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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Norway

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Norway --

1. Over the past couple of years, there has been an increase in the number of criminal cases regarding corruption in Norway. In 2004, there were 2 cases registered whilst in 2007 there were 32 cases.¹ In 2009, Norway dropped from number 8 to number 14 on Transparency International's list ranking which ranks the least corrupt countries in the world. Could this fall in rank be interpreted as a rise in corruption in the Norwegian society?

2. One of the questions in the annual survey carried out by Transparency International is if the population considers the government's efforts against corruption to be effective. In the last survey, 61 % of the Norwegians in the sample assessed this effort to be ineffective (TI survey in the Norwegian population about corruption).² The natural question to pose is: Do the results of the survey give a correct assessment of corruption in Norway or is the rise in criminal corruption cases, as described above, a result of a more aggressive and/or more effective governmental approach towards corruption?

3. The development of legislation and prosecution procedures against corruption must be seen in connection with the legislative efforts made to enhance the awareness of civil servants on how to effectively and ethically carry out public procurement. As described below, this field of public activity has undergone an extensive reform in Norway.

4. In this report, The Norwegian Competition Authority (NCA) will present the Norwegian public bodies involved in fighting collusion, corruption and infringements of the Public Procurement Act. We will also present the mainline of legislation in the three areas and the tools used to uncover and sanction infringements.

1. Public Procurement: Enforcement and Legislation

5. The Norwegian Complaints Board for Public Procurement (KOFA) has been empowered to enforce infringements of the Norwegian Act on Public Procurement and ancillary secondary legislation.³ KOFA has mainly power to give advisory decisions in infringements on the public procurements rules. However, where the public authority has failed to notify the procurement (illegal direct procurement) and shown intent or gross negligent in performing the illegal direct procurement, KOFA may issue fines up to 15 percent of the contract value.

6. KOFA⁴ was established in 2003 and the administration has since 2005 been embedded administratively in the Norwegian Competition Authority (NCA). The main purpose behind the

¹ Cases regarding Norwegian penal code section 276 a-c).

² See www.transparency.no.

³ Lov av 16. juli 1999 nr. 69 og Forskrift av 7. april 2006 nr. 402 and Forskrift av 7. april 2006 nr 403.

⁴ For more information on KOFA and the decisions, look to www.kofa.no.

establishment of KOFA was to offer an efficient and cheap way to solve conflicts for suppliers in procurement matters. KOFA publish approximately 200 decisions every year and strive to maintain (on average) a three months case handling time for complaints without allegations of illegal direct procurement, and four months time for complaints with allegations of illegal direct procurement. The latter complaints follow a more comprehensive process and thus demand longer time to be handled.

7. The Act on Public Procurement over the EU threshold values is an implementation of the EU public procurement directives. Under the threshold values we have national legislation. There are currently no provisions in the procurement rules which sanctions corruption performed by the public authority/its officials in a public procurement process. Thus, the prosecution of financial crime is the responsibility of the Public Prosecutor in Norway, through provisions in the Criminal Act.⁵

8. In Norway the public sector has a total expenditure of public procurement of more than 380 billion NOK each year.⁶ Public procurement constitutes more than 15 percent of the gross national product in Norway (BNP). The main legislative rationale behind the public procurement rules is that, competition gives more value for money in the public sector and that the rules ensure more efficient use of public expenditure.⁷ The requirement of competition also reduces the risk of financial crime as this enhances transparency in the spending of public money. As competition reduces the risk of corruption, the issuing of fines for illegal direct procurement may be considered an important remedy to prevent corruption in the public sector.

9. The Norwegian public procurement legislation impose a duty on the public authority to notify procurements over 500 000 NOK.⁸ KOFA has authority to issue fines to public authorities up to 15 percent of the contract value for illegal direct procurement. Since 1st January 2007, KOFA has issued 12 fines to various public authorities. Fines have been issued to the Norwegian Defence Estate Agency, the Norwegian Public Roads Administration, the Norwegian Collection Agency, the Norwegian Correctional Services region east, various municipalities (Storfjord kommune, Askøy kommune, Troms fylkeskommune, Hadsel kommune) and health authorities (Helse Nord RHF, Sykehuset Innlandet HF). The highest fine issued is 1.75 million NOK. This represents 8.3 % of the contract value (Askøy kommune).

10. The power to issue fines for illegal direct procurement was introduced and implemented as a consequence of the National Audits Office' identification of illegal direct procurement in the public sector. The statistics on DOFFIN,⁹ the national database for public procurement, showed that public authorities did not always comply with the statutory demand to notify. The government established a select committee (The AUDA committee) which in 2003 issued a report that recommended introducing a fine to combat illegal direct procurement. In the report, illegal direct procurement was considered to be the most serious breach of the legislation on public procurement due to the lack of competition. The existing sanctions were not sufficient to prevent the public authorities, gross negligently or with intent, setting the rules aside. However, it was also stated that the main reason for non compliance was lack of knowledge about the rules.

⁵ Lov av 22.mai 1902 nr. 10 §§276 a og 276 b.

⁶ Data from expenditure in 2008, See www.ssb.no.

⁷ There are also other reasons behind the rules, ie. fair and equal treatment of tenderers, transparency, predictability.

⁸ Norwegian procurement regulation § 8-1/19-1.

⁹ See www.doffin.no for more information.

11. The interesting question in the aftermath of the implementation of the powers to fine for illegal direct procurement is whether the fine has had the desired effect in preventing breach of the rules. To the best of our knowledge¹⁰ there has not yet been carried out an analysis regarding the effect of the fines. However, the media has given the fines great attention and there are numerous examples of political parties/elected representatives demanding that public authorities increase their knowledge of the rules and improve their routines in handling public procurement. There are also examples of public authorities expressing in the media, after being fined, that the fine has been taken seriously and that there will be a greater focus on better and more efficient procurement routines. In addition, a recent search has shown that, there has been a considerable increase in the number of notifications of procurements after KOFA got the powers to fine. Whilst there were approximately 12000 notifications in 2006 there were 15500 in 2009. The rather huge increase in notifications may also be due to other factors such as increase in public expenditure, but we believe that a significant cause is the underlying threat of fines and the related publicity the fine/ infringement is given through

12. The liability for fines lies on the public authority and there is no personal liability for illegal direct procurement in the public procurement legislation. One may argue that, as long as there is no personal liability for illegal direct procurements, the threat will not have substantial deterrent effects as the added expenditure resulting from the fine can be retrieved easily by increasing the public budget or by transferring the costs to another public authority. However, this is not our experience so far. Our impression is that, the deterrent effect is linked to the publicity and shame of not having complied with the rules, and the underlying suspicion that there may be corruption involved at another level.

13. The Norwegian experience with corruption in public procurement is so far linked to criminal cases where the main issue for the investigation has been suspicions of fraud, embezzlements or similar crimes. Some cases have led to an investigation into the suspect's role in public procurement, but this has then been at a later stage in the investigation and not as a systematic search for the corruption itself.

2. Collusion: Enforcement and Legislation

14. Fighting collusion in Norway is done in two tracks as collusion is made a felony punishable by jail as well as an infringement of the Norwegian Competition Act where the NCA can issue fines. Section 10 of the Norwegian Competition Act is an implementation of article 101 in the treaty for the function of the EU.

15. The NCA can perform investigations if there is reason to believe that undertakings collude. The investigation can span from taking statements from people in key positions in the undertakings involved to performing dawn raids and confiscating evidence in any form.

16. The NCA has an investigation department which carries out much of the technical side of the investigation. However, the entire organisation participates in the task of uncovering and pursuing cartels and collusion. Unveiling and curtailing cartel activity is one of the NCA's highest priorities.

17. The NCA has a "*collusion hot line*" to receive tip offs and information on possible infringements on the Competition Act. There is also an active leniency programme shaped much in the same design as in the EU. However, this programme is not effective in the criminal track. There will have to be made deals on a case by case basis with the prosecution authority on the leniency issue.

¹⁰ See also study by Professor Luitzen de Boer and post doc Ottar Michelsen at NTNU on assignment from Norwegian Federation Enterprise (NHO), which estimated that 30 to 60 percent of the public procurement was not notified according to the rules.

18. As part of its work to combat collusion, the NCA can stage preliminary investigations and studies irrespective of whether it has received complaints. To inform the public about these tools a webpage¹¹ is used in addition to other information campaigns.

19. Certain important markets are undergoing continuous scrutiny. This means that the NCA tries to maintain up to date knowledge of the trade (sectors), events and the key actors in the market, their market shares and the structure of the business performed and relevant legislature for the markets.

20. There has so far not been discovered any corruption or infringements of the public procurement Act as result of an NCA investigation. The discovery of either corruption or infringement of the Public Procurement Act would have to be turned over to the police or KOFA, as NCA has no jurisdiction to investigate anything but infringements on the Competition Act.

21. One important element in the struggle to uncover collusion is a constant (persistent) information campaign towards public procuring entities. As the administration of KOFA is embedded in NCA, NCA personnel join KOFA on information campaigns to make sure that public procurers know about the dangers of falling victim to collusion. The OECD bid-rigging check list is promoted actively. This has made results. Two cases of collusion were uncovered last year. The first case involves two entrepreneurs who colluded on a bid for repair work on a number of bridges. In the second case all the taxis in a region colluded on a joint bid for a long term contract on driving patients from the local hospitals.¹² Both these cases were discovered due to tips from procurers contacting the NCA.

22. As mentioned above, collusion is a crime. However, the police rarely perform its own investigation in these cases until after the NCA has finished its investigation. After the implementation of the two-track system, no police investigation has been carried out in a case regarding the Competition Act.

3. Corruption: Enforcement and Legislation

23. Norway has entered and signed the OECD conventions against bribery and the UN convention against corruption, and thus pledged itself to facilitate adequate legal framework.

24. When it comes to corruption, the regulations were partly there before the said conventions, but were fragmented and quite unpractical with inexplicable differences in conditions for criminality and sentencing framework. The law was limited to cover bribery of domestic civil servants (maximum penalty 1 year imprisonment) or for civil servants receiving bribes (maximum penalty 5 years if the bribe affected the officials choice of actions, otherwise maximum penalty was imprisonment for 6 months).

25. These regulations were unchanged in the Norwegian penal code from its passing in the parliament in 1902 until 2003. The notable exception was the amendment of revisions in existing regulations in 1998 as a result of Norway's signing of the OECD convention of 1997 on combating bribery of foreign public officials in international business transactions.

26. During these years up until the 1990s, the cases brought to court on corruption were quite few and far between. With a few exceptions, the said cases also seemed to be about petty bribes. Though serious in itself, this did not bring much attention to the issue, and because of the fragmented nature of the

¹¹ <http://www.konkurransetilsynet.no/>.

¹² The decisions can be found at www.kt.no
http://www.konkurransetilsynet.no/ImageVault/Images/id_1987/ImageVaultHandler.aspx
http://www.konkurransetilsynet.no/ImageVault/Images/id_1847/ImageVaultHandler.aspx.

legislation, it was not possible to extract statistical material on this. The fact is that, we do not know exactly how many criminal cases of this kind there were in the penal system in the period preceding 2003.

27. As for the development of legislation and public awareness on this issue, this has been studied and reported on in the OECD phase 2 report¹³ and its follow-up report as a part of the process following the 1997 convention against bribery. Norway has implemented the Working Group on Bribery's recommendations on legislation. We have also enhanced the institutional framework for investigation. Increased awareness among public procurement officers has been achieved through advocacy schemes. The legislation on this field is now completely revised and reflects the demands in the convention completely. A number of public institutions such as the tax authorities, the Auditor General, The National Authority for Investigating and Prosecuting Economic and Environmental Crime, and many more, have been encouraged to increase focus on detecting corruption. As one can see from the phase 2 reports, this has resulted in several cases where Norwegian companies and individuals were investigated and prosecuted for actively bribing foreign public officials. There have also been some cases of domestic corruption.

28. As the sentencing frame for severe corruption is now 10 years imprisonment, all the regular investigative tools in the Norwegian penal process, including communication-control, except electronic room surveillance, are available in police-investigation in severe cases of corruption.

4. Cross Over Effects: Do They Exist?

29. Public procurement is no doubt an area particularly vulnerable to corruption.¹⁴ As one can see, much effort has been put into combating corruption, collusion and infringements of the regulation on public procurement. Thus, the statistics showing an increase in the number of corruption cases and in cases of infringement of the Public Procurement Act must be seen in this light. An increase in the number of cases should not necessarily be alarming if this is a result of an increased effort to uncover such cases. However it is understandable that the general population gets the opposite impression based on the numbers alone.

30. Norway is obliged to implement the new remedies directives on public procurement.¹⁵ The Norwegian government has established a committee¹⁶ which is scheduled to submit its proposal in March 2010. The proposals will then be sent on a public hearing and through the usual legislative process. The mandate of the committee is to suggest how the review procedure should be implemented in Norway, and the result will affect the future role of KOFA. One of the essential questions is: Which body should be given the powers of the new directives?

¹³ OECD Norway Phase 2 report on the application of the Convention on Combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions.

¹⁴ OECD recommendation on Enhancing Integrity in public procurement (2008).

¹⁵ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

¹⁶ "Håndhevelsesutvalget" led by Francis Seiersted.