92. PC section 388 only provides for prison terms for aggravated bribery (including normally foreign bribery) and not for fines. This is in line with the Penal Code's approach in some, but not all, provisions for other serious economic crimes. For example, only prison terms are available as sanctions for aggravated fraud (PC section 372), but both fines and prison are available for aggravated currency counterfeiting (PC section 368). That said, Penal Code Section 54 would permit a fine to be imposed "in addition to" a sanction of imprisonment, even where "a fine is not prescribed as a penalty for the offence".⁷⁹ In addition, section 80 would, under certain defined conditions, permit the court (or prosecutors through a penalty notice) to impose a fine in lieu of jail time even for aggravated corruption. Most notably, the fine could be imposed instead of jail time if the offender makes a "full confession".

93. For the less serious corruption offences – that is, non-aggravated corruption (PC section 387) and trading in influence (PC section 389) – both fines and prison terms are available. No maximum fine is established. It is worth recalling that, according to Norway, foreign bribery would almost always be handled as aggravated corruption and not as one of the lesser corruption offences.

94. PC Section 53 also provides guidance for assessing fines and confers considerable discretion in this matter. It states that "weight shall be given [...] to the offender's income, assets, responsibility for dependents, debt burden, and other circumstances affecting financial capacity [...]".

B.5.4. Fines for legal persons

95. Section 27 of the Penal Code ("Penalties for enterprises") states that the "penalty is a fine." No maximum is set for this fine. The courts set fines for legal persons based on the non-exhaustive list of factors contained in Section 28 of the Penal Code. These factors include the "preventive effect" of the fine; the severity of the offence; whether the enterprise could have prevented the offence by the use of guidelines, instruction, training, control or other measures; whether a person acting on behalf of the enterprise has demonstrated guilt; and the financial capacity of the enterprise. Thus, as was the case for natural persons, the Penal Code confers considerable discretion on the courts in handing down sanctions for legal persons. Prosecutors also rely on these provisions when setting penalties in penalty notices.

⁷⁸ See, generally, prior WGB evaluation reports for Germany, Japan, Norway, the United Kingdom and the United States. Note that, in addition to the maximum per offence, a full study of dissuasiveness would need to account for countries' different approaches concerning whether jail terms can be cumulated for multiple offences.

⁷⁹ Norway reports that this provision has been little used in practice.

96. Norway's written submission states that all fines, fees and monetary penalties imposed with a legal basis in law or regulation, and with "a main characteristic of being a penalty", are not tax deductible.

B.5.5. Confiscation

97. In Phase 3, the WGB recommended that Norway "make full use of the provisions available to confiscate the proceeds of foreign bribery" under Convention Article 3(3). This recommendation was found to be only "partially implemented" at the time of Norway's 2013 Phase 3 Follow-up Report.

98. On its face, the Penal Code appears not to erect significant procedural barriers that would prevent Norway from having active recourse to confiscation in foreign bribery cases. PC sections 66-76 provide for various forms of confiscation, including confiscation of proceeds (section 67), extended confiscation (section 68), and confiscation of the "product, subject or tools of a criminal act" (section 69). Under section 67, the proceeds of a criminal act "shall be" confiscated. Instead of the proceeds, all or part of the value of the proceeds may be confiscated. The Penal Code permits the confiscation of any object⁸⁰ that "has been used or is intended for use in a criminal act", provided that it is "necessary for the purposes of effective enforcement of the penal provision, and [...] proportionate." PC section 69 elaborates that in "assessing proportionality, weight shall among other things be given to other sanctions that are imposed, and the consequences for the person against whom the confiscation is directed." It also confers further discretion insofar as any liability "pursuant to this provision may be reduced or waived if confiscation would clearly be unreasonable."

99. At the on-site visit, law enforcement officials reported that confiscation amounts are also not tax deductible.

⁸⁰ PC section 69 adds that "Rights, receivables and electronically stored information are also considered objects".

Table 2. Sanctions and confiscation imposed for foreign bribery and related offences

Case name (years of bribery acts)	Purpose and Proceeds of Bribe	Sanctions on legal persons	Sanctions on natural persons
Yara International (2004-2009)	Two acts of foreign bribery in Libya and India and one act of private bribery in Russia. Agreed bribe amounts were USD 3 million in India and USD 5 million in Libya. The purpose of bribes was market entry through fertiliser production joint ventures.	Fine worth NOK 270 million and confiscation worth NOK 25 million in January 2014. Confiscation was for private bribery in Russia, not for bribery of foreign public officials.	Former legal director sentenced to 7 years of imprisonment. No fines. No confiscation.
Norconsult (2003)	Contract for water and sewage system improvements in Tanzania worth about USD 6 million. A total of USD 172 000 was paid in bribes to public officials.	Supreme Court acquits company. No sanctions.	2 employees sentenced to prison terms of 6 months (some conditional). No fines. No confiscation.
Cabu Chartering/ Klaveness (2003-2004)	Purpose was to obtain or retain business connected to a contract for shipping aluminium to Bahrain with an estimated value of USD 8 million. The total bribe amounted to the major portion of the USD 2 684 250 paid to the agent.	In May 2014, a fine of NOK 20 million (approx. USD 2.5 million) and confiscation of NOK 12 million (USD 1.5 million) are imposed.	None.
Statoil (2001)	Purpose was to win a contract for developing an offshore natural gas field worth millions of USD. According to US DOJ, bribe payments totalled more than USD 5 million.	In June 2004, fine of NOK 20 million (EUR 2.4m), for 'trading in influence' but no admission of guilt. No confiscation. US authorities imposed US 21 million in total monetary payments for same facts in 2008.	Vice President fined NOK 200 000 (EUR 24 000) for trading in influence. No prison terms. No confiscation.
SINTEF Petroleum Research (2002)	The purpose of the bribe was to win a consulting contract worth USD 6 million with National Iranian Oil Company's Research Institute. The bribe amount was originally agreed to be USD 254 000, but payments were halted after USD 101 771 had been paid.	2007 total sanctions of NOK 2 million (USD 250 000). No confiscation.	None.

B.5.6. The application of fines and confiscation in concluded foreign bribery cases

100. The application of all forms of sanction plus confiscation for foreign bribery and related offences are summarised in Table 2 above. In what follows, Norway's measures imposed in the context of its foreign bribery cases – confiscation, fines, and prison sentences – are reviewed in order to provide background information on how Norway seeks, in practice, to implement a dissuasive sanctions regime.

101. *Sanctions imposed on natural persons.* Table 2 shows that prison sentences were imposed in two of the three foreign bribery cases in which natural persons were sanctioned. These were in the *Yara* case (where the legal director received a sentence of seven years) and the *Norconsult* case (where two employees were sentenced to six months imprisonment, two of which were conditional). In the *Statoil* case, the executive was sanctioned with a fine of NOK 200 000 (EUR 20 000) for trading in influence without any prison time being imposed. Confiscation has never been imposed on a natural person for foreign bribery.

102. *Confiscation imposed on legal persons – a mixed picture.* Norway's written submission states that the purpose of confiscation "is to 'reset' the convicted person's financial position to the situation before the crime." That is, its purpose is to ensure that offenders do not reap economic

benefits from their unlawful acts. The two foreign bribery cases that have sanctioned legal persons since Phase 3 have both involved confiscation.⁸¹ These were:

- For the *Cabu Chartering* case, the confiscation of NOK 12 million (EUR 1.2 million) was for foreign bribery and was calculated on the basis of the proceeds from the shipping contract.
- For the *Yara* case, the confiscation was for private-to-private bribery in Russia and not for the two components of the case that involved bribery of Indian and Libyan public officials

103. In the *Cabu Chartering* case, Norway could be said to have implemented Phase 3 Recommendation 2 to make “full use of the provisions available to confiscate the proceeds of foreign bribery.” The same could be said for the private bribery portion of the *Yara* case. On the other hand, the fact that no confiscation took place for the two foreign bribery components of the *Yara* case does raise some issues regarding how confiscation amounts should be calculated. These two bribery schemes were intended to enable Yara to enter the fertiliser markets in India and Libya via joint ventures with local partners. In Libya, the bribes were made in the context of a deal creating a joint venture partnership in a fertiliser production complex in which Yara’s stake was initially valued at USD 225 million.⁸² Although the value of *Yara*’s joint venture share has since suffered a steep decline, the [joint venture website](#) reported that, as of March 2018, the fertiliser complex’s products are still being sold to countries from the Mediterranean, southern Africa and the Americas. Thus, market entry actually took place, but political events caused an unexpected (and possibly temporary) decline in the value of project.

104. In its written submission, Norway explained the absence of confiscation for foreign bribery in this case as follows:

The value of the proceeds in the foreign bribery cases is normally the economic gain that has been obtained as a result of the bribes. In the [*Yara*] case, the proceeds were calculated as the company’s revenue from the supply contract obtained by bribes. The bribes in India did not lead to a contract, so there were no proceeds. The bribes in Libya did not give revenue, as the joint venture factory in Libya was closed down during the “Arab spring”, and did not generate a surplus.

105. Finally, Norway did not confiscate the value of the bribes as an estimate of the minimum value of the benefit that *Yara* expected to earn from its unlawful conduct. The agreed bribe amounts were USD 3 million in India and USD 5 million in Libya. The OECD StAR publication notes that some countries have used the bribe amount as a minimal estimate of the value of the benefit the briber expected to receive from the bribe at the time the offence was committed.⁸³ Norway, however, reports that Norwegian law does not permit the bribe amount to be confiscated as a substitute for proceeds that never materialised.⁸⁴ Moreover, according to on-site visit participants it is not an

⁸¹ Norway has never imposed confiscation for foreign bribery on a natural person.

⁸² See Independent Chemical Information Service, [Chemical News 9 February 2009](#).

⁸³ The [OECD/Star publication](#) states that “the value of the bribe may be confiscated or disgorged in cases where the contract revenues or profits cannot be ascertained.” It describes two US cases in which “the bribe was disgorged on the assumption that the benefit to the briber is equal to at least the bribe” (page 43). The publication also provides a detailed description of the Willi Betz case, in which Germany estimated the proceeds of bribery that should be confiscated based, in part, on the value of the bribes given (page 62).

⁸⁴ Confiscation of the bribe may be possible under PC section 69 regulating confiscation of the product, subject and tools of a criminal act. This provision has been used for confiscation in the context of money laundering cases, and should thus also be available in foreign bribery cases. However, as yet, there is no case law on this point.

established practice in Norway to account for the “time value of money”⁸⁵ in calculating confiscation amounts. Norway nevertheless reports that if the proceeds are invested in such assets as property or bank accounts, increases in the value of the asset are clearly subject to confiscation. Accounting for the time value of money, however, may be permitted under a broad reading of PC section 67 (second paragraph) which allows the amount of the proceeds to be “determined approximately”.

106. *Fines and confiscation for legal persons in practice.* In what follows a preliminary attempt is made to assess the broad thrust of Norway’s practice in determining monetary fines and confiscation for legal persons in foreign bribery cases. A more complete assessment would benefit greatly from further consideration by and guidance from the WGB.

107. Norway notes that, historically, the highest fines imposed on legal persons were for foreign bribery. Despite this, a first observation about the fines shown in Table 2 is that it is not clear, on the face of it, that they are systematically dissuasive. For example, SINTEF’s USD 101 771 bribe helped the company to obtain a consulting contract worth USD 6 million and it was fined USD 250 000. In order for it to not earn a profit on this transaction, the company must have had a very low gross profit margin of only 6% or less.⁸⁶ Likewise, for the *Cabu Chartering* case, the bribe of about USD 2.6 million helped the company obtain a shipping contract worth USD 8 million. Thus, even after paying the bribe and the fine plus confiscation amount of USD 4 million, the company could have still made money if it had a gross profit margin of 83% or more, which appears to be slightly above historical values.⁸⁷ Moreover, since this transaction occurred in 2002-2003, this rough calculation does not account for the fact that that Cabu was able to earn a return on the proceeds for ten years⁸⁸ before the fine plus confiscation amounts were imposed in 2014.

108. The fines in the *Yara* case are particularly difficult to assess because they cover two bribery offences relating to public officials in India and Libya and one private bribery offence in Russia. For all three offences combined, the fine was NOK 270 million (EUR 27 million), a record for Norway. The agreed bribe amounts for public officials were USD 5 million in Libya and USD 3 million in India. As noted above, the purpose of these bribes was to effect market entry through joint ventures in fertiliser production. When it was initially concluded, the company’s stake in the Libyan joint venture was valued at USD 225 million,⁸⁹ although it quickly suffered a steep decline. In these circumstances, Norway did not impose confiscation for either the Libyan or the Indian bribes. The

⁸⁵ One investment website, [Investopedia](#), explains this concept as follows: “The time value of money means that money available at the present time is worth more than the same amount in the future due to its potential earning capacity. This core principle of finance holds that, provided money can earn interest, any amount of money is worth more the sooner it is received.” Likewise, the [OECD/StAR publication](#) (pages 43-44) states: “Money has a time value... When lengthy periods are being considered the interest rate or cost of capital becomes critical, as does the period over which it is applied.”

⁸⁶ That is, USD 250,000 plus the USD 101 771 (the bribe amount that was actually paid) divided by USD 6 million. In fact, the company’s annual reports suggest that its average gross operating profits are higher than 6%. For SINTEF annual reports, see: <https://www.sintef.no/en/annual-reports-and-brochures2/#Annualreports>. Gross operating profits corresponds to the ‘net proceeds’ described on page 30 of the [OECD/StAR publication](#).

⁸⁷ That is, USD 4 million plus the USD 2.6 million bribe divided by USD 8 million. Estimates of gross profit margin are presented in a [Danske Bank analysis of Klaveness Ship Holding](#). The report states shows the company had gross profit margins of between 59% and 77% over the 2010-2015 period (see the ‘EBITDA margin’ in the “Key ratios” table on page 8 of the report).

⁸⁸ That is, the bribe transaction took place in 2003-2004 while the fines plus confiscation were not imposed until 2014.

⁸⁹ Oil and Gas Journal ‘[Yara creates JV fertilizer company with Libyan authorities](#)’. 10 February 2009

English translation of the penalty notice resolving the *Yara* case contains a brief, four-line description of how the monetary fines and confiscation were calculated.⁹⁰ Given the limited publicly available information and the additional information provided by Norway, it has not been possible for the evaluation team to assess how dissuasive the total fine was for the Indian and Libyan components of the case.

109. Of course, this overview is very approximate and cannot fully capture the idiosyncrasies of each case or how mitigating factors might have been taken into account.⁹¹ Nevertheless, it raises the issue (without resolving it) of whether or not the combinations of fines imposed by Norway on legal persons in foreign bribery are indeed dissuasive. Although the legal provisions allow for dissuasive fines to be set, there can be doubts about the adequacy of current sanctions-setting practices. Publication of more information on the details as well as guidance on how the legal criteria are applied to calculate fines would be a good starting point for clarifying this matter and would be useful both for the enforcement community and for companies and legal advisors.

110. At the on-site visit, representatives of the business sector and civil society, as well as lawyers and academics, agreed that the calculation of penalties is not sufficiently transparent and predictable. They stated that greater clarity on how fines are set would be helpful. ØKOKRIM seems to be ready to try to enhance transparency and predictability in this area. It stated at the on-site visit that it intends to publish more information in the future about how sanctions are set in cases resolved by penalty notices. Publishing such information would enhance ØKOKRIM's accountability, while also giving the business sector and other interested parties better insight into its practices and policies. In addition to demonstrating that the sanctions imposed are effective, proportionate and dissuasive, publishing additional information and guidance would help to raise public awareness of foreign bribery and enhance deterrence.

Commentary

Overall, the lead examiners consider that, the sanctions provided for in the Penal Code are dissuasive. The maximum prison term for aggravated corruption – the offence typically applied in foreign bribery cases – is on the high end of the range for other enforcing WGB countries. Furthermore, Norway does not set any limit on the size of fines that can be imposed on natural or legal persons.

While the sanction regime appears dissuasive on paper, the picture is less clear in practice. In some cases, the sanctions imposed are clearly dissuasive – for example, the on-site participants agreed that the seven-year prison term imposed on Yara's chief legal officer dramatically raised awareness about Norway's commitment to fighting foreign bribery in Norwegian business circles.

For corporate fines, however, the situation is less clear. On one hand, Norway recently imposed a record-breaking fine on Yara. On the other hand, when looking at all of Norway's foreign bribery cases that resulted in corporate sanctions, the lead examiners still have some doubts about their overall dissuasiveness, while recognising that they do not have access to all the relevant facts. In addition, business representatives and legal practitioners at the on-site expressed uncertainty about how fines are assessed in foreign bribery cases.

⁹⁰ The four-page penalty notice explains the calculation of fines plus confiscation as follows: "The amount of the fine has been determined based on the criminal offences having been admitted and the matter therefore can be settled out of court through the acceptance of the penalty notice. The amount of the fine consequently therefore includes a discount." (page 4)

⁹¹ In the *Yara* case, for example, the company not only conducted its international investigation in coordination with OKOKRIM's own investigation, it also disclosed the results of its investigation and even waived privilege.

In terms of confiscation, Norway appears to have largely implemented the WGB’s Phase 3 recommendation by making “full use” of its confiscation provisions. In one of the two cases resolved since Phase 3, Norway confiscated the proceeds of foreign bribery. In the second case, Norway confiscated the proceeds from the private bribery component but concluded that the foreign bribery components did not generate proceeds to confiscate. Thus, the lead examiners conclude that Norway can apply its confiscation rules in foreign bribery cases.

For all these reasons, the lead examiners encourage Norway to clarify how fines and confiscation amounts are to be calculated in foreign bribery cases and to ensure that these calculations result in dissuasive sanctions for both natural and legal persons. Furthermore, Norway should also publish more extensive information on how fines and confiscation amounts are calculated in concluded foreign bribery cases.

B.6. Debarment and loss of rights

111. The enterprise may also be sentenced to lose the right to operate, or may be prohibited from operating in certain forms. No company has been subjected to debarment or loss of rights in the context of a foreign bribery case. In the *Norconsult* case, the possibility that the legal person could have been debarred from domestic public contracting played a role in the decision to acquit the company. The Supreme Court majority opinion concurred with the Court of Appeals that any public procurement consequences were “in principle [...] without significance when the question of corporate penalties shall be assessed.” Nonetheless, it took notice of the fact that the potential debarment of the company could lead to “disproportionate consequences”, especially as the World Bank had already provisionally disqualified the company under its own procedures. At the on-site visit, civil society representatives expressed concern over this reasoning. They explained that it could convey the idea that companies whose business depends on contracting with the Norwegian government may be shielded from corruption convictions.

112. This concern may be somewhat alleviated by Norway’s new public procurement rules, which enable a company to avoid the consequences of debarment by demonstrating that it has taken “self-cleaning” measures, such as the adoption of a compliance programme. Norway’s policies in relation to debarment are the subject of Phase 3 Recommendation 6. This will be considered in Section D.1 below on public advantages.

B.7. Investigative tools

113. During Phase 3, the WGB did not identify any shortcomings in the investigative tools available to ØKOKRIM and thus made no recommendations in this regard.⁹² Since Phase 3, there have been several legislative developments and a number of foreign bribery cases have been concluded. In 2016, Norway amended its CPA so as *inter alia* to enhance the usefulness of certain investigative techniques and to permit the use of coercive measures without notification in specific circumstances. The amendments to CPA provisions on investigative tools pertain to serious offences, for which prison sentences of ten years or more may be imposed. Thus it applies for aggravated corruption. The enhanced techniques are therefore available for investigating what would

⁹² See Norway Phase 3 Report, para. 60. In Phase 2, the WGB briefly reviewed the investigative tools then available in Norway. While the WGB did not see any need to make recommendations at the time, it observed that further case law would be needed to ensure that the judicial process for protecting “business secrets” that may be contained in seized documents would need to be reviewed to ensure that it is not abused by defendants to “undermine [the] effective prosecution and sanctioning of bribery offences”. See Norway Phase 2 Report, paras. 118-121.

normally be the offence used for foreign bribery, but not for lesser corruption offences such as non-aggravated corruption and trading in influence.

114. Of particular note is an enhanced computer surveillance technique, called “reading of data”, which is now regulated under CPA section 216o. According to Norway, this is a collective term for real-time surveillance as well as the accessing of private electronic information (*e.g.* accessing information stored on servers). The aim is to allow investigators to keep up with technological developments and to improve their ability to access electronic information under certain conditions. In particular, this technique can only be used when authorised by a prior court order and a showing of “just cause”. These amendments are expected to promote more extensive access to evidence from electronic sources that have been seldom used to date (see below). ØKOKRIM investigators at the on-site visit said they were still learning how to use these techniques effectively. In addition, Norway reports that CPA Sections 208a and 210a were amended to grant prosecutors the authority to delay notification about seizure and disclosure orders.

B.7.1. The proactive use of investigative tools in foreign bribery cases

115. In its foreign bribery investigations, ØKOKRIM has made proactive use of a variety of investigative tools. These tools and their deployment in 23 matters are summarised in Table 3. These matters were (i) 13 matters that did not proceed beyond a preliminary investigation; (ii) 2 ongoing investigations; and (iii) 8 concluded cases. The data on investigative tools used in these shows the following:

- *Formal and informal international cooperation is the most frequently used tool.* The most common investigative tool is informal international cooperation (non-MLA related cooperation such as meetings with other law enforcement agencies). It was used in 18 cases, 13 of which were not pursued after preliminary investigative steps were taken. Indeed, the Norwegian approach to the preliminary investigation of these cases seems to involve the use of informal international cooperation in order to determine if the case is worth pursuing. Formal MLA requests were used in all eight of the completed cases and in the two ongoing cases.
- *Tracing money internationally.* Norway attempted to trace money internationally in eight cases, though these efforts were not always successful. Problems associated with these efforts were also noted during the on-site visit, including in relation to some of the recent cases. In one case, bank records were no longer available in the jurisdiction where the funds were first transferred, and subsequent payments were traced through two jurisdictions before being withdrawn as cash. Another seemingly increasing problem is the use of professional middlemen whose very business model appears to be the obscuring of money flows through an opaque network of shell companies and bank accounts.
- *Tools used less frequently.* Forensic audit is the only tool that has not been used in any of the cases. Norway has only intercepted communications in two cases.
- *The average number of investigative tools used per case is increasing over time.* For the completed cases, eight investigative tools were used per case on average. Looking at these cases over time (of resolution), it would appear that the average is going up: the three oldest completed cases involved an average of fewer than six investigative tools, while the three most recent completed cases involved over nine tools on average.

116. The use of cooperation agreements and cooperating witnesses and informants was identified in a recent WGB publication⁹³ as an important tool for detection. Norway has a mixed policy in this area. On one hand, it is resistant to the idea of providing incentives to witnesses in the form of immunity agreements or agreements to prosecute for lesser offences. Guidance provided by the Director of Public Prosecutions (RA-2007-3) states that “a decision not to prosecute or to apply a less stringent provision shall not be used as remuneration for information.” On the other hand, it is possible for prosecutors to recommend leniency in sentencing to courts or “in cases where a penalty notice has been issued, the discount may consist of the fine being set lower than the normal level.”

⁹³ See Chapter 3 (Confidential informants and cooperating witnesses) of [Detection of Foreign Bribery](#), 2017.

Table 3. Tools used in foreign bribery investigations

(number of tools used)

Investigative Tool	Allegations* (13 matters)	Ongoing investigations (2 cases)	Concluded cases* (8 cases)	Total (23 matters)
Searches	0	1	6	7
Seizures	0	1	6	7
Seizing/ processing electronic evidence	0	1	5	6
Intercepting communications	0	0	2	2
Interviews	1	1	7	9
Forensic audits	0	0	0	0
Self-reporting and cooperation by companies	2	0	5	7
Cooperation with domestic counterparts	2	0	5	7
Bank enquiries	0	1	7	8
Tracing money internationally	0	1	7	8
Formal international cooperation: MLAs	0	2	8	10
Other international cooperation (e.g. visits, informal contacts, joint investigation teams)	10	2	6	18
Number of tools used per category	15	10	64	89

*Sources and definitions: OECD calculations based on information provided by Norway. Information on investigative tools was not available for four cases. "Allegations" are matters that were subjected only to preliminary investigative steps. 'Concluded cases' include both cases that were concluded either in court or through penalty notices, as well as investigations discontinued at an advanced stage.

Commentary

The lead examiners commend Norway for the broad range of investigative tools available to its investigators and for its proactive use of some of these tools. It will be useful to follow up on how Norway's use of investigative tools evolves, particularly with regard to tracing money internationally, forensic audit and the impact of the new rules on enhanced electronic surveillance techniques.

B.8. Mitigating factors

117. PC section 78 now contains a non-exhaustive list of mitigating circumstances that are relevant for imposing sanctions.⁹⁴ Among these is whether “the offender has made an unreserved confession, or contributed significantly to solving other offences”. In addition, PC section 80 provides *inter alia* that, when the offender has made an “unreserved confession”, the sanctions “may be set below the minimum penalty of the penal provision or to a less severe penalty type.” The legislative history makes clear that this provision would enable the court or the prosecutors to fine a natural person for aggravated corruption, including foreign bribery, in lieu of imprisonment. PC sections 78 and 80 apply to both natural and legal persons, and regardless of whether the contemplated sanction is a monetary fine or imprisonment.

118. The term “unreserved confession” is construed in a way that provides credit in sanctioning for self-reporting. Guidance provided by the Director of Public Prosecutions (RA-2007-3) states the following: “A confession will often have material significance and be in the interests of procedural economy [...]. A discount of between one fourth and one third is considered generally appropriate.”

119. Several completed foreign bribery cases involved references to mitigating factors, including:

- *Cabu Chartering*. Norway’s written response describes the setting of sanctions via a penalty notice as follows: “The amount of the fine was decided after taking into account [...] mitigating factors: the company self-reported and cooperated throughout the investigations, considerable time had gone since the offence (ten years), and the company had later implemented a good compliance program.”
- *Yara International – credit for self-reporting and cooperation*. The company self-reported, but only after the media started looking into its international operations. It is not clear whether and how this self-reporting was taken into account because the penalty notice for Yara does not explain how the fine of NOR 270 million fine was calculated. Norway’s written submission states that it reviewed “internal material and guidelines” and determined that Yara had “inadequate internal policies and lack of focus by the top management.” Following the on-site visit, Norway also recalled the important cooperation that the company provided during the investigation.
- *Yara International – endemic corruption in a host country excluded as a mitigating factor*. In a significant development, the Supreme Court rejected the District Court’s conclusion that “bribery of a foreign public official in a country prone to corruption should be punished less severely” than corruption of a Norwegian public official. The Supreme Court majority held to the contrary: “When a criminal infraction of the law has been established, the purpose of the [Penal Code] indicates that similar offences are to be dealt with in a similar manner. [Thus ...], there is no support in sources of law for the relativization of criminal-law protection depending on the country affected by the corruption.” Following this ruling, foreign bribery should now be punished in the same way as domestic bribery in Norway.
- *Norconsult* – In the Supreme Court’s decision to acquit Norconsult, the majority argued as follows: “When the various factors are weighed against each other, [...] the general preventive considerations, seriousness of the act and the

⁹⁴ Aggravating circumstances are listed in PC section 77, but these are not covered in this report because they are not of special interest for foreign bribery enforcement. In addition, as discussed in Section C.3 below, PC section 28 provides a list of potentially aggravating or mitigating factors specific to sanctioning legal persons.

company's lack of guidelines, instructions, training and control clearly indicate that corporate penalties shall be imposed [...]. When the case was reported [...] on 23 May 2007, the company had itself carried out an internal and external investigation and had made all of its documentation available to the prosecuting authority. It appears as if the most important facts in the case [...] were clarified at the time the case was reported. However [...] the main hearing was not held until 9 May 2011.” The majority acquitted the company, stating, “Now that a disproportionately long period of time has passed [...] it must weigh heavily that the company has implemented several measures to prevent corruption in the future, that the act of corruption has resulted in comprehensive sanctions from the World Bank, that employees had been sentenced, and that there is a risk that the contracting authority's application of the Public Procurement Regulations will lead overall to disproportionate consequences.” The Court then concluded that corporate penalties should not be imposed. This decision is the only jurisprudence available on the application of mitigating factors in the context of a foreign bribery case. The *Norconsult* case is further discussed in Section C.3 below.

120. At the on-site visit, the application of mitigating factors was one of several areas of Norwegian law that was identified as needing further clarification. Yet, aside from the one Supreme Court decision and the law itself, there is little guidance available to alleged offenders, the business community and the general public. The Director of Public Prosecutions has issued guidelines (RA-2007-3) for prosecutors to ensure uniform use of self-reporting as a mitigating factor. Experts from the private sector and legal profession were clearly and consistently concerned about the lack of guidance on this matter.

Commentary

The lead examiners concur with the views expressed at the on-site visit that greater predictability is needed in relation to mitigating factors. As Norway itself points out, authoritative guidance will come with the emergence of jurisprudence. When business managers and legal practitioners ask for guidance, their uncertainty is undoubtedly a symptom of the fact that the enforcement framework for foreign bribery is, in the words of a business executive at the on-site visit, still “maturing”. Norway has a solid body of written law, but the full ramifications of this law in concrete business situations need to be explored as jurisprudence develops. With Norway’s heavy reliance on penalty notices, this is likely to take some time. In the meantime, law enforcement authorities would do well to develop other forms of guidance on the application of mitigating factors. The lead examiners encourage Norway to use all the means at its disposal to clarify the meaning and application of mitigating factors in the context of foreign bribery and recommend that the Working Group follow up on this issue.

B.9. Mutual legal assistance

121. Article 9 of the Convention states that Parties should provide “prompt and effective legal assistance” to other Parties. In response to the WGB’s standard Phase 4 request for information on experiences in international cooperation, two responses were received from countries with experience making requests of Norway. The first country reported having made four requests, all of which were executed promptly, on average within two months of receipt of request. A second country reported making one MLA request and described the cooperation as “excellent”.

122. Norway states that “referrals from foreign law enforcement authorities seem to be the one source that has increased the most.” Section B.7 on investigative tools shows that Norway makes extensive use of formal and informal cooperation with international partners, especially when deciding whether a case should be subjected to a full investigation.

123. Norway's law and practice for international cooperation and MLA has the following characteristics:

- *Treaty not required for MLA.* Under Extradition Act section 26, paragraph 3, Norway may provide assistance irrespective of the existence or applicability of a treaty.
- *MLA tracking systems.* Systems to facilitate the tracking and provision of MLA exist both in the Ministry of Justice and at ØKOKRIM.
- *MLA requests made and received in the context of foreign bribery investigations.* ØKOKRIM reports in the written submission that it has tallied all MLAs sent in the foreign bribery cases that has been concluded or investigated by ØKOKRIM since Phase 3. In total, ØKOKRIM has sent 85 separate requests. All requests have been responded to except in two cases. On the receiving side, ØKOKRIM reports having received 19 requests regarding foreign bribery from various countries, mainly from Switzerland, the Netherlands and from the United States. Norway reports that it responded to all requests as soon as possible.

124. Several participants in the on-site visit, including ØKOKRIM, complained about unwieldy procedures for making formal MLA requests, as they are excessively time consuming and resource intensive. A procedure whereby MLA requests may be communicated directly between law enforcement authorities would be much more efficient, as shown by experiences within the Schengen agreement. There, MLAs may be sent directly to the prosecutor without first going through the Ministry of Justice and the embassies of the jurisdictions concerned.

Commentary

Norway makes extensive use of formal and informal international cooperation, but it notes that MLA procedures are cumbersome without international agreements that support direct communication amongst law enforcement authorities.

C. RESPONSIBILITY OF LEGAL PERSONS

125. Since 1991, Norway has been able to hold companies and other “enterprises” liable for criminal offences.⁹⁵ However, this liability framework is discretionary – permitting, but not requiring, liability to be imposed if certain conditions are met.⁹⁶ As Norway lacked any jurisprudence applying this framework in foreign bribery cases, the WGB identified corporate liability as a follow-up issue in its previous evaluations.⁹⁷

126. Since Phase 3, Norway has had two major developments concerning corporate criminal liability. First, with the Supreme Court’s 2013 *Norconsult* decision,⁹⁸ Norway has begun developing court jurisprudence applying corporate criminal liability principles in the foreign bribery context. Second, Norway re-codified the relevant legal provisions with the new Penal Code, which entered into force on 1 October 2015. As discussed below, the new Penal Code maintains Norway’s discretionary, multi-factored approach for determining whether to impose corporate criminal liability. This Section explores the significance of these developments for Norway’s fight against foreign bribery.

C.1. Foreign bribery cases involving legal persons

127. Norway has completed five cases against legal persons for foreign bribery and related offences since the Convention was adopted. All five predated the new Penal Code’s entry into force. Two cases, involving Statoil and SINTEF Petroleum Research, were concluded by Phase 3. Since Phase 3, Norway has concluded cases against Norconsult, Yara International and Cabu Chartering.⁹⁹ In four cases, fines were imposed through penalty notices, using Norway’s out-of-court settlement procedure. Table 4 summarises Norway’s enforcement results to date.

⁹⁵ See Norway Phase 2 Report, para. 99. Before the new Penal Code entered into force, Norway’s criminal corporate liability provisions were codified in Sections 48a and 48b of the 1902 General Civil Penal Code.

⁹⁶ See Norway Phase 3 Report para. 34; Norway Phase 2 Report, para. 99.

⁹⁷ See Norway Phase 2 Follow-up Issue 13; Norway Phase 3 Follow-up Issue 7(b). One explanation for this lack of jurisprudence is that Norwegian authorities have traditionally resolved foreign bribery cases against companies by using “penalty notices” in an out-of-court settlement procedure. See section B.4.

⁹⁸ Supreme Court, *Norconsult*, RT 2013-125.

⁹⁹ Proceedings against *Norconsult* were already underway at the time of the Phase 3 evaluation. See Norway Phase 3 Report paras. 15-17.

Table 4. Norway's foreign bribery enforcement actions against legal persons

Entity	Resolution
Statoil ¹⁰⁰ (14 Oct. 2004)	NOK 20 million fine (approx. EUR 2 million) for trading in influence (penalty notice).
SINTEF ¹⁰¹ (7 Feb. 2007)	NOK 2 million fine (EUR 200,000) fine for aggravated corruption (penalty notice)
Norconsult ¹⁰² (28 June 2013)	Acquitted of aggravated corruption by District Court; convicted on appeal; ultimately acquitted by Supreme Court
Yara International ¹⁰³ (14 Jan. 2014)	NOK 270 million fine (EUR 27 million) for aggravated corruption, including two foreign and one private bribery schemes, plus NOK 25 million in confiscation for the private bribery scheme (penalty notice)
Cabu Chartering ¹⁰⁴ (15 May 2014)	Penalty notice with a NOK 20 million fine (EUR 2 million) plus NOK 12 million (EUR 1.2 million) in confiscation (aggravated corruption)

C.2. Conditions for liability

128. PC section 27 permits corporate sanctions to be imposed when “a penal provision is violated by a person who has acted on behalf of an enterprise.”¹⁰⁵ Even if these conditions are satisfied, however, there is no presumption that liability should be imposed.¹⁰⁶ Instead, PC section 28 sets forth factors to help assess what, if any, penalty should be applied in the particular case. As a preliminary matter, PC section 27 covers a broad range of legal persons, defining “enterprise” to include a “company, co-operative society, association or other organisation, sole proprietorship, foundation, estate or public body”. In practice, Norway has sanctioned two partially state-owned entities for foreign bribery or related offences in the *Statoil* and *Yara* cases.

¹⁰⁰ See Statoil, Press Release, “[Statoil accepts Økokrim penalty in the Horton case](#)” (14 Oct. 2004) (last accessed 19 June 2018).

¹⁰¹ See SINTEF Petroleum Research, Press Release “[SINTEF Petroleum Research accepts fine](#)” (7 Feb. 2007) (last accessed 19 June 2018).

¹⁰² See “[Supreme Court acquits Norconsult, World Bank sanctions still pending](#),” Development Today (28 June 2018) (last accessed 19 June 2018).

¹⁰³ See Yara International ASA, Press Release, “[Yara accepts corporate penalty](#)” (15 Jan. 2014) (last accessed 19 June 2018).

¹⁰⁴ See Torvald Klaveness, [Consolidated financial statements for year ending 31 Dec. 2014](#) (20 Mar. 2015), Note 33 (reporting that Cabu Chartering AS, Torvald Klaveness’s indirectly owned subsidiary, accepted ØKOKRIM’S penalty notice to resolve the case) (last accessed 19 June 2018).

¹⁰⁵ All quotes to the new Penal Code refer to the unofficial translation provided by Norway. The Norwegian word (*noen*), here translated as “person”, could also be translated as “someone”. On-site participants thus understood the word to restrict liability under PC section 27 to acts committed by one or more natural person(s). Following the on-site visit, the Ministry of Justice also confirmed that the provision indeed refers to a natural person or persons.

¹⁰⁶ See Preparatory Works to 2003 Amendment to Penal Code, Ot.prp. 90 (2003-2004); see also Supreme Court, *Norconsult*, RT 2013-1025, para. 27.

C.2.1. Corporate liability independent from the natural person's liability

129. Under Annex I(B) of the 2009 Recommendation, Parties to the Convention should be able to impose liability on companies without prosecuting or convicting the natural person involved in the offence. This is the case in Norway.¹⁰⁷ While PC section 27 requires that a natural person must commit a violation of a penal provision, a company can be held liable even when the natural person offender cannot be punished.¹⁰⁸ Furthermore, as discussed in Phase 3, the company can in principle also be liable when the natural person offender cannot be identified.¹⁰⁹ Moreover, companies can be held liable for “cumulative wrongdoing”, when “several persons together have contravened a penal provision” but no single person would be punished.¹¹⁰

130. Notably, PC section 27 now permits corporate liability even where “no single person has demonstrated guilt.” The legislative history¹¹¹ explains that this provision was intended to change prior law, under which the Supreme Court required that the natural person or persons involved must demonstrate the guilt (*mens rea*) required for the offence.¹¹² As a result, it is now potentially possible to hold a company liable for an objective violation of the foreign bribery offence even where no intent has been established – *i.e.* strict liability.

131. While participants in the on-site panels were not sure how this amended provision would be applied in practice, the lead examiners cautiously welcome this change. Conceivably, a company could be held liable for aggravated corruption when a foreign public official is objectively bribed on its behalf, even if the prosecution cannot prove a natural person's subjective guilt (*e.g.*, the natural person genuinely believed the payment was lawful, following advice of counsel). Together, these various options for imposing corporate liability without prosecuting or convicting a natural person demonstrate that Norway still satisfies this aspect of 2009 Recommendation Annex I(B).

C.2.2. Broad range of individuals for whom the company can be held liable

132. In Phase 3, the WGB also considered that Norway's corporate liability regime was “sufficiently pragmatic and flexible to reflect the wide variety of decision making structures in legal persons”, thus fulfilling the second paragraph of 2009 Recommendation Annex I(B).¹¹³ PC section 27 maintains this approach. In principle, a company can be held liable for a violation committed by any natural person acting on its behalf. According to the legislative history, this covers any person having a “positive legal authority to act” for the company, such as employees and independent

¹⁰⁷ See Norway Phase 3 Report commentary, page 17.

¹⁰⁸ See Penal Code Section 27 (“This [i.e. corporate liability] applies even if no single person [...] meets the accountability requirement [...] under the new Penal Code] Section 20.”). Similarly, Section 48a of the prior penal code authorised corporate liability even where “no individual person may be punished for the contravention”.

¹⁰⁹ Cf. Norway Phase 3 Report, para. 40. The WGB expressed uncertainty over how this would work for crimes, like aggravated corruption, that require proof of intent. No case law so far confirms this interpretation.

¹¹⁰ Preparatory Works to Penal Code, Section 27, Op.prp. 22 (2008-2009).

¹¹¹ According to Norway's written submission, the legislative history as the “preparatory work to the laws, together with relevant case law from the Supreme Court, are the most important guidelines for the interpretation of the laws, both for prosecutors and judges”.

¹¹² Supreme Court, Rt-2002-1312 (holding that Section 48a required that “there must [...] either be guilt – wilful intent or negligence – on the part of an individual person who acts on behalf of the enterprise or be anonymous and/or cumulative wrongdoings”)

¹¹³ Norway Phase 3 Report page 17 (Commentary).

contractors. The “offender’s position at the enterprise”, however, “may be of importance [as] to whether the act is deemed to be carried out on behalf of the enterprise”.

133. So far, Norway has only sanctioned companies for foreign bribery and related offences that implicated members of senior management.¹¹⁴ In the 2013 *Norconsult* case, the Supreme Court split on the question whether the company’s non-managerial employee could trigger liability for the legal person. The majority, which nonetheless acquitted the company on other grounds, found that the employee was indeed acting “on behalf” of the company when he committed the offence while serving as *Norconsult*’s representative on the board of directors for a joint venture. Stressing the need to examine the employee’s “actual responsibility and not the formal position”, the majority observed that the employee “represented the enterprise externally” concerning the “establishment and execution of the project”.¹¹⁵

134. In a concurring opinion, the minority would have found that the employee’s acts should not have been attributed to the company. They would have held *Norconsult* liable only if its management had failed to prevent the offence through a lack of supervision. In their view, this was not the case here because the employee committed the offence despite knowing that it was unlawful. Furthermore, they believed that the employee thwarted *Norconsult*’s supervision by “disloyally” deleting references to the bribes from the minutes of the board’s meetings.¹¹⁶

135. This relatively recent case shows that Norwegian law on corporate criminal liability is still being clarified and refined in practice. Fortunately, the liability standards employed by the majority and concurring opinions for assigning liability for the acts of non-managerial employees would appear to track, respectively, both the “flexible” approach and the “functionally equivalent” approach (imposing liability for a manager’s failure to supervise) described in Annex I(B) of the 2009 Recommendation. Thus, the WGB’s Phase 3 conclusion on this point remains valid, even if the two standards potentially could have produced different outcomes in the *Norconsult* case.

C.2.3. Types of acts for which a company can be held liable

136. According to the legislative history, PC section 27’s condition that the offence must be committed “on behalf of the enterprise” means that “both the offender and the act must have a certain connection with the enterprise”. Specifically, acts “within the scope of the enterprise’s operations” may be considered acts committed on its “behalf”, provided that they are not “beyond what is reasonable to expect”. As an additional limitation, acts that are “clearly marked by disloyalty to the enterprise” would not be considered to have been committed on the company’s “behalf”.¹¹⁷ Significantly, a company can be liable for an offence even if it did not give the offender “positive authority to perform a specific act”.¹¹⁸ In this regard, the Supreme Court in *Norconsult* rejected the argument that corruption inherently fell outside the scope of offences for which a company can be

¹¹⁴ Specifically a Statoil executive Vice President was involved in its scheme, while a “senior executive” of SINTEF Petroleum Research was allegedly involved in that company’s scheme (though the executive was acquitted after the company accepted the penalty notice). See Norway Phase 3 Report paras. 15-16. Similarly, Yara’s Legal Counsel was convicted of engaging in aggravated corruption for schemes involving public officials in Libya and India. Finally, Norway reported during the Phase 4 evaluation that Cabu Chartering’s management was implicated in its bribery scheme.

¹¹⁵ Supreme Court, *Norconsult*, RT 2013-1025, para. 44 (Mattheson, J).

¹¹⁶ Supreme Court, *Norconsult*, Rt-2013-1025, paras. 107-119 (Utgård, J) (concurring opinion).

¹¹⁷ Supreme Court, Rt-2007-1684, para. 18; Supreme Court, *Norconsult*, Rt-2013-1025, para. 115 (Utgård, J) (concurring opinion); Supreme Court, HR-2012-1016-A; Rt-2012-770, paras. 22-23.

¹¹⁸ Preparatory Works to the new Penal Code, Section 27, Op.prp. 22 (2008-2009).

held liable. To the contrary, it concluded that “corruption offences belong to the core area of corporate penalties” because such liability “giv[es] enterprises an incentive to stop offences from being committed”.¹¹⁹ Finally, a company can be held liable for acts that are contrary to its instructions, at least when it is foreseeable that the violation could occur.¹²⁰

C.2.4. Liability for intermediaries, including related legal persons

137. Under 2009 Recommendation Annex I(C), the Parties to the Convention “should ensure that [...] a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf”. As explained above, any natural person with some delegated authority or relationship to a legal person can be considered to have acted on the company’s behalf for purposes of PC section 27. This can include independent contractors or anyone to whom the company has given “positive authority” to act. Nevertheless, during the on-site visit representatives from ØKOKRIM and corporate compliance officers expressed uncertainty about the exact scope of corporate liability when corruption is committed by intermediaries, such as foreign subsidiaries, independent consultants or agents. This uncertainty stems from the lack of definitive jurisprudence interpreting when a person is acting “on behalf” of a legal person. In late May 2018, the Ministry of Justice appointed a leading Norwegian corporate liability expert to address this issue and to consider whether to propose legislative amendments to Norway’s corporate liability framework. The expert’s report is expected in January 2020 and will be submitted to a public consultation.

138. At the time of Phase 3, the on-site participants believed, albeit without supporting case law, that a legal entity could be held liable for the acts attributed to a related entity – e.g. a parent company could be liable for a subsidiary’s operations – as the latter entity could act on the former’s “behalf”.¹²¹ Whether that was accurate at the time, the legislative history to the new Penal Code specifies that “a parent company may not automatically be held liable for acts committed on behalf of a subsidiary”. Ostensibly, this would still be true even if the subsidiary were wholly owned, such that the parent company would ultimately obtain any economic benefit from the offence. This follows from the fact that Section 27 envisions that an enterprise will only be liable for the acts committed by a natural person acting on its behalf.¹²² According to the legislative history, the natural person must have some “connection to [the parent] company”. During the on-site visit, law enforcement officials suggested that this connection could be established, for example, if the offender has positions in both the subsidiary and the parent company. Given the lack of case law, however, on-site participants from both the government and the private sector were not certain exactly how broad the parent company’s liability would be for offences committed within a subsidiary’s operations.

139. Norway’s approach mirrors the pattern found in the WGB’s 2016 stocktaking analysis of corporate liability. At that time, at least 32 of the then 41 Parties (78%) could clearly hold a company liable for foreign bribery committed by another related entity, such as a subsidiary. For 29 Parties (71%), however, this liability would typically require that a natural person in the first company was complicit in the offense. Only 16 Parties (39%) could clearly impose liability on some

¹¹⁹ Supreme Court, *Norconsult*, Rt-2013-1025, paras. 35, 36 (Matheson, J).

¹²⁰ Supreme Court, Rt-2012-770, para. 22; Supreme Court, Rt-2007-1684, para. 18.

¹²¹ See Norway Phase 3 Report para. 41.

¹²² See note 111 above for a discussion of translation issues concerning the Norwegian word “noen.”

other basis.¹²³ This included Norway’s ability to hold a company liable if the offence committed within its subsidiary’s operations was done on its “behalf”.

140. Despite this uncertainty, ØKOKRIM has been able to impose liability for bribery committed through related legal persons. Yara International, for example, was held liable for a private-to-private bribery scheme involving its Russian subsidiary’s operations. In addition, the Supreme Court majority in Norconsult was willing to impose liability on the company as a result of decisions taken by its representative acting as part of the board of directors for a joint venture. Finally, Torvald Klaveness decided to report the unlawful activities of its subsidiary, Cabu Chartering AS, to Norwegian authorities. While Cabu ultimately paid the fine, the case shows that Norway’s rules of attribution can encourage the companies to take responsibility for addressing corruption committed within their corporate group.

C.2.5. *Successor liability*

141. The legislative history for PC section 27 provides that “[c]hanges in the corporate structure are in principle not of importance to criminal liability”. Thus, a successor entity created as resulted of a merger, spin-off of companies – or a company that acquires part of another company’s economic activity – can be held liable if the offender could be considered to have “acted on behalf” of the new enterprise.

142. This was also the Supreme Court’s approach under the prior criminal code.¹²⁴ It held that successor liability generally would only arise when the first company entirely “ceased to exist”.¹²⁵ Such liability, however, could also arise when one company transferred only part of its company’s assets or economic activity to another, provided that there is a “structural connection” between the selling and acquiring entities or where the transaction was “primarily motivated based on a desire to avoid criminal liability”.¹²⁶ Such “structural connections” would include whether the entities have the same “ownership interest” or if they have “shared boards or administrative management”.¹²⁷

143. As always, the factors listed in PC section 28 would still guide the courts or prosecutors in deciding whether it would be appropriate to hold sanction the successor entity in an individual case. Notably, the legislative history to PC section 28 provides that “[s]tructural changes ... such as new owners, new management, spin-offs or mergers, may indicate that penalties should not be imposed”.

C.3. **Discretion to impose liability and sanctions**

C.3.1. *Legislative factors for guiding discretion*

144. Norwegian prosecutors and courts are not required to prosecute or to hold a company liable whenever the conditions under PC section 27 are met. Instead, they will make a discretionary overall assessment whether the company should be charged or held liable and, if so, the type and level of sanctions that should be imposed. PC section 28 provides a list of eight factors to consider

¹²³ OECD (2016), [The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report](#), pages 79 *et seq.* Examples of other grounds for imposing liability documented in the report included, for example, the fact that the sanctioned company had ownership or control over the other related entity where the offence occurred, or that the related entity or its employee was considered to have been an agent of the sanctioned company.

¹²⁴ Supreme Court, Rt-2008-1201, para. 17.

¹²⁵ Supreme Court, Rt-2008-1201, para. 27.

¹²⁶ Supreme Court, Rt-2008-1201, paras. 20-21.

¹²⁷ Supreme Court, Rt-2008-1201, para. 27.

when a court issues judgment or when the prosecutors issue a penalty notice. According to the legislative history, the PC section 28 factors are not exhaustive.¹²⁸

145. The factors listed in PC section 28 largely track those contained in Section 48b of the former penal code, which were analysed in prior WGB evaluations.¹²⁹ Like its predecessor, PC section 28 stresses considerations of deterrence and prevention when deciding whether to impose corporate sanctions.¹³⁰ In this regard, legislative history asserts that it “will be of great importance” whether the company could have prevented the offence through “guidelines, instruction, training, control or other measures”. The assessment of liability and sanctions will also be influenced by the severity of the offence, whether the offence was committed to “promote the interests of the enterprise, and whether the enterprise either obtained “or could have obtained any advantage” from it.¹³¹ In addition, PC section 28 requires consideration of the company’s “financial capacity” as well as “other sanctions” (such as confiscation) that have been “imposed on the enterprise or [the] person who has acted on its behalf”.¹³²

146. In addition, PC section 28 contains two new provisions that were not found in the prior penal code. First, the “severity” of the offence factor, which is now codified in PC section 28(b), specifies that the natural person’s “guilt” should also be considered when deciding whether or not to sanction the legal person. This amendment was introduced as a corollary to the amendment to PC section 27, which now makes it possible to impose “objective” liability on a company even when the natural person did not manifest subjective guilt. According to the legislative history, however, it may be “unreasonable” to impose penalties for the violation when the natural person does not manifest the subjective guilt required for the particular offence and the “enterprise cannot be blamed”.

147. Second, PC section 28(h) contains an entirely new factor, which potentially could favour the imposition of liability and higher sanctions in foreign bribery cases. Under this provision, Norway will consider whether its international agreements encourage the use of corporate penalties. Significantly, the legislative history indicates that even non-binding provisions that merely “require [... Norway] to allow the imposition of fines on criminal enterprise shall also be taken into account.” Presumably, Norwegian courts would thus favour imposing corporate liability for foreign bribery in light of Articles 2 and 3 of the Convention.

C.3.2. *The Norconsult case: An exercise in discretion*

148. In Phase 3, the WGB indicated that it would need to follow up on how Norway’s corporate liability regime would work in practice in foreign bribery cases. In particular, the WGB identified certain factors for attention, namely: (i) whether the offence was committed in the “interests of the enterprise”; (ii) whether the enterprise obtained or could have obtained a “benefit” from the offence;

¹²⁸ The wording of Section 28, however, appears to be more ambiguous (at least in translation) on this point than the provision in the prior code. This is because section 28 merely provides that “considerations shall include” the listed statutory factors, whereas old section 48b provided that “particular consideration shall be paid to” the statutory factors. In *Norconsult*, the Supreme Court majority relied on the phrase “particular consideration” to justify its consideration of other non-statutory factors. Supreme Court, *Norconsult*, Rt-2013-1025, paras. 29-30; *cf.* new Penal Code Sections 77-78 (also referencing “particular consideration” when evaluating aggravating and mitigating factors).

¹²⁹ Norway Phase 2 Report, paras. 108-112; Norway Phase 3 Report, paras. 42-46.

¹³⁰ See CP Sections 28(a) & (c).

¹³¹ Sections CP 28(b), (d), & (e).

¹³² CP Sections 28(f),(g).

and (iii) whether the company could have prevented the offence through “guidelines, instructions, training, control or other measures”.¹³³

149. The Supreme Court’s 2013 *Norconsult* decision offers some guidance on how courts should exercise their discretion when assessing liability in foreign bribery cases. Specifically, the Supreme Court considered whether Norconsult, Norway’s “largest interdisciplinary consulting firm”, should be held liable after its joint venture partners promised bribes to municipal Tanzanian officials to obtain a public works contract.¹³⁴ Although the company’s own employees were not originally complicit in the scheme, the joint venture partners revealed the scheme to Norconsult’s joint venture representative before concluding the joint venture agreement. Instead of objecting, the representative deleted references to the scheme from the minutes of the joint venture’s board meetings. Once the joint venture was underway, Norconsult’s representative also furthered the scheme in several ways, for example, by not objecting to board decisions approving budgets that included the corrupt payments and by submitting actual payment requests to the accounting department. The representative and one other Norconsult employee, the treasurer for the joint venture, were ultimately convicted of aiding and abetting aggravated corruption.¹³⁵ As the decision illustrates how Norwegian courts evaluate the discretionary factors set forth in the Penal Code, it is worthwhile exploring it in detail. In particular, the majority emphasised the factors concerning deterrence, prevention, and consideration of other sanctions imposed on the company and/or natural person.¹³⁶

150. As discussed in Section C.2.2 above, the majority decided that Norconsult could be held liable for the representative’s acts. It also found that several factors would support convicting the company. First and foremost, the need to punish the company for corruption as a matter of general deterrence weighed strongly in favour of convicting the company under former section 48b(a). Second, the company could have done more to prevent the offence instead of simply relying on generic prohibitions in its Code of Conduct. Thus, former section 48b(c) also supported conviction. Third, the seriousness of the offence also supported a conviction under former section 48b(b).¹³⁷ Fourth, even though the actual contract proved a net loss, the court found that the offence was committed in the company’s “interest” and that the company “has ... or could have obtained a benefit” from it, reasoning that the scheme helped Norconsult establish access to the Tanzanian market.¹³⁸ Thus, former sections 48b(d) and 48b(e) both supported conviction.

151. Ultimately, the majority acquitted Norconsult for a combination of three reasons. First, pursuant to former section 48b(g), it took notice of other sanctions that had already been imposed on the company and its employees. Notably, World Bank had provisionally debarred Norconsult, though this decision was pending review.¹³⁹ The majority also observed that the company, which generated 60% of its revenue from public sector contracts, would risk debarment in Norway if

¹³³ Norway Phase 3 Report, paras. 44-45.

¹³⁴ All quotes from the Supreme Court’s *Norconsult* decision are taken from an unofficial translation that Norway provided for its Phase 4 evaluation.

¹³⁵ ØKOKRIM indicted three individuals and issued a penalty notice to Norconsult on the same day. All three individuals were convicted at trial, but the third Norconsult employee, who served as the joint venture’s office manager, was acquitted on appeal.

¹³⁶ See 1902 Penal Code, Sections 48b (a),(c) & (g); now codified as PC sections 28(a), (c) and (g).

¹³⁷ Supreme Court, *Norconsult*, Rt-2013-1025, paras. 38-40.

¹³⁸ Supreme Court, *Norconsult*, Rt-2013-1025, paras. 79-80.

¹³⁹ Ultimately, the World Bank imposed a six-month debarment on Norconsult in 2014, but it gave retroactive credit for the time that Norconsult had spent on temporary debarment between 2011 and 2014. See Bjørn H Amland, “[Norconsult re-enters World Bank market](#)”, *Development Today* (15 Feb. 2014).

convicted.¹⁴⁰ In addition, the employees had already been convicted. Second, it “attached a great deal of importance” to the fact that, in its view, ØKOKRIM unreasonably delayed proceedings by only indicting Norconsult in November 2011, roughly two and a half years after the company notified ØKOKRIM about the incident. The majority believed that ØKOKRIM could have proceeded more quickly because Norconsult had already concluded its own internal investigation and made the documents available to the authorities. Finally, the majority believed that, in view of the time that had elapsed, it should give weight to reforms Norconsult had made to prevent corruption in the future. In sum, the majority (joined by the concurring justices) believed that it would be disproportionate to trigger a “total sanction” on the company for the deeds of one employee especially where the offence was “not attributed to any culture of corruption”.

C.4. The predictability of the corporate liability framework

152. The business sector representatives and legal practitioners with whom the evaluation team met during the on-site visit were highly knowledgeable about corporate compliance matters, ranging from corporate social responsibility to corruption. According to on-site panellists, this was, at least in part, the result of consistent efforts undertaken by the Norwegian Confederation of Industries (NHO) and other groups to raise awareness about the Anti-Bribery Convention since its adoption. While recognising that smaller Norwegian enterprises might not be aware of the Convention itself, the participants believed that there was a general understanding in Norway that foreign bribery was both illegal and could give rise to high-profile prosecutions. Confirming the findings in Phase 3, all the private sector representatives concurred that they understood facilitation payments to be illegal under Norwegian law.

153. While they expressed some uncertainty about the scope of liability under Norwegian law, they emphatically rejected the notion that the *Norconsult* decision had undermined the case for corporate compliance in Norway. Several of these participants observed that they were “surprised” by the outcome and reasoning. Without exception, they also insisted that they did not rely on this “fact-specific judgment” when designing or advising companies about compliance programmes. Instead, they reported that they supplement the general principles of Norwegian law by referring to other WGB countries’ standards, including the UK Bribery Act and the US Foreign Corrupt Practices Act.

154. The perceptions of the business sector heard during the on-site visit are supported by a 2017 private-sector survey of 250 Norwegian entities, 46% of public entities and 24% of private entities have developed written risk assessments to help guide their compliance efforts. More specifically, the survey found a 50% increase from 2015 in the number of Norwegian companies operating in high-risk countries that always conduct due diligence of their partners’ management structure and business practices in order to ensure that their partners adhere to ethical and legal standards.¹⁴¹ During the on-site visit, accountants and other service professionals confirmed that corporate awareness of criminal liability for corruption – and corresponding interest in compliance efforts – has continued to deepen in recent years. On-site participants particularly stressed ØKOKRIM’s high-profile enforcement efforts, particularly the cases against corporate executives. One even referred to a “paradigm” shift in recent years in terms of recognising the risks that can be encountered when doing business abroad.

¹⁴⁰ The majority agreed that debarment consequences should “in principle be without significance when the question of corporate penalties shall be assessed”. Supreme Court, *Norconsult*, 2013-1025, paras. 86-87.

¹⁴¹ Norwegian Business and Industry Security Council, “Norwegian Crime and Security Survey 2017”, pages 6, 13-15, & 18-19.

Commentary

In the lead examiners' view, Norway's corporate liability framework is potentially broad in scope but not fully defined in practice. While welcoming the Supreme Court's ruling that corruption falls within a "core area" of corporate liability, the lead examiners note that on-site participants still expressed some uncertainty on how the various factors for corporate liability will be applied in practice in foreign bribery cases. The participants expressed particular uncertainty about when an offence committed within the operations of related entities, such as subsidiaries, or joint ventures, would be attributed to the parent company. There is also a question whether Norwegian courts will acquit companies that would particularly suffer from debarment. While the range of discretionary factors reduces predictability, the lead examiners observed that both law enforcement and private practitioners generally perceived Norway's corporate liability regime as credible and expressed appreciation that there was a "safety valve" permitting courts not to impose liability in appropriate cases.

Compliance officers and legal practitioners also stressed that the Norconsult ruling had not dampened businesses' focus on compliance. To the contrary, the business community's awareness of corporate liability for corruption has been heightened as a result of ØKOKRIM's enforcement actions against both companies and executives. However, the extent of liability for related and unrelated intermediaries has yet to be fully explored in case law. For this reason, the lead examiners recommend following up to see whether Norway is able to effectively sanction companies that use intermediaries, including subsidiaries, on their behalf.

C.5. State-Owned Enterprises

155. As noted in the introduction, SOEs play an important role in the Norwegian economy and approximately 35% of the Oslo stock exchange's capitalization is in government hands. Norway's portfolio of companies contains, in total, 74 companies.¹⁴² These include an energy company (mainly oil and gas) with operations in more than 30 countries, a large telecommunications firm, Norway's largest financial group, and the world's largest supplier of mineral fertilisers. The total value of the state's commercial ownership was estimated to be NOK 715 billion (EUR 71.5 billion) at year-end 2016.¹⁴³

C.5.1. Management of the State's ownership positions – a model governance arrangement

156. Norway's SOEs are divided into four categories based on the state's objectives for ownership¹⁴⁴: (i) Commercial objectives only (7 companies); (ii) Commercial objectives and the objective of maintaining head office functions in Norway (9 companies); (iii) Commercial objectives and other specifically defined objectives (9 companies); and (iv) Sectoral policy objectives in areas such as health, environment and education (49 companies).

¹⁴² The information in this section on SOE governance is drawn mainly from Norway's non-public response to the OECD Working Party on State Ownership and Privatisation Practices questionnaire on integrity and anti-corruption by SOES and their ownership and from the Norwegian Ministry of Trade, Industry and Fisheries, "[State Ownership Report 2016](#)".

¹⁴³ Norwegian Ministry of Trade, Industry and Fisheries, "[State Ownership Report 2016](#)," page 3.

¹⁴⁴ Norwegian Ministry of Trade, Industry and Fisheries, "[State Ownership Report 2016](#)," page 2.

157. Oversight of these companies is vested in 12 ministries that are charged with managing the state's direct ownership in 74 companies.¹⁴⁵ The Ownership Department of the Ministry of Trade, Industry and Fisheries (MITOF) manages most of the SOEs with commercial objectives, while companies with sectoral-policy objectives are administered by the ministries responsible for their respective sectors. For example, the Ministry of Petroleum and Energy manages Statoil.

158. Norway's main commercial objective for companies in the first three categories is to achieve "the highest possible return on invested capital over time."¹⁴⁶ The State Ownership Report 2016 summarises the government's other ownership policies, which include promoting responsible business conduct in general and anti-corruption compliance in particular. According to this report: "The state as an owner has general expectations related to corporate social responsibility and transparency and anti-corruption. The board is responsible for assessing how the expectations can best be followed up and that they are operationalised and reported on appropriately. Work on sustainability and corporate social responsibility shall support the shareholder value."¹⁴⁷

159. The Norwegian state has, in its capacity as an owner, several expectations for SOEs regarding both responsible business conduct in general and more specific "key areas", including foreign bribery. Notably, they are expected to be "front runners" in these areas.¹⁴⁸ Other expectations include: board level commitment; ethical guidelines for the SOE (including on foreign bribery) should exist and be publicly available; and annual reporting on these matters.

160. In addition, the government has more specific expectations in the area of corruption prevention, including: (i) transparency of cash flows, including taxes paid to host countries; (ii) companies with international operations should apply the OECD guidelines on taxation,¹⁴⁹ (iii) companies should have guidelines, systems and measures in place to prevent corruption, and to address possible or borderline violations that might be detected in this area; and (iv) companies should assess corruption-related risks in relation to their undertakings. If such assessments point to reasonable doubt as to whether behaviours may be construed as corrupt, then the companies are expected to refrain from such behaviours.

161. Under the Norwegian approach to SOE governance, SOE boards themselves are responsible for assessing how Norway's expectations in its capacity as an owner may best be implemented effectively. Nevertheless, the approach is not *laissez-faire* – the Supervisory Ministries seek to impress upon SOE Boards the importance that they as owners attach to these expectations. Over the past two years, the MITOF has had two meetings with the Chairs of SOE Boards in order to reiterate the State's expectations in the fight against bribery and corruption (setting the "tone at the top"). Further, issues relating to responsible business conduct, including foreign bribery, are covered in the MITOF Ownership Department's annual seminars for the new SOE board members. The meetings permit exchanges of experience on good board practice and enhance new board members' understanding of the role of the state as an owner. In addition, the MITOF has yearly meetings with

¹⁴⁵ For convenience, this Report refers to these ministries as "Supervisory Ministries".

¹⁴⁶ Norwegian Ministry of Trade, Industry and Fisheries, "[State Ownership Report 2016](#)," The Minister's Introduction.

¹⁴⁷ Norwegian Ministry of Trade, Industry and Fisheries, "[State Ownership Report 2016](#)," page 27.

¹⁴⁸ This goal is also established explicitly in Section 1.6.1 of the Government White Paper on Corporate Social Responsibility. See 'Corporate social responsibility in a global economy' - [Report No. 10 \(2008 – 2009\) to the Storting](#).

¹⁴⁹ This includes the expectation that SOEs seek to avoid the use of tax havens that do not apply the standards of the Global Forum on Transparency and Exchange of Information for Tax Purposes and which decline to conclude tax information exchange agreements with Norway.

the SOEs that it supervises regarding sustainability and compliance issues. In 2017, MITOF held additional meetings specifically focused on anti-corruption practices.

C.5.2. SOEs and the law

162. Norway's anti-corruption law applies to all companies, including SOEs. There are, according to information provided by MITOF, no general provisions in laws that are specific to SOEs.¹⁵⁰ MITOF has made efforts to clarify for SOEs the anti-corruption legal framework in which they operate. In 2016, a consulting firm was hired by the MITOF Ownership Department to map out the relevant parts of this legal framework. The report covered: (i) the most relevant anti-bribery statutes, including Norwegian law, the United Kingdom's 2010 Bribery Act and the United States' Foreign Corrupt Practices Act; (ii) a good practice model for anti-corruption programmes; and (iii) different issues of current interest regarding the state's role as a shareholder.¹⁵¹ The report was distributed to all the companies in the Ministry's portfolio and included a list of relevant questions based on the report's good practice anti-corruption programme.

C.5.3. Interaction of the State's roles as company owner and law enforcement authority

163. A session during the on-site visit was organised with two Supervisory Ministries – the MITOF and the Ministry of Petroleum and Energy – and a number of large, multinational SOEs. This conversation largely confirmed the view of the State's role as described above and in official documents. The SOEs reported that State has high ambitions for SOEs, *inter alia*, in the area of corruption prevention. One SOE at the on-site visit described these ambitions as “best in class” – that is, Norwegian SOEs should be the leaders in responsible business conduct in the sectors in which they operate.

164. That said, the relevant Ministries reiterated at the on-site visit their policy of not stepping into the shoes of SOE management or of infringing on the responsibilities of the General Assembly. In practical terms, this meant for the Ministry of Petroleum that if, for example, the Ministry were to become aware of bribery in the operations of one of its SOEs, it would not necessarily share this information immediately with law enforcement authorities. Instead it would encourage the company itself to report it. That said, in at least one case, the Supervisory Ministries have also shared information about suspected corruption with ØKOKRIM.

165. *SOEs and Article 5 considerations.* Article 5 of the Convention states that the investigation and prosecution of foreign bribery “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.” The State's dual role as enforcer of foreign bribery laws and partial owner of numerous multinational companies operating in high risk sectors inevitably raises the question as to whether the two roles do not occasionally conflict in ways that evoke Article 5. MITOF maintains that there are no incentives for the state as owner to be less diligent in anti-bribery enforcement. To the contrary, it cites the loss of reputation for the SOEs and for the state as shareholders as compelling reasons for the state to be strict on both compliance and enforcement

166. MITOF's views on this matter were largely backed up by the business representatives at the on-site visit. They noted that the government had acted aggressively with the most recent imposition of record-high sanctions for foreign bribery on an SOE and a long prison term for its legal director. They believed that the government's “best in class” ambitions for its SOEs were genuine and were being followed through by SOEs. They also reported that the more recent cases sanctioning SOEs

¹⁵⁰ One exception to this may be public procurement provisions that are explicitly directed to SOEs whose objective is to serve the interests of the general public and that are not of industrial or commercial nature.

¹⁵¹ Some of this material is available on the [anti-corruption page](#) of the consulting firm's website.

had already provided the impetus for stronger anti-corruption compliance programmes and had significantly raised awareness of the risks of foreign bribery.

167. The on-site participants also largely agreed with MITOFs views, but warned against complacency. Overall, they noted that, in addition to government pressures, forces acting within Norwegian society put genuine pressure on companies, including SOEs, not to engage in bribery. These include the amplified negative impact of bribery allegations on companies' reputation and branding in a small, tight-knit country such as Norway. Moreover, an on-site participant speaking in a different panel, defended the criminal justice system, saying that it was largely immune from the type of influence that might cause SOEs to be treated differently than other companies. The same participant provided some nuance that Norway is a small country and "everyone moves in the same circles". Thus, if government on criminal justice were to occur, it would probably take place through informal contacts and social connections.

Commentary

The lead examiners congratulate Norway on its efforts to promote anti-corruption awareness and effective compliance programmes among its SOEs. Norway has a detailed and transparent policy. It actively promotes its expectations for anti-corruption compliance, including for foreign bribery, through meetings with Boards, special events and publications and in carefully naming candidates for SOE Boards. Norway has prosecuted SOEs for foreign bribery and other corruption offences and, in two cases, imposed criminal sanctions on both SOEs and managers.

In the lead examiners' view, there are no immediate Article 5 concerns in evidence in Norway. Quite the contrary, the lead examiners consider that Norway can serve as a model for other countries with large SOE sectors. Despite this encouraging situation, the lead examiners propose that the WGB follow up on Norway's enforcement of the foreign bribery offence vis-a-vis state-owned enterprises.

C.6. Engagement with the business sector

168. The Phase 3 report did not address any recommendations or identify any follow-up issues for Norway in the area of engagement with the private sector. Nevertheless, the Phase 3 commentary commended Norway's efforts to raise public awareness and promote the reporting of foreign bribery. They also encouraged Norway to continue its active engagement with SMEs.

169. In the past few years, the MOFA has focused on updating the GAN Business Anti-Corruption Portal, which was developed by a Danish company with support from a group of countries, including Norway, in order to provide country-risk profiles to help businesses improve their due diligence and compliance efforts.¹⁵² The government explained that the portal has significantly expanded in the past four years and has become an important resource for the Norwegian companies doing business abroad. When questioned on the subject, private sector representatives reported that the development of business abroad is encouraged by the government and efforts are made to raise awareness of associated risks of foreign bribery. However, they reported that they would welcome more robust support from Norwegian officials posted abroad when they encounter solicitation requests or even extortion.

170. Since Phase 3, ØKOKRIM has also developed a web page¹⁵³ that provides information to the businesses and the public at large about bribery. Companies also have access to a nine-point

¹⁵² The free country profiles on the GAN Business Anti-Corruption Portal can be found at: <https://www.business-anti-corruption.com/country-profiles>.

¹⁵³ This web page can be accessed at <https://www.okokrim.no/korrupsjon.422251.no.html>.

checklist,¹⁵⁴ which was developed in 2013 based on existing case law.¹⁵⁵ This checklist seeks to help companies, including SMEs, to prevent corruption. ØKOKRIM regularly meets with both SMEs and larger companies to discuss the importance of self-reporting. Innovation Norway, an agency that promotes innovation and development of Norwegian enterprises, also conducts training for SMEs on managing bribery risks.

171. ØKOKRIM hosts an annual conference on corruption, in co-operation with Transparency International Norway (TI-Norway) and a Norwegian law firm. Now in its sixth year, this two-day conference provides an opportunity for ØKOKRIM and private sector representatives to exchange views on domestic and foreign bribery. At the on-site visit, both ØKOKRIM and representatives from the private sector described it as a successful event that increasingly attracts media attention.

172. Norway participates in several activities that TI-Norway conducts concerning foreign bribery. In 2016, TI-Norway organised a workshop with the NHO and Innovation Norway to develop a series of corruption-related dilemmas and the appropriate way to address them. In 2017, TI-Norway published a collection of these dilemmas,¹⁵⁶ meant to “help Norwegian companies, universities, colleges and other enterprises in their anti-corruption work”. In the preface, TI-Norway wrote that the material also aspires to “raise awareness about corruption challenges and increase the competence in tackling these challenges well”.

173. The Norwegian Export Credit Guarantee Agency (GIEK) also provided input to TI’s [Anti-Corruption Handbook for the Norwegian Business Sector](#), which provides guidance on the design and implementation of compliance programmes. The handbook, last updated in 2014, was financed by the Finance Market Fund, which operates under the responsibility of the Ministry of Finance, and by Innovation Norway. Finally, TI-Norway has issued a compilation of foreign bribery cases, in cooperation with [Lovdata](#), a web platform that publishes a broad range of legal documents, such as laws, regulations, and court decisions. Lovdata was established by the Norwegian Ministry of Justice, the Police and the University of Oslo. During the on-site visit, TI-Norway explained that this compilation resulted from a demand from their members for more clarity on certain legal concepts, including the notion of “improper advantage”.

174. When asked about Norway’s engagement with the private sector, business representatives explained that Norway’s efforts to raise awareness, in combination with increased enforcement of the foreign bribery offence, has been fruitful. However, they believe that Norway could do more to clarify the law and provide guidance. Norway is aware of this concern. They further explained that

¹⁵⁴ Norway provided an unofficial translation of the nine-point list, as follows:

1. *Organisation, training and follow-up and control must be reflective of the business operations and corruption risks of the entity.*
2. *General instructions and guidelines.*
3. *Corruption should explicitly be reflected in ethical guidelines.*
4. *Procedures to handle corruption issues.*
5. *Good manuals are not sufficient, compliance is decisive.*
6. *Mapping and identification of significant risk indicators.*
7. *Regular follow-up by posing concrete questions on how risk-prone operations are being carried out.*
8. *Instil managers/leaders on their responsibility as leaders and role models, both in terms of complying with rules, and to report deviations.*
9. *Continuous tightening and updating of procedures, etc.*

¹⁵⁵ The checklist was originally a part of an article, and then a presentation, from the Director of ØKOKRIM at private sector prevention of corruption, and the checklist has since been used by various stakeholders.

¹⁵⁶ Transparency International Norway, Anti-Corruption Dilemmas Collection, 2017, available at <http://transparency.no/wp-content/uploads/Dilemmasamling-eng-participants.pdf>

they needed more concluded cases to issue guidelines, but now that there are a few, they could contemplate issuing this type of material. ØKOKRIM explained that they are discussing this with Norway's Director of Public Prosecutions.

D. OTHER ISSUES AFFECTING IMPLEMENTATION OF THE CONVENTION

D.1. Public procurement

175. In Phase 3, the WGB recommended that Norway consider adopting a systematic approach to allowing "its public agencies to easily access information on companies sanctioned for foreign bribery, such as through the establishment of a national debarment register" (Phase 3 Recommendation 6). This recommendation was evaluated as "partially implemented" at the two-year written follow up evaluation. During this evaluation, Norway expressed its willingness to consider establishing a central point of access for its agencies, such as a national debarment register, now that the EU Directives on Public Procurement has been finalised.

176. The Directives establish a number of grounds for the exclusion of suppliers based on evidence of unsuitability, some of which are mandatory. Grounds include criminal conviction for certain offences including foreign bribery (mandatory), failure to pay taxes (mandatory), and previous poor performance which has led to early termination, damages or other comparable sanctions (discretionary). Some of the grounds for mandatory exclusion are subject to account being taken of remedial action by the supplier (*e.g.* organisational changes). There are statutory limits to the duration of any exclusion period.¹⁵⁷

177. In Norway, individuals can request a certificate of their own conduct from the Police Registry. The certificate lists convictions and optional penalty writ for *inter alia* corruption, for a period of three years. Such certificates can only be issued for specific reasons, including for the "submission of tenders under the Public Procurement Act where the entity requires proof that the supplier is not guilty of criminal offence relating to the professional conduct".¹⁵⁸ During the on-site visit participants in the public procurement session did not seem to be aware of the Police Certificate of Conduct for business entities (its availability was verified by a participant after the visit). This may indicate that, in practice, it is not yet systematically requested by public agencies.

- *Norway's implementation of the EU Public Procurement Directives.* The Directive was transposed into Norwegian law in 2017. As a result, Norwegian law now provides for mandatory exclusion of economic operators from participation in a procurement procedure where the contracting authority has established that the tenderer has been the subject of a conviction for corruption by final judgment or an optional penalty writ. While mandatory, this exclusion can be reversed by the contracting authority on grounds that are described in Norway as "self-cleaning" measures. This includes remediation by the company, establishing new procedures and cooperation with authorities.
- *European Single Procurement Document (ESPD).* The ESPD is a self-declaration form used in public procurement procedures by public buyers and businesses in the EU.¹⁵⁹ When participating in procurement procedures and filling out the ESPD, Norway's procurement rules require that tenderers report if the legal

¹⁵⁷ A brief overview of the these EU Directives can be found in Crown Commercial Service, "[A Brief Guide to the 2014 EU Public Procurement Directives](#)" (Oct. 2016).

¹⁵⁸ See *e.g.*, Norwegian Police Service, "[Police certificate – Purpose](#)" (last updated 9 Mar. 2018).

¹⁵⁹ See [this European Commission webpage](#) for more information on ESPD.

person, or a member of their board, has been convicted for corruption or accepted an optional penalty writ. If the answer is affirmative, it is mandatory for the contracting authority to exclude the tenderer unless the latter has taken “self-cleaning” (remedial) measures, as set out in the public procurement regulation section 24-5. Only the winner of the bid provides full documentation supporting what is stated in the ESPD.

Commentary

To a large extent, Phase 3 Recommendation 6 on the debarment register has been overtaken by events. The European Public Procurement Directive and its transposition into Norwegian law have altered the legal environment for public procurement to such an extent that Recommendation 6 may no longer be relevant. Furthermore, the availability of the Police Certificate of Conduct, the requirement of a self-declaration by all tendering entities, and the requirement that the winner of the tender must provide supporting documentation for this declaration seem to represent a reasonable approach to ensuring that debarment rules are effectively implemented. Since this is a new legal framework for procurement, however, it is likely that certain questions may arise regarding the legal interpretation and the practical implementation (e.g. regarding the use of Police Certificates of Conduct). The lead examiners therefore recommend that Norway raise awareness of the new public procurement rules, including the use of the Police Certificate of Conduct, and seek to ensure that contracting agencies apply the rules relevant for debarment for foreign bribery with the utmost diligence and professionalism.

Finally, as discussed in Section B.6 above, the availability of “self-cleaning” measures in Norway’s public procurement rules may influence the application of corporate liability in future cases. The lead examiners thus recommend following up on this issue.

D.2. Export credits

178. Two institutions are involved in providing export credits and loan guarantees in Norway. First, [Export Credit Norway](#) provides financing to buyers of Norwegian capital goods and services worldwide. Second, the Norwegian Export Credit Guarantee Agency ([GIEK](#)) facilitates export financing with guarantees that mitigate economic and political risks for exporters, buyers and banks. GIEK provides loan guarantees for exports as well as for power contracts in Norway and for construction of ships and offshore installations at Norwegian shipyards. GIEK and Export Credit Norway collaborate closely.¹⁶⁰ Export Credit Norway supplies the loans on favourable terms and GIEK provides the guarantees. Both are “obligated entities” under Norway’s anti-money laundering legislation.

179. Since Phase 3, both GIEK and Export Credit Norway have adopted anti-corruption guidelines that are designed to be in accordance with the 2006 [OECD Council Recommendation on Bribery and Officially Supported Export Credits](#). Both agencies’ guidelines include provisions on declarations on corruption, consultation with international debarment lists, grounds for rejection and termination of contracts, and reporting obligations. Contracts for officially supported export credits can be terminated and/or rejected when a client or applicant is the subject of allegations of or convictions for foreign bribery, either before or after support has been approved.¹⁶¹

¹⁶⁰ For example, at the on-site visit they described their shared risk assessment tool.

¹⁶¹ See [Phase 3 report](#) (para 111).

180. GIEK and Export Credit Norway are both active participants in the OECD Working Party on Export Credit and Credit Guarantees (WPECCG). According to the WPECCG's 2017 *Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits*, Norway has implemented the following corruption control policies:

- *Encouraging exporters and applicants to develop, apply and document anti-corruption management control systems.* Export Credit Norway reports that it encourages such management control systems by including in their contracting practices an anti-corruption declaration which exporters, and, where appropriate, applicants are required to submit before support is provided. ([TAD/ECG\(2017\)4/FINAL](#), para 25).
- *Ceiling imposed on agents' commissions and eligibility of commission for export credits.* Norway provides official support for agents' commissions (included in the export contract). GIEK conducts an enhanced due diligence if the commission either is of large absolute value, constitutes more than 5% of contract value or is large relative to the duties performed by the agent. Export Credits and Bribery: ([TAD/ECG\(2017\)4/FINAL](#), para 48).
- *Credible evidence of bribery before the decision to provide support has been made.* The recommendation asks countries to inform law enforcement authorities and suspend the approval of an application pending the outcome of the enhanced due diligence process when there is credible evidence that bribery was involved in the award of the export contract. Both Export Credit Norway and GIEK report that they systematically do this ([TAD/ECG\(2017\)4/FINAL](#), para 48).
- *Credible evidence of bribery after the export credit has been approved.* Adherents to the OECD Export Credits Recommendation are expected to inform law enforcement authorities and the loan disbursement is interrupted. ([TAD/ECG\(2017\)4/FINAL](#), Table 5). During the on-site visit, Norway reported that it had never had the occasion to interrupt its loan disbursement under these circumstances, but that there had been cases where loan applications have been rejected in part due to corruption risk. It also reported that it had never brought suit for breach of contract because an export credit or guarantee was found to have been associated with a transaction tainted by corruption.

D.3. Official Development Assistance

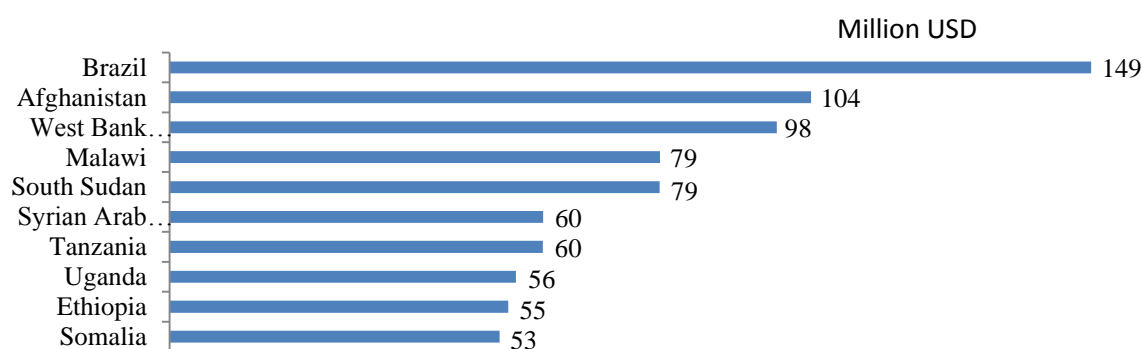
181. Norway is a major force in international development assistance. In 2016, Norway provided USD 4.4 billion in net official development assistance (ODA), which represented 1.11% of gross national income. Norway has spent about 1% of gross national income on ODA every year since 2009 and is one of only six members of the OECD Development Assistance Committee to have met the UN target of 0.7%. All of Norway's ODA was untied in the years 2013-2015, while the DAC average was 78.1%. This means that none of the procurement of goods or services involved in ODA is limited to Norwegian suppliers.¹⁶²

182. The figures below show, respectively, the top ten recipients of ODA from Norway and the share of bilateral ODA by sector, averaged between 2014 and 2015.

¹⁶² The descriptive information and the statistics in this section are taken from the [OECD Development Cooperation Report 2017](#), page 245.

Figure 5. Top 10 recipients of ODA from Norway

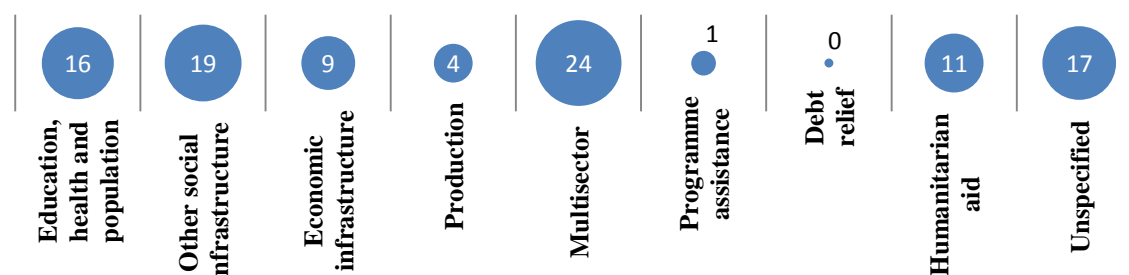
(average 2014 and 2015 flows)



Source: OECD Development Cooperation Report, page 246.

Figure 6. Norway's ODA by Sector

(2014-15 average, percentage of total ODA).



Source: OECD Development Cooperation Report, page 247.

183. Most of the Norwegian development aid is managed by the MOFA, Norway's embassies abroad and Norad. Norad's main purpose is to provide technical advisory services to MOFA, but Norad also manages a share of ODA funds. The relative share managed by Norad has varied somewhat over time, but is currently quite high (approx. 30%, 12.3 billion NOK or about EUR 1.2 billion in 2016).

184. Another Norwegian development institution, Norfund (the [Norwegian Investment Fund for Developing Countries](#)) takes minority stakes in SMEs in developing countries in order to promote sustainable private sector development in clean energy finance and agrifood. Norfund also invests in Private Equity and Venture Capital Funds targeting SMEs in need of early phase or growth capital.

185. The [OECD Recommendation for Development Co-operation Actors on Managing the Risks of Corruption](#) offers guidance on how official development assistance institutions should ensure that their aid is not tainted by corruption. Recommendations 6 to 10 are particularly relevant in this respect.

186. *Recommendation 6 on measures to prevent and detect corruption enshrined in ODA contracts.* Norway requires ODA grant recipients to identify material risk factors including corruption and to analyse and manage these risk factors throughout the project cycle. The grant manager has an independent responsibility to consider whether risk assessment and risk management by the grant recipient provide sufficient security that unintended negative effects will be avoided.

Guidance is available to assist with the assessment of risks. The Norwegian zero tolerance policy toward corruption is formalized in all grant agreements entered into by MOFA/Norad, along with an obligation for grant recipients to promptly report suspected cases.

187. *Recommendation 7 on reporting/whistleblowing mechanisms.* Suspicions of financial irregularities related to the Foreign Service or Norad are to be reported to the Foreign Service Control unit or to Norad's anti-fraud team. Reporting can be done directly, or through a single, external whistleblowing mechanism. The mechanism is administered by an independent law firm and allows the whistleblower to remain anonymous. The law firm makes an initial assessment on each whistleblower report, but further follow up is the responsibility of the respective government entities and Norfund. Only a small portion of suspected irregularities – less than ten percent of the cases in a given year – is reported through this channel. ODA institutions at the on-site visit said that they had communicated with ØKOKRIM on some of these reports, but that they all involved suspected offences that were below ØKOKRIM's threshold for investigation. Information-sharing between MOFA/Norad and ØKOKRIM and other law enforcement bodies is channelled through the Foreign Service Control Unit (MOFA and Embassies) or through Norad's Fraud Team. ØKOKRIM has assigned a point of contact for such cases.

188. *Recommendation 8 on sanctioning regimes.* Sanctions within the ODA system are available when irregularities in grant implementation have been discovered. A clause in the MOFA's agreement template states that the "matter will be handled by MOFA in accordance with the MOFA's guidelines for handling suspicion of financial irregularities". The clause further provides:

The Grant Recipient shall cooperate fully with MOFA's investigation and follow-up. If requested by MOFA, the Grant Recipient shall initiate prosecution and/or apply other sanctions against persons or entities suspected of financial irregularities.

In the event that irregularities are found to have occurred, the MOFA may claim repayment of all or parts of the grant as well as any interest, investment income or any other financial gain obtained as a result of the financial irregularity.

189. *Recommendation 9 on joint responses to corruption among development assistance partners.* Norway partners with other aid agencies in managing the risks of corruption. One example is the [U4 Anti-Corruption Resource Centre](#), which provides research and practical guidance in fighting corruption in an ODA context. U4 is an institutional partnership of nine bilateral international development agencies/ministries of foreign affairs.

190. *Recommendation 10 on taking into consideration the risks posed by the environment of operation.* Risk assessment is the responsibility of both the grant recipients and the grant manager. The grant recipients must identify material risk factors and analyse and manage these risk factors throughout the project cycle. The grant manager has an independent responsibility to consider whether risk assessment and risk management by the grant recipient provide sufficient security that unintended negative effects will be avoided. As mentioned above, guidance is available on how these risk assessment are to be made.

Commentary

The lead examiners commend Norway on its approach to managing the risks of corruption in the context of its development cooperation programmes. The programmes represent a thorough response to Recommendations 6-10 of the OECD Council Recommendation for Development Cooperation Actors in Managing Risks of Corruption. The lead examiners recommend that the Working Group recognise Norway's approach to managing corruption risks in an ODA context as a good practice in this area.

D.4. Money laundering cases predicated on foreign bribery

191. In the Phase 3 report, the lead examiners commended “Norway on the broad coverage of its anti-money laundering law and practice, including the positive step of explicitly criminalising self-laundering of one’s own proceeds of crime”. However, “given the absence of investigations and prosecutions of money laundering based on a predicate offence of bribery, they recommend[ed] that the Working Group follow-up on the application of the money laundering offence in such cases”.¹⁶³

192. To date, no money laundering case has been concluded with foreign bribery as a predicate offence.¹⁶⁴ In its written submission, Norway reported that AML investigations following foreign bribery cases concluded in Norway have been opened in foreign jurisdictions, and wrote that “this is logical as the alleged money laundering in these cases have taken place outside Norway.” However, Norway’s 2016 National Risk Assessment of money laundering and terrorist financing (p. 29) reports: “investigation into major Norwegian corruption cases shows that the proceeds from such cases are invested in real estate in Norway and abroad, and in shares spent on valuable objects such as cars and boats, as well as general increases in consumption”. Thus, it seems reasonable to pursue such cases in Norway as well, including in such money laundering channels as real estate.

193. Norway’s 2014 [Mutual Evaluation for the Financial Action Task Force](#) states that the “FIU’s analytical capability functions well, but is hampered by the low quantity and quality of suspicious transaction reports (STRs) received”. Norway reports in its written submission that efforts have been made since Phase 3 to increase the quality of STRs and that the quality of STRs has improved in the last years. They also add that “some, but few” STRs are related to possible corruption offences, including foreign bribery, and the quality of these STRs is considered “satisfactory”.

194. Obligated entities participating in the on-site visit largely confirmed this view. Financial institutions noted the quarterly meetings with the Financial Supervisory Agency and the guidance it issued as examples of positive initiatives. They also mentioned that an annual AML conference, which is co-organised with Finance Norway (an industry association), ØKOKRIM and the FIU, attracts hundreds of attendees from the Nordic region. Several examples of guidance documents for obligated entities, sometimes involving collaborations between sectoral and government agencies, have been designed to help entities adopt more effective AML strategies.¹⁶⁵

195. Nevertheless, while recognising that the situation had improved, reporting entities said that they “would not mind having more feedback on the usefulness of our reports [...] This would help us

¹⁶³ Phase 3 Report, Commentary page 25; *see also* Phase 3 follow-up issue 7(d)..

¹⁶⁴ STRs did, however, play a role in a defence industry case involving foreign bribery (elements of which are ongoing) that was detected through an STR that included the findings of an internal investigation.

¹⁶⁵ Examples include guidance for banks and other financial institutions developed by Finance Norway and the Financial Supervision Agency (FSA).

target our reporting better.” They also noted the lack of progress in transposing the 2015 [EU Fourth AML Directive](#), including its provisions on beneficial ownership.¹⁶⁶

Commentary

As no case has yet arisen in Norway involving money laundering predicated on foreign bribery, the Phase 3 Follow-up issue 7(d) remains relevant. Thus, the lead examiners recommend that the WGB continue to follow-up on the application of the money laundering offence predicated on foreign bribery as Norway transposes the EU Fourth AML Directive.

E. CONCLUSIONS: RECOMMENDATIONS AND FOLLOW UP ISSUES

E.1. Positive Achievements and Good Practices

196. This report has identified several good practices and positive achievements by Norway. First, Norway's ten foreign bribery investigations have been proactively pursued by ØKOKRIM, which has deployed the wide range of investigative tools available under Norwegian law. ØKOKRIM has placed a high priority on prosecuting foreign bribery. Its successes in these cases have raised awareness about foreign bribery across Norwegian society and especially in the business community. At the on-site visit, business representatives agreed that recent enforcement actions, in particular ones against corporate executives, have caused companies to take a much closer look at their compliance systems.

197. Second, ØKOKRIM embodies an integrated approach to law enforcement in which investigators and prosecutors work under a single institutional umbrella. This enables ØKOKRIM to harness a wide array of law enforcement expertise – including that of prosecutors, financial investigators, and police officials. This is particularly valuable for the investigation and prosecution of complex economic and financial crime such as foreign bribery.

198. Third, Norway has a robust legal framework for whistleblower protection, portions of which have been recognised as good practice. Most notably, the Working Environment Act's protections apply to both the private and public sectors. Whistleblowers are also protected from retaliation, whether they choose to first report internally or proceed directly to the authorities. When a whistleblower can provide reasons to believe that he or she has been subjected to retaliation, this will be presumed unless the employer can demonstrate otherwise. Sources at the on-site visit expressed concern about how whistleblower protection works in practice, but all agreed that the legal framework itself provides a very solid basis for such protection. The recent White Paper on Whistleblower Protection contains proposals, which if translated into law, could enhance whistleblower protections (e.g. clarifying the notion of “censurable condition” and creating an Ombudsman that can provide advice and support to the whistleblower).

199. Fourth, Norway is a front runner in managing corruption risks in the context of official development assistance. Since Norway is, in both absolute terms and relative to the size of its economy, a major provider of such assistance, this is a welcomed development. The corruption risk management programmes that Norway has implemented represent a thorough response to Recommendations 6-10 of the OECD Council Recommendation for Development Cooperation Actors in Managing Risks of Corruption. These include an obligation for both grant recipients and grant managers to actively manage the risks of corruption, contractual arrangements on grant

¹⁶⁶ A bill implementing the Directive (as well as FATF-standards) was developed and made available for public consultation in 2017. In February 2018, it was sent to Parliament and is now under parliamentary procedure, with an expectation of being passed before summer recess.

recipients to report incidents of corruption to law enforcement authorities and contractual sanctions if a grant recipient's project is found to have been tainted by corruption. Norway's approach to managing corruption risks in an ODA context is a valuable model for the development community as a whole.

E.2. Recommendations of the Working Group

1. Regarding the detection of foreign bribery, the Working Group recommends that Norway:
 - a Raise awareness of its embassy staff of foreign bribery and their role in detecting foreign bribery and reporting allegations to the appropriate authorities [2009 Recommendation III.i and iv; IX.ii and Annex I.A];
 - b Clarify whether and how a Supervisory Ministry should report foreign bribery allegations involving an SOE when the SOE in question does not fully and promptly disclose relevant information to law enforcement authorities [2009 Recommendation IX.i and ii];
 - c Reinforce the FIU's efforts to review STRs for matters potentially related to foreign bribery [Convention Article 7; 2009 Recommendation III.i]; and
 - d Enhance the feedback and guidance provided by the FIU in order to help reporting entities better identify suspicious transactions that potentially could be tied to foreign bribery [Convention Article 7; 2009 Recommendation III.i].
2. Regarding the amendments to the Penal Code that came into force in 2015, the Working Group recommends that Norway:
 - a Amend the Penal Code to ensure that it can prosecute foreign bribery offences committed by its nationals abroad without regard to whether the act was unlawful or "punishable" in the jurisdiction where it was committed [Convention Article 1, 2009 Recommendation, III.ii and V]; and
 - b Modify the Penal Code's current provisions limiting sanctions for foreign bribery offences committed abroad to those that would be available in the jurisdiction where the crime occurred [Convention Article 3].
3. Regarding the enforcement of the foreign bribery offence, the Working Group recommends that Norway:
 - a Ensure that ØKOKRIM continues to make adequate resources available to its corruption teams in order to (i) maintain and further develop the professionalism and expertise that it has acquired in foreign bribery cases and (ii) investigate and prosecute foreign bribery allegations that arise [Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D];
 - b Clarify how fines and confiscation amounts are to be calculated in foreign bribery cases and ensure that these calculations result in dissuasive sanctions for both natural and legal persons [Convention Articles 3(1) and 3(3)];
 - c Publish more extensive information on how fines and confiscation amounts are calculated in concluded foreign bribery cases [Convention Articles 3(1). and 3(3)]; and
 - d Make public, where appropriate and in conformity with any applicable laws, as much information as possible about accepted penalty notices.

4. Regarding the reporting obligations of external auditors, the Working Group recommends that Norway:

- a. Expand the reporting obligations under the Auditing Act to require auditors to also report to management circumstances that may trigger the liability of the legal person (and not only the natural persons at senior management level) [Phase 3 Recommendation 4.a; 2009 Recommendation III.iv, v and X.B.iii]; and
- b. Consider including an explicit requirement to report to law enforcement authorities, when appropriate, in the draft amendment to the Auditing Act [2009 Recommendation X.B.v)].

5. Regarding public advantages, the Working Group recommends that Norway raise awareness of the new public procurement rules, including the use of the Police Certificate of Conduct, and seek to ensure that contracting agencies apply the rules relevant for debarment for foreign bribery with the utmost diligence and professionalism [2009 Recommendation XI.i].

E.3. Follow-up by the Working Group

6. The Working Group will follow-up on the issues below as case law, practice, and legislation develop:

- a. Steps Norway has taken to enhance the predictability of (i) penalty notices, (ii) mitigating factors, (iii) self-reporting, (iv) the calculation of sanctions; and (v) liability of legal persons for the acts of related and unrelated intermediaries.
- b. Whether Norway is able to effectively sanction companies that use intermediaries, including subsidiaries, to commit foreign bribery on their behalf.
- c. Further developments in whistleblower protection, both because there is apparently a need for continued progress and because elements of Norway's existing whistleblower protection framework could serve as a model for other countries.
- d. Norway's continuing enforcement of the foreign bribery offence, especially *vis-a-vis* state-owned enterprises.
- e. Norway's use of investigative tools, particularly with regard to tracing money internationally, forensic audit and the impact of the new rules on enhanced electronic surveillance techniques.
- f. The application of the money laundering offence based on a predicate offence of foreign bribery as Norway transposes the EU Fourth AML Directive.
- g. Whether the availability of "self-cleaning" measures in Norway's public procurement rules influences the application of corporate liability in future cases.

ANNEX 1: PHASE 3 RECOMMENDATIONS AS OF 2014 WRITTEN FOLLOW-UP

Annex Table. Recommendations of the WGB in Phase 3

Recommendations	<i>Status at Written follow-up*</i>
<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</i>	
1. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Norway continue its efforts to proactively investigate and prosecute cases of foreign bribery [2009 Recommendation II.].	<i>Fully implemented</i>
2. Regarding the confiscation of the bribe and proceeds of foreign bribery , the Working Group recommends that Norway make full use of the provisions available under the law to confiscate the proceeds of foreign bribery, where appropriate, including when relying on penalty notices to settle cases out of court [Convention, Article 3.3; 2009 Recommendation III. (ii)].	<i>Partially implemented</i>
3. Regarding international cooperation , the Working Group recommends that Norway develop its information system to allow for the collection of data on MLA requests in foreign bribery cases, including on the origin of such requests, and the timeframe for providing responses, with a view to allowing a better assessment of Norway's practice in providing MLA [Convention, Article 9].	<i>Fully implemented</i>
<i>Recommendations for ensuring effective prevention and detection of foreign bribery:</i>	
4. Regarding accounting and auditing requirements , the Working Group recommends that Norway:	
(a) Expand the reporting obligations under the Auditing Act to require auditors to also report to management circumstances that may trigger the liability of the legal person (and not only the natural persons at senior management level) [2009 Recommendation III.(iv), (v) and X.B.(iii)]; and	<i>Not implemented</i>
(b) Consider, beyond the current anti-money laundering reporting requirements on proceeds of criminal acts, requiring external auditors to report suspected acts of foreign bribery to external competent authorities, in particular where management of the company fails to act on internal reports by the auditor, and ensure that auditors making such reports reasonably and in good faith are protected from legal action	<i>Fully implemented</i>

[2009 Recommendation III(iv), (v), X.B(v)].

- Regarding **internal controls, ethics and compliance**, the Working Group recommends that
5. Norway pursue the important efforts already engaged in the area of corporate liability, and in particular:

(a) Continue encouraging companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery [2009 Recommendation X.C.(i), and Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance]; and *Fully implemented*

(b) Encourage companies to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance systems for preventing and detecting bribery [2009 Recommendation X.C.(iii), and Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance]. *Fully implemented*

6. Regarding **public advantages**, the Working Group recommends that Norway consider adopting a systematic approach to allow its public agencies to easily access information on companies sanctioned for foreign bribery, such as through the establishment of a national debarment register [2009 Recommendation XI. (i)]. *Partially implemented*

Note: Add the note here. If you do not need a note, please delete this line.

Source: Add the source here. If you do not need a source, please delete this line.

Follow-up by the Working Group

The Working Group will follow-up the issues below as case law and practice develops:

- 7(a) The application of the foreign bribery offence as litigation further develops to ensure that it covers bribes paid to third parties and bribery through the use of intermediaries, as well as the interpretation of the “impropriety of the advantage” and the application of the trading in influence offence in cases of foreign bribery;
- 7(b) The responsibility of legal persons in cases of foreign bribery as case law develops, in particular to ascertain how the factors under section 48b of the GCPC are interpreted by the courts in deciding whether to impose a penalty on a legal person;
- 7(c) The use of penalty notices (or optional penalty writs) in cases of foreign bribery as practice develops, particularly with regard to the development of prosecutorial guidelines or guidance from the courts; and
- 7(d) The application of the money laundering offence, given the absence of investigations and prosecutions of money laundering based on a predicate offence of foreign bribery.

ANNEX 2: LIST OF PARTICIPANTS IN PHASE 4 ON-SITE VISIT TO NORWAY

Ministry of Justice, Law Enforcement and the Judiciary

- Borgarting Court of Appeal
- Director of Public Prosecutions
- Ministry of Justice and Public Security, the Police Department
- Ministry of Justice and Public Security, Legal department
- Norwegian Police Service/ Oslo Police District
- ØKOKRIM, Financial Intelligence Unit
- ØKOKRIM, Anti-Corruption team and the Corruption and Fraud team

Government Ministries and Agencies

- Difi (Agency for Public Management and eGovernment)
- Export Credit Norway
- Export Credit Guarantees Institute (GIEK)
- Innovation Norway
- Ministry of Finance, Financial Markets Department
- Ministry of Foreign Affairs, Section for Global Security
- Ministry of Foreign Affairs, Section for International Development Policy
- Ministry of Petroleum and Energy
- Ministry of Trade, Industry and Fisheries, Section for Company Law and Business Registers
- Norwegian Agency for Development Cooperation (Norad), Department for Quality Assurance
- Norwegian Tax Administration

Companies and business associations

- DNB ASA
- EiendomsMegler 1 Midt Norge
- Eika-gruppen
- Kongsberg Gruppen ASA
- KPMG
- Nordea ASA
- PWC
- Sparebank1
- Banking Alliance DA (strategic alliance among savings banks)
- Statoil ASA
- Telenor ASA
- Yara International ASA

Business federations and auditing associations

- Finance Norway
- Virke
- Norwegian Confederation of Industries (NHO)
- Norwegian Business and Industry Security Council
- Norwegian Institute of Public Accountants
- Norwegian Seafood Federation
- Real Estate Norway

Legal profession

- Statkraft, in house counsel
- Norwegian Bar Association

- Selmer
- Elden
- Wiersholm

Civil society and academics

- Aftenposten
- Norwegian Confederation of trade Unions
- Norwegian School of Economics
- Tax Justice Network
- Transparency International - Norway

ANNEX 3: EXCERPTS FROM LEGISLATION

Penal Code

(entered into force 1 October 2015)

Section 4. Application of the criminal legislation to acts committed in Norway and in areas under Norwegian jurisdiction, etc.

The criminal legislation applies to acts committed in Norway, including in Svalbard, on Jan Mayen and in the Norwegian dependencies, see the Act of 27 February 1930 No. 3.

The criminal legislation also applies to acts committed

- a) on installations on the Norwegian continental shelf for exploration for or exploitation or storage of natural submarine resources and on pipelines and other fixed transport facilities connected to such installations, including ones located elsewhere than on the Norwegian continental shelf,
- b) in the area of jurisdiction established pursuant to the Act of 17 December 1976 No. 91 relating to the Economic Zone of Norway, in the case of acts that harm interests that Norwegian jurisdiction is intended to protect, and
- c) on Norwegian vessels, including aircraft, and drilling platforms or similar movable installations. If a vessel or installation is in or above the territory of another state, the criminal legislation applies only to an act committed by a person on board the vessel or installation.

Section 5. Application of the criminal legislation to acts committed abroad

Outside the area of application pursuant to section 4, the criminal legislation also applies to acts committed

- a) by a Norwegian national,
- b) by a person domiciled in Norway, or
- c) on behalf of an enterprise registered in Norway,

when the acts:

1. are also punishable under the law of the country in which they are committed,
2. are deemed to constitute a war crime, genocide or a crime against humanity,
3. are deemed to constitute a breach of the laws of war,
4. are deemed to constitute child marriage or forced marriage,
5. are deemed to constitute genital mutilation,
6. are directed at the Norwegian State or Norwegian state authority, or fall within the scope of sections 120 a or 127, see also 120 a,
7. are committed outside the area of sovereignty of any state and are punishable by imprisonment,
8. are deemed to constitute deprivation of care,
9. fall within the scope of sections 257, 291-296, 299-306 or sections 309-316,
10. are deemed to constitute terrorist or terrorism-related acts pursuant to chapter 18 of the Penal Code or fall within the scope of sections 145 or 146, or
11. are deemed to constitute incitement of a criminal act pursuant to section 183 of the Penal Code or constitute expression of hate speech pursuant to section 185 of the Penal Code.

The first paragraph applies correspondingly to acts committed

- a) by a person who after the time of the act has become a Norwegian national or has become domiciled in Norway,

- b) by a person who is, or who subsequent to the act has become, a national of or domiciled in another Nordic country and who is present in Norway, or
- c) on behalf of a foreign enterprise that after the time of the act has transferred its entire operation to an enterprise registered in Norway.

Numbers 1, 2, 3, 6, 7, 8, 10 with the exception of section 145, and 11 of the first paragraph apply correspondingly to acts committed by persons other than those covered by the first and second paragraphs when the person is present in Norway and the act carries a maximum penalty of imprisonment for a term of more than one year.

In the case of acts specified in no. 2 of the first paragraph, the second and third paragraphs apply only if the act, pursuant to international law, is deemed to constitute genocide, a crime against humanity or a war crime.

The criminal legislation also applies to acts committed abroad by persons other than those covered by the first to fourth paragraphs if the act carries a maximum penalty of imprisonment for a term of six years or more and is directed at someone who is a Norwegian national or domiciled in Norway.

In the event of criminal prosecution pursuant to this section, the penalty may not exceed the maximum statutory penalty for a corresponding act in the country in which it has been committed.

Prosecution pursuant to this section shall only be instituted when in the public interest.

Section 6. Special grounds for prosecution under international law

Outside the area of application pursuant to sections 4 and 5, the criminal legislation also applies to acts that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law.

Section 5, seventh paragraph, applies correspondingly.

Chapter 4. Corporate penalties

Section 27. Penalties for enterprises

When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable for punishment. This applies even if no single person has demonstrated guilt or meets the accountability requirement, see section 20.

“Enterprise” means a company, co-operative society, association or other organisation, sole proprietorship, foundation, estate or public body.

The penalty is a fine. The enterprise may also be sentenced to lose the right to operate, or may be prohibited from operating in certain forms, see section 56, and be subject to confiscation, see chapter 13.

Section 28. Factors in determining whether a penalty shall be imposed on an enterprise

In determining whether an enterprise shall be penalised pursuant to section 27, and in assessing the penalty, considerations shall include

- a) the preventive effect of the penalty,
- b) the severity of the offence, and if a person acting on behalf of the enterprise has demonstrated guilt,
- c) whether the enterprise could have prevented the offence by use of 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 financial capacity of the enterprise,
- g) whether other sanctions arising from the offence are imposed on the enterprise or a person who has acted on its behalf, including whether a penalty is imposed on any individual person, and
- h) whether agreements with foreign states prescribe the use of enterprise penalties.

Chapter 9. Fines

Section 53. Imposing a fine

A fine may be imposed as the sole penalty when this is provided for by the penal provision.

When assessing a fine weight shall be given, in addition to such factors as are commonly given weight in assessing penalties, to the offender's income, assets, responsibility for dependents, debt burden, and other circumstances affecting financial capacity. Section 28 applies to the assessment of fines against an enterprise.

The fine accrues to the State unless otherwise provided.

Section 54. Combination of a fine with other penalties

A fine may be imposed in addition to

- a) imprisonment, see section 32, b),
- b) a community sentence, see section 51, b), or
- c) loss of rights, see section 59, c).

This applies even if a fine is not prescribed as a penalty for the offence.

Chapter 13. Confiscation

Section 66. Combination of confiscation with penalties and other criminal sanctions

Confiscation pursuant to this chapter may be imposed alone or together with penalties or other criminal sanctions.

Section 67. Confiscation of proceeds

Any proceeds of a criminal act shall be confiscated. Instead of the proceeds, all or part of the value of the proceeds may be confiscated. Confiscation shall take place even though the offender was unaccountable, see section 20, or did not exhibit culpability. Liability pursuant to this provision may be reduced or waived if confiscation would clearly be unreasonable.

Any asset that takes the place of the proceeds, profit and other benefits of the proceeds shall be regarded as proceeds. Expenses incurred shall not be deducted. If the amount of the proceeds cannot be established, the amount shall be determined approximately.

The court – or the prosecuting authority in an optional penalty writ of confiscation – may determine that the amount to be confiscated shall be reduced by an amount which corresponds to compensation the offender or someone who is liable for the harm done has paid to the injured person, and which wholly or partially corresponds to the proceeds. The same applies when the offender has met an obligation which plays a part in the criminal prosecution.

In the event of confiscation of value, see the second sentence of the first paragraph, it may be stipulated that the asset shall serve as security for the amount to be confiscated.

Section 68. Extended confiscation

Extended confiscation may be effected when the offender is found guilty of a criminal act of such a nature that the proceeds thereof may be significant, and the offender has committed

- a) one or more criminal acts that collectively may be punishable by imprisonment for a term of six years or more,
- b) at least one criminal act which may be punishable by imprisonment for a term of two years or more, and the offender during the five years immediately preceding the commission of the act has had a penalty imposed for an act of such a nature that the proceeds thereof may be significant, or
- c) an attempt at an act specified in a) or b).

An increase of the penalty limit pursuant to section 79 b) and c) shall not be taken into account.

In the event of extended confiscation all assets belonging to the offender may be confiscated unless the offender proves on a balance of probabilities that said assets have been lawfully acquired. Section 67, first paragraph, second sentence, and fourth paragraph, apply correspondingly.

In the event of extended confiscation from the offender the value of all assets belonging to the offender's present or previous spouse may also be confiscated unless

- a) they were acquired before the marriage was entered into or after the marriage was dissolved,
- b) they were acquired at least five years before the criminal act that provides a basis for extended confiscation, or
- c) the offender proves on a balance of probabilities that the assets were acquired by means other than criminal acts the offender has committed personally.

When two persons are living together permanently in a marriage-like relationship, this is deemed equivalent to marriage.

Section 69. Confiscation of the product, subject or tools of a criminal act

An object which

- a) is created by,
- b) has been the subject of, or
- c) has been used or is intended for use in

a criminal act, may be confiscated. Instead of the object, all or part of the value of the object may be confiscated. Section 67, first paragraph, third sentence, and fourth paragraph, apply correspondingly.

Rights, receivables and electronically stored information are also considered objects.

In determining whether confiscation shall be effected, and the scope of the confiscation, particular weight shall be given to whether confiscation is necessary for the purposes of effective enforcement of the penal provision, and whether it is proportionate. In assessing proportionality, weight shall among other things be given to other sanctions that are imposed, and the consequences for the person against whom the confiscation is directed.

Section 70. Preventive confiscation

An object may be confiscated when, due to the nature of the object and other circumstances, there is an obvious risk that it will be used in a criminal act. If the object is suited for use in physical assault, it is sufficient that there is a risk of such use. Confiscation of an information carrier, see section 76, may only be effected when there is a risk of irreparable harm.

Instead of confiscating the object, measures may be imposed to prevent the use of the object in offences.

Section 69, second paragraph, applies correspondingly.

Confiscation pursuant to the first paragraph may be effected regardless of who is the owner.

Section 71. Whom confiscation may be effected against

Confiscation of proceeds pursuant to section 67 shall be effected against the person to whom the proceeds have directly accrued as a result of the act. It shall be assumed that the proceeds have accrued to the offender, unless the offender proves on a balance of probabilities that they have accrued to another person.

Extended confiscation pursuant to section 68 shall be effected against the offender.

Confiscation pursuant to section 69 shall be effected against the offender or the person the offender acted on behalf of. Confiscation as specified in section 69, first paragraph, c), or of an amount that wholly or partially corresponds to its value, may alternatively be effected against an owner who understood or should have understood that the object was to be used in a criminal act.

Confiscation pursuant to section 70 shall be effected against the person who is in possession of or owns the object.

Section 72. The relationship to receivers

If proceeds, see section 67, or objects as specified in section 69 have been transferred after the time of the act from a person who may be subject to confiscation, confiscation of the transferred object or value may be effected against the receiver if the transfer has occurred as a gift or the receiver understood or should have understood the connection between the criminal act and what has been transferred.

If extended confiscation may be effected pursuant to section 68, and the offender has transferred an asset to one of his or her next-of-kin, the asset or its value may be confiscated from the receiver if the prosecuting authority proves on a balance of probabilities that it has been acquired by the offender's commission of an offence. This shall nevertheless not apply to assets transferred more than five years before commission of the act that forms the basis for confiscation, or assets received by way of ordinary maintenance from a person who is obligated to provide such maintenance.

If, in the event of confiscation from the offender, the assets of any person specified in section 68, third paragraph, are wholly or partly accounted for, and the person meets his or her obligations pursuant to this section, the offender's liability shall be correspondingly reduced. If the offender has met his or her obligations pursuant to section 68, second paragraph, further fulfilment of the offender's obligations shall lead to a corresponding reduction of the liability of the receiver.

The second paragraph applies correspondingly to transfer to an enterprise if the offender

- a) alone or together with any person specified in the second paragraph owns a substantial part of the enterprise,
- b) receives a significant part of the income of the enterprise, or
- c) by virtue of his or her management position has substantial influence over it.

The same shall apply to any right which after the time of the act is established in the object by any person against whom confiscation may be effected unless the right has been established by attachment lien, freezing order or statutory lien.

Section 73. Relationship to rights holders

A right that is legally secured in an asset which is confiscated may wholly or partially be determined to have lapsed in relation to a rights holder

- a) who has personally committed the criminal act,
- b) on whose behalf the offender has acted, or
- c) who, when the right was legally secured by other means than by attachment lien, freezing order or statutory lien, understood or should have understood that the object was to be used in a criminal act, or that it could be confiscated.

Section 67, first paragraph, third sentence, applies correspondingly.

Section 74. General rules on confiscation of proceeds and objects which do not belong to the offender

If confiscation of seized proceeds, see sections 67 and 68, or objects, see sections 69 and 70, which do not belong to the offender is demanded, the demand is directed at the owner or rights holder. The same applies when confiscation is demanded of the value of an object which has been seized, or which has been exempted from seizure on provision of security.

When the owner or rights holder is unknown or has no known place of residence in Norway, confiscation may be effected in proceedings against the offender or the person who was in possession at the time of seizure, provided this is deemed reasonable in view of the owner's circumstances. The same applies when confiscation is demanded of the value of an object which has been seized, or which has been exempted from seizure on provision of security. The owner shall as far as possible be notified about the matter.

If neither the offender nor the possessor has a known place of residence in Norway, the district court may order confiscation on the terms specified in the second paragraph, without any person being made a defendant.

These rules apply correspondingly to confiscation of rights pursuant to section 72, fifth paragraph, and section 73.

Section 75. Beneficiaries of confiscation

Confiscation shall be effected in favour of the State unless otherwise provided.

In the judgment or in a subsequent order issued by the district court that decided the issue of confiscation, the court may determine that the proceeds of confiscation be applied to cover any claim for compensation made by the aggrieved person.

The Ministry may decide that the proceeds of any confiscation shall be divided between the Norwegian State and one or more other states. In the decision, importance shall be attached to, inter alia, what expenses have been incurred in such states and in which countries harmful effects have occurred and proceeds have been acquired. Any division pursuant to this paragraph may not result in any reduction of the covering of the aggrieved person's claim for compensation pursuant to the second paragraph.

Section 76. Special rules for confiscation of an information carrier

In this provision, "information carrier" means printed text matter or anything else that conveys written, visual, auditory or electronically stored information.

When confiscating an information carrier, the parts of the contents which justify the confiscation must be stated. The person who is subjected to the confiscation may, in return for covering the costs, demand a copy of the portion of the contents not covered by the confiscation.

If the offender does not hold the rights to an information carrier on a data processing system that is subjected to confiscation, the demand shall be directed at the provider of the data processing system. The provider may be required to block the offender's access to the information carrier and delete content belonging to the offender. If the offender holds the rights to the information carrier, the provider may be required to block access to the information carrier and delete the contents.

Chapter 14. General rules on determining sanctions**Section 77. Aggravating circumstances**

In connection with sentencing, aggravating factors to be given particular consideration are that the offence:

- a) was committed by means or methods which are particularly dangerous or carry a significant potential for harm,
- b) placed human life or health at risk or caused loss of well-being,
- c) was intended to have a substantially more serious outcome or this could easily have been the consequence,
- d) was committed in a particularly reckless manner,
- e) formed part of a planned or organised enterprise,
- f) was committed by multiple persons acting together,
- g) was perpetrated by the offender exploiting or misguiding young persons, persons in a very difficult life situation, who are mentally disabled or in a dependent relationship with the offender,
- h) affected persons who are defenceless or particularly vulnerable to criminal offences,
- i) was motivated by another's religion or life stance, skin colour, national or ethnic origin, homosexual orientation, disability or other circumstances relating to groups with a particular need for protection,
- j) was committed in the course of public service or was perpetrated by violating a special trust,
- k) was committed by a person who has previously been the subject of criminal sanction for similar acts or other acts of relevance to the matter,
- l) was committed in the presence of a child under 15 years of age.

Section 78. Mitigating circumstances

In connection with sentencing, mitigating factors to be given particular consideration are that:

- a) there exists a situation or condition as specified in section 80 b), c), d), e), i) or j),
- b) the offender has prevented, reversed or limited the harm or loss of well-being caused by the offence, or sought to do so,
- c) the offence was to a significant degree occasioned by the circumstances of the aggrieved party,
- d) the offender had, at the time of the act, reduced ability to realistically assess his or her relationship to the outside world due to mental illness, mental disability, impairment of consciousness not caused by self-induced intoxication, or a state of severe mental agitation,
- e) a long time has passed since the offence, or the proceedings have taken longer than is reasonable based on the nature of the offence, through no fault of the offender,
- f) the offender has made an unreserved confession, or contributed significantly to solving other offences,
- g) the offender himself/herself has been severely affected by the offence, or the criminal sanction will impose a heavy burden due to advanced age, illness or other circumstances,
- h) the prospects for rehabilitation are good,
- i) the offender was under 18 years of age at the time of the act.

Section 79. Imposition of penalties exceeding the maximum penalty (multiple offences, repeated offences, organised crime)

If one or more of the situations in a) to c) exist, the sentence of imprisonment may be increased up to double length, but under no circumstances by more than six years and never beyond 21 years, and for persons who were under 18 years of age at the time of the act, not beyond 15 years:

- a) when an offender has by one or more acts committed multiple offences, and an aggregate penalty shall be imposed. The increase in the sentence of imprisonment shall be calculated on the basis of the maximum penalty prescribed in the most severe penal provision. The penalty pursuant to the present lettered provision may never exceed the sum of the maximum penalties. Increase of the maximum penalty pursuant to the present lettered provision is only relevant in relation to statutory provisions which provide that the increased maximum penalty shall be given legal effect.

- b) when a previously convicted person has again committed a criminal act of the same nature as one for which he/she has previously been convicted within the realm or abroad, unless the penal provision itself determines otherwise. Increase of the maximum penalty pursuant to the present lettered provision is only relevant in relation to statutory provisions which provide that the increased maximum penalty shall be given legal effect.

The first part of the present lettered provision only applies when the convicted person was at least 18 years of age at the time of the previous criminal act, and has committed the new act after the penalty for the previous act has wholly or partially been executed. If the new criminal act carries a penalty limit of more than one year, the first part of the present lettered provision does not apply if the new act was committed more than six years after execution of the previous penalty was complete, unless otherwise provided. If the new criminal act carries a penalty limit of one year or less, no more than two years may have passed since the execution was complete.

- c) when a criminal act was perpetrated as part of the activities of an organised criminal group.

“Organised criminal group” means a collaboration between three or more persons with the primary purpose of committing an act that may be punishable by a sentence of imprisonment for a term of at least three years, or which is based on activities consisting to a not insignificant degree of the commission of such acts.

Increase of the maximum penalty pursuant to the present lettered provision is applicable in relation to statutory provisions which confer legal effect on the penalty limit, unless otherwise provided.

Section 80. Imposition of a penalty below the minimum penalty or a less severe type of penalty

The penalty may be set below the minimum penalty of the penal provision or to a less severe penalty type when the offender

- a)
1. without knowing he/she was under suspicion has to a significant degree prevented or reversed the harm caused by the offence, or
 2. has made an unreserved confession,
- b) is being sentenced for attempt,
- c)
1. has acted on the basis of a dependent relationship to another participant, or
 2. has only participated to a minor degree,
- d) has exceeded the limits of
1. an act of necessity (see section 17),
 2. self-defence (see section 18), or
 3. self-enforcement (see section 19),
- e) has acted out of justifiable anger, under compulsion or under obvious danger,
- f) at the time of the act, had a serious mental illness with a significantly reduced ability to realistically assess his/her relationship to the surrounding world, but is not psychotic,
- g) at the time of the act, is mentally retarded to a lesser degree,
- h) at the time of the act, had a somewhat less severe impairment of consciousness than would provide exemption from punishment pursuant to section 20, d). However, if the impairment of consciousness is a consequence of self-induced intoxication, this only applies when particularly mitigating circumstances warrant it,

- i) is under 18 years of age at the time of the act, or
- j) has acted under negligent ignorance of the law when violating a penal provision which requires intent or gross negligence.

Section 255. If the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect (an optional penalty writ) instead of preferring an indictment. Sanctions referred to in section 2, No. 4, may also be decided by issuing such a writ and may also be imposed together with sanctions specified in the first sentence.

Chapter 30. Fraud, tax fraud and similar financial crime

Section 387. Corruption

A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who

- a) for himself/herself or others demands, receives or accepts an offer of an improper advantage in connection with the conduct of a position, an office or performance of an assignment, or
- b) gives or offers any person an improper advantage in connection with the conduct of a position, an office or performance of an assignment.

“Position”, “office” or “assignment” in the first paragraph also means a position, office or assignment abroad.

Section 388. Aggravated corruption

Aggravated corruption is punishable by imprisonment for a term not exceeding 10 years. In determining whether the corruption is aggravated, particular weight shall be given to whether the act

- a) was carried out by or toward a civil servant or any other person by violating the special trust attached to his position, office or assignment,
- b) whether it has or could have resulted in significant financial advantage,
- c) whether there was a risk of significant harm of a financial or other nature, and
- d) whether incorrect accounting information has been registered, or incorrect accounting documentation or incorrect annual accounts have been prepared.

Section 389. Trading in influence

A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who

- a) for him/herself or others demands, receives or accepts an offer of an improper advantage in return for influencing the conduct of another person’s position, office or performance of an assignment, or
- b) gives or offers any person an improper advantage in return for influencing the conduct of another person’s position, office or performance of an assignment.

“Position”, “office” or “assignment” in the first paragraph also means position, office or assignment abroad.

Section 69. Even though guilt is deemed to be proved, a prosecution may be waived provided that such special circumstances exist that the prosecuting authority on an overall evaluation finds that there are weighty reasons for not prosecuting the act.

Waiver of prosecution pursuant to the first paragraph can be made conditional upon the person charged not committing any new offence during the probationary period. The probationary period is two years from the day the decision to waive the prosecution was made, but shall not be longer than the limitation period for the institution of criminal proceedings for the act in question. If the person charged was under the age of 18 when committing the act, the probationary period may be set at 6, 12, 18 or 24 months.

Waiver of prosecution can also be made conditional upon such conditions as are specified in section 53, No. 2, No. 3, (a) to (h), No. 4, and No. 5 of the Penal Code. The person charged shall be given the opportunity to comment on the conditions beforehand. When the circumstances of the person charged provide reason for doing so, the prosecuting authority may during the probationary period terminate or alter conditions that have been laid down and fix new conditions.

Section 70. A prosecution may be waived when the provisions as to sentencing in the case of a concurrence of two or more felonies or misdemeanours entail that either no or only a slight penalty would be imposed.

A prosecution may also be waived when a military reprimand has been imposed for the matter.

Section 71. If the person charged maintains that he is not guilty of an offence for which prosecution has been waived pursuant to section 69 or 70, he may require the prosecuting authority to bring the case before the court if the charge is not withdrawn. An application to this effect must be submitted within one month after the person charged has been notified of the waiver of prosecution and of his right to require that the case be brought. The provisions of section 318, first paragraph, shall apply correspondingly.

Section 72. A prosecution may be discontinued at any time before judgment is delivered at first instance. The same applies when a judgment is set aside or a legally enforceable decision has been made not to grant an application pursuant to sections 242 a, 264, sixth paragraph, 267, first paragraph, third sentence, cf. section 264, sixth paragraph, or section 292 a.

When a public prosecution is pursuant to statute dependent on an application from a special authority, the prosecution shall be discontinued if the application is withdrawn. The same applies when a public prosecution is conditional upon an application for a prosecution from the aggrieved person and the said application is validly revoked.

Section 73. If a case is dropped after the main hearing has begun either because of lack of evidence or because no penalty can be imposed in the matter, the court will pronounce an acquittal. If the case is discontinued pursuant to section 72, first paragraph, second sentence, second alternative, after the main hearing has begun, the case shall be quashed. The case shall also be quashed **if** judgment has been pronounced at a previous instance. If the judgment involves a conviction, it shall be set aside.

When a prosecution is otherwise discontinued, written notice of this shall be given to the person charged and to the aggrieved person who has acted as complainant.

Section 74. If a prosecution of a person charged is discontinued because of lack of evidence, it may be resumed if material evidence is later discovered. If the prosecution of a person charged is discontinued pursuant to section 72, first paragraph, second sentence, second alternative, the prosecution may be resumed if the reason for discontinuing the case ceases to exist.

If a prosecution is waived pursuant to section 69, the proceedings may be resumed if a charge is brought for another offence that has been committed before the waiver of prosecution. An indictment

must in this case be preferred or an application for a summary judgment on confession (tilståelsesdom) must be submitted within one year of the waiver of prosecution. If the person charged is not found guilty of the second offence, the waiver of prosecution will remain in force unless the court finds that the person charged must be acquitted.

If conditions have been imposed for the waiver of a prosecution, the prosecution may be resumed if such conditions are not fulfilled. The same applies if the person charged avoids mandatory supervision or disregards an order from the supervising authority. In such case an indictment must be preferred or an application for a summary judgment on confession must be submitted within three months of the expiry of the probationary period.

If a prosecution is waived pursuant to section 70, the proceedings may be resumed if the person charged is not convicted of the offence or offences that formed the subject of the prosecution.

If the proceedings are discontinued because a necessary application for prosecution or some other prerequisite for proceeding with the case is lacking, the proceedings may be resumed if the deficiency is remedied.

Otherwise proceedings may be resumed only on the reversal of a decision by a superior authority pursuant to section 75, second paragraph, because of a decision in an appeal pursuant to section 59 a, or if the conditions for reopening a case are satisfied.

These provisions do not prevent a decision to waive a prosecution from being reversed for the benefit of the person charged.

Chapter 16 d. Computer surveillance

Section 216 o. The court may by order give the police permission to read information that is not publicly available in a computer system (computer surveillance) when any person is with just cause suspected of an act or attempt at an act

- a) that is punishable pursuant to statute by imprisonment for a term of 10 years or more
- b) that contravenes sections 121, 123, 125, 126, 127, cf. 123, 128, first sentence, 129, 136, 136 a, 232, 254, 257, 311, 333, 337, cf. 231, or 340, cf. 231, or section 5 of the Act relating to control of the export of strategic goods, services and technology, etc., or section 108, fifth paragraph of the Act relating to the Entry of Foreign Nationals into the Kingdom of Norway and Their Stay in the Realm.

Computer surveillance may be ordered even if a sentence cannot be imposed due to the provisions of section 20, first paragraph of the Penal Code. This also applies when the situation has entailed that the suspected person has not demonstrated guilt.

Permission in accordance with the first paragraph may only be granted if it must be assumed that computer surveillance will be of material importance to solving the case, and clearing up the case would otherwise be made significantly more difficult. Section 216 c, second paragraph shall apply correspondingly.

Permission may only be granted to read specific computer systems or user accounts in network-based communications and storage services that the suspected person possesses or can be assumed to use. The surveillance may include communication, electronically stored data and other information on the use of the computer system or user account.

Sections 216 d to 216 k shall apply correspondingly, however, such that the court's permission may not be granted for more than two weeks at a time. Any equipment that is used to conduct computer surveillance shall be removed as soon as possible when the surveillance period expires.

Section 216 p. Computer surveillance pursuant to section 216 o may only be conducted by personnel who are particularly suited to such work and who are appointed by the chief of police, head of the Police Security Service or whoever is so authorised. The surveillance may be performed by means of technical appliances, computer programs, etc. Section 199 a shall apply correspondingly. The police may violate or circumvent the computer system's protection if necessary in order to read data. Technical applications and computer programs may be installed on the computer system and other hardware that can be connected to the computer system. When the court does not decide otherwise, the police may also conduct break-ins to install or remove technical appliances or computer programs that are necessary in order to conduct computer surveillance.

Computer surveillance shall be arranged so that it does not unnecessarily collect information on use of the computer system by persons other than the suspected person. The surveillance shall be conducted so that it does not unnecessarily cause the risk of an operational impediment or damage to the hardware or data. The police shall as far as possible avert the risk that the surveillance conducted enables any person to gain unauthorised access to the computer system or protected information, or other criminal offences to be committed.

Chapter 20. Optional penalty writ

Section 255. If the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect (an optional penalty writ) instead of preferring an indictment. Sanctions referred to in section 2, No. 4, may also be decided by issuing such a writ and may also be imposed together with sanctions specified in the first sentence.

Section 256. The said writ shall be signed and dated and contain:

- (1) the name and residence of the person charged,
- (2) a reference to the penal provision applicable, with a reproduction of its contents in so far as it is of significance in the case,
- (3) a short but as accurate as possible description of the matter to which the writ relates, with details of the time and place,
- (4) a determination of the fine to be imposed and the sentence of imprisonment to be served if the fine is not paid and, as the case may be, the confiscation or sanction referred to in section 2, No. 4,
- (5) an admonition to the person charged to declare within a fixed time limit whether he accepts the option of a fine or confiscation or both. The time limit shall be so determined that he is given a period for reflection which should usually be from three to 10 days.

The said writ may also include provisions that the person charged shall pay to the person so entitled a financial claim that comes under section 3, and costs to the State. The provisions of section 432, first, third, and fourth paragraphs, shall apply correspondingly.

Section 257. If the person charged accepts the option, he shall endorse the writ. The person charged shall receive a copy of the writ.

Section 258. An accepted option may be annulled in favour of the person charged by a superior prosecuting authority. Such annulment shall not affect any financial claim on behalf of a person so entitled which is included in the writ.

Otherwise acceptance of the option has the effect of a judgment.

Section 259. Acceptance of the option may be appealed against by the parties. The following are the only grounds for appeal:

- (6) that a procedural error has been committed,
- (7) that penal legislation has been wrongly applied to the matter described in the writ to the detriment of the person charged, or that criminal liability has become time-barred,
- (8) that the acceptance is not binding as a declaration of intent.

Section 260. For the person charged the time limit for an appeal begins to run from acceptance. For the prosecuting authority the time limit begins to run from the time when the acceptance is received in the office of the official who is entitled to appeal.

If the appeal is allowed, the acceptance shall be annulled. Otherwise the appeal shall be dismissed.

Otherwise, the provisions of chapter 23 shall apply correspondingly in so far as they are appropriate.

Section 261. An application for the reopening of a case that has been decided by acceptance of the option of a fine or confiscation or both shall be submitted to the District Court. The application must state the grounds for reopening the case and the evidence that will be produced. Sections 389 to 393 shall apply correspondingly in so far as they are appropriate.

If the application is obviously unfounded, the court will immediately make an order dismissing the application. Otherwise it shall be submitted to the opposite party for comment. The court may obtain further information and decide that evidence is to be judicially recorded. The provisions of section 97, first sentence, and section 270 shall apply correspondingly. The parties shall be given an opportunity to comment on the information obtained.

When special reasons so warrant, the court may decide to hold oral proceedings concerning the application, including an examination of the parties and witnesses or the immediate hearing of other evidence. The court's decision may not be appealed or serve as a ground of appeal. If oral proceedings are held, the person charged shall have a defence counsel if such counsel will be necessary in the event of a new full hearing of the case.

The court will by order decide whether a reopening of the case shall be permitted. The provisions of section 54 shall not be applicable. If it is decided to reopen the case, it shall be heard by the District Court. Section 400 shall apply correspondingly in so far as it is appropriate.

Working Environment Act, 2005

Chapter 2 A. Notification

Section 2 A-1 The right to notify censurable conditions at the undertaking

- (1) An employee has a right to notify censurable conditions at the employer's undertaking. Workers hired from temporary-work agencies also have a right to notify censurable conditions at the hirer's undertaking.
- (2) The employee shall proceed responsibly when making such notification. The employee has notwithstanding the right to notify in accordance with the duty to notify or the undertaking's routines for notification. The same applies to notification to Supervisory Ministries or other public authorities.
- (3) The employer has the burden of proof that notification has been made in breach of this provision.

Section 2 A-2 Protection against retaliation in connection with notification

- (1) Retaliation against an employee who notifies pursuant to section 2 A-1 is prohibited. As regards workers hired from temporary-work agencies, the prohibition shall apply to both employers and hirers. If the employee submits information that gives reason to believe that retaliation in breach of the first or second sentence has taken place, it shall be assumed that such retaliation has taken place unless the employer or hirer substantiates otherwise.
- (2) The first paragraph applies correspondingly in connection with retaliation against an employee who makes known that the right to notify pursuant to section 2 A-1 will be invoked, for example by providing information.
- (3) Anyone who has been subjected to retaliation in breach of the first or second paragraph may claim compensation without regard to the fault of the employer or hirer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. Compensation for financial loss may be claimed pursuant to the normal rules.

Section 2 A-3. Obligation to prepare procedures for internal notification

- (1) If the conditions at the undertaking so indicate, the employer shall be obliged to prepare procedures for internal notification in accordance with section 2 A-1 in connection with systematic health, environment and safety work.
- (2) The employer is always obliged to prepare such procedures if the undertaking regularly employs five or more employees.
- (3) The procedures shall be prepared in cooperation with the employees and their elected representatives.
- (4) The procedures shall not limit the employees' right to notify pursuant to section 2 A-1.
- (5) The procedures shall be in writing and at least contain: a) encouragement to notify censurable conditions, b) procedure for notification, c) procedure for receipt, processing and follow-up of notifications.
- (6) The procedures shall be easily accessible to all employees at the undertaking.

Section 2 A-4. Duty of confidentiality in connection with notification to public authorities

- (1) When Supervisory Ministries or other public authorities receive notification concerning censurable conditions, any person who performs work or services for the body receiving such notification shall be obliged to prevent other persons from gaining knowledge of employees' names or other information identifying employees.
- (2) The duty of confidentiality shall also apply in relation to parties to the case and their representatives. Sections 13 to 13e of the Public Administration Act shall otherwise apply correspondingly.

ANNEX 4: LIST OF ABBREVIATIONS AND ACRONYMS

AML	Anti-Money Laundering
CPA	Criminal Procedures Act
ESPD	European Single Procurement Document
FIU	Financial Intelligence Unit
GIEK	Norwegian Export Credit Guarantee Agency
KRIPOS	Norway's National Crime Investigation Service
MITOF	Ministry of Trade, Industry and Fisheries
MLA	Mutual Legal Assistance
MOFA	Ministry of Foreign Affairs
NHO	Confederation of Norwegian Enterprises
Norad	Norwegian Agency for Development Cooperation
Norfund	Norwegian Investment Fund for Developing Countries
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
ØKOKRIM	National Authority for the Investigation and Prosecution of Economic and Environmental Crime
PC	Penal Code
SME	Small- and medium-sized enterprise
SOE	State-Owned Enterprise
StAR	Stolen Asset Recover Initiative
STR	Suspicious Transaction Report
TI-Norway	Transparency International Norway
WEA	Working Environment Act
WGB	OECD Working Group on Bribery
WPECCG	OECD Working Party on Export Credit and Credit Guarantees