

## NORWAY

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Norway signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 18, 1998. On October 27, 1998 it enacted implementing legislation in the form of amendments to the Norwegian Penal Code (Penal Code 22 May 1902 No. 10, Section 128) - and these came into force on January 1, 1999.

##### Convention as a whole

The Convention has been implemented into Norwegian law by extending the already existing provisions in the General Civil Penal Code regarding bribery of public officials to also include bribery of foreign public officials and agents of public international enterprises.

According to the Norwegian authorities, it is an important principle that “Norwegian law must as far as possible be presumed to be in accordance with treaties by which Norway is bound” [Norwegian Supreme Courts Reports (Norsk Retstidende 1984, p. 1175)]. Norway explains that this “speaks in favour of the fact that section 128 in the Penal code will be applied in keeping with the requirement in the Convention”.

#### 1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

To meet the requirements of article 1 of the Convention, Norway amended, as follows, an existing provision on active bribery of national public servants in section 128 of the Penal Code by adding a paragraph on the active bribery of foreign public servants and servants of public international organisations:

*Any person who by threats or by granting or promising a favour seeks to induce a public servant illegally to perform or omit to perform an official act, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year.*

*The term public servant in the first paragraph also includes foreign public servants and servants of public international organisations.*

*The provisions of the previous section third (...) paragraph, shall apply accordingly.*

(amendments are underlined)

## **1.1 Elements of the Offence**

### **1.1.1 any person**

Like the Convention, section 128 of the Penal Code utilises the term "any person". This term is generally used in Norwegian penal provisions to denote that no one is excluded from the purview of an offence unless explicitly stated.

### **1.1.2 intentionally**

Although section 128 is silent with respect to intent, section 40 of the Penal Code states that, unless otherwise indicated, the provisions of the Penal Code do not apply to a person who has acted unintentionally. Thus, the person must intend to "induce" a foreign public servant or a servant of a public international organisation "illegally to perform or omit to perform an official act".

### **1.1.3 to offer promise or give**

The relevant part of the offence deals with the act of "granting or promising a favour". The Penal Code uses the word "granting" instead of "give" and does not expressly use the word "offer". Norway contends that the words "granting" and "promising" would cover all forms of "giving".

### **1.1.4 any undue pecuniary or other advantage**

Section 128 of the Penal Code contains the word "favour" as opposed to the words "any undue pecuniary or other advantage" contained in the Convention. But Norway states that "favour" includes any "pecuniary or non-pecuniary advantage".

Norway provides that, as required by paragraph 7 of the Commentary on the Convention, an offence is committed regardless if the advantage is tolerated or necessary in the relevant foreign country. Norway also states that in conformity with its own legal principles and the Convention (Commentary 8) when the favour granted was "permitted or required by the written law or regulation", it is not unlawful and thus no crime was committed.

### **1.1.5 whether directly or through intermediaries**

Section 128 of the Penal Code is silent on the issue of intermediaries. Norway states that despite this, intermediaries will fall under the wording "accessory" as their role will be seen as aiding the briber. In addition, a person bribing through intermediaries will be held directly liable and will be treated as being in direct breach of section 128.

### **1.1.6 to a foreign public official**

Section 128 of the Penal Code applies to a bribe given to a "foreign public servant" and "servants of public international organisations". These terms are not defined in the Penal Code, except to the extent that it incorporates by reference the definition contained in the third paragraph of section 127 on domestic public servants. Thus, "railway employees, military guardsmen, and any person who in the course of duty or on request assists a public servant shall be regarded as public servants".

Additionally, in applying its domestic bribery provisions, Norway interprets "public servant" to mean any person exercising public functions, whether appointed or elected. It recognises that privately employed persons may also fall within the definition to the extent that they exercise public functions. It interprets public functions as those which normally may only be performed by the public sector, such as the exercise

of legislative, judicial and administrative powers. It is immaterial whether the person exercising the public function is a superior or subordinate official.

It is understood under section 128 that the definition of “foreign public servant” corresponds in meaning to domestic “public servant”. As stated by Norway, this definition is very similar to the one in the Convention, and Norway’s preparatory work on section 128 clearly indicates that “foreign public servant” is to be interpreted in accordance with the Convention.<sup>1</sup>

Furthermore, section 128 contains neither a reference to, nor a definition of, “foreign country”. However, Norway contends that the wording “foreign country” is, in its opinion, self-explanatory.

Section 128 also applies to "servants of public international organisations" in keeping with the requirement in the Convention that the bribery offence apply to "any official or agent of a public international organisation".

#### **1.1.7 for that official or for a third party**

Section 128 of the Penal Code does not specify to whom the favour must be intended to benefit. In its reply to the questionnaire, Norway states that it equates favours accepted by a foreign public servant on behalf of a third person to favours for the benefit of the foreign public official. Norway states further that there is nothing in the wording of section 128 that limits its application to favours accepted by the foreign public official himself/herself. In addition Norway draws attention to the “passive” bribery offence in section 112 of the Penal Code, which establishes criminal liability for the receiving of bribes by a public servant “for himself or another”. Norway clearly intends for section 128 to apply where the favour is meant for a third party.

#### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Section 128 of the Penal Code targets bribes that are intended to induce the foreign public servant "illegally to perform or omit to perform an official act". Norway intends this to be a limited breach of duty concept. Thus, section 128 applies only where the foreign public servant acts in breach of duty, which includes the case where, for instance, the foreign public servant does not exercise judgement or discretion impartially, accelerates the mode of treatment or performs an act outside his or her authority.

According to Commentary 3 on the Convention, a statute that defines the offence in terms of payments to induce a breach of the official's "duty" could meet the standards of the Convention "provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an autonomous definition not requiring proof of the law of the particular official's country". Norway states that it will apply the duty concept in keeping with the Commentaries, and thus proof of an offence under section 128 will not require proof of the law of the particular official’s country in order to prove that judgements or discretion not exercised in an impartial manner is an offence. It further states that pursuant to Norwegian law and practice, it is part of the public servants duty to exercise judgement or discretion impartially.

Moreover, the Norwegian authorities note that the receiving of the bribe in itself makes a foreign public official’s actions illegal, and that the presence of the word “illegally” denotes that *de minimus* gifts and gifts that are required in a foreign public official’s country are exempted from section 128. The Norwegian

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1 . Travaux préparatoires, 5.3 on page 5 in Ot prp nr 66 91997-98

authorities confirm that the word “illegally” would give the prosecution discretion to not prosecute the giving of facilitation payments.

### **1.1.9/ in order to obtain or retain business or other improper advantage**

#### **1.1.10 in the conduct of international business**

Section 128 does not address the “aim” of the bribery. The provision criminalises bribery promised or granted to achieve an illegal performance or omission to perform an official act but with no requirement that such bribery have any relation to national or international business. According to the Norwegian authorities, pursuant to the principle that laws should be interpreted in accordance with the treaties by which Norway is bound, the courts would interpret section 128 so that it only covers bribes given in relation to international business.

## **1.2. Complicity**

Article 1(2) of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Section 128 of the Penal Code does not explicitly incorporate this provision. Instead it extends the purview of the offence to an "accessory", which by definition applies to someone who aids and abets, and possibly also “authorises” or “incites”.

## **1.3 Attempt and Conspiracy**

Article 1(2) of the Convention requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as these acts are criminalised with respect to their own domestic official.

Neither an attempt to bribe a domestic official nor a foreign public official is included in the offence under section 128 of the Penal Code. According to Norway, the words "seeks to induce" have been included in section 128 in order to indicate that there is no stage of attempt in the act of bribing a domestic or foreign public servant. The offence is considered to have been committed irrespective of the public official's acceptance of the bribe, or whether the bribe was made in vain because the public official had already performed the act.

Section 128 of the Penal Code is silent with respect to the issue of a conspiracy to bribe either a domestic official or a foreign public official. However, Norway states that it is not the intent that section 128 not apply to conspiracy. It adds that section 128 will apply to conspiracy if, depending on the facts of a case, an act of conspiracy can be subsumed under the wording “seeks to induce” and/or “accessory”. There is no specific legislation in Norway regarding conspiracy.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official".

The liability of an enterprise is discretionary pursuant to section 48a of the Penal Code, which states that “when a provision is contravened by a person who has acted on behalf of an enterprise the enterprise may be punished for the contravention”. The rules for exercising this discretion and in assessing the penalty are codified in section 48b (see below under 2.1.2).

### 2.1.1 Legal Entities

Pursuant to section 48a of the Penal Code, an “enterprise” is defined as “a company, society or other association, one-man enterprise, foundation, estate or public activity”. The Penal Code does not specify that “enterprise” also means a state-owned or state-controlled company, but Norway states that it intends that these entities are captured by the general terms “company” or “society”, and this is supported by case law and literature (including the travaux préparatoires and textbooks).

### 2.1.2 Standard of Liability

Norway states that the criterion of guilt is determined by examining the relevant offence. Thus, in the case of bribery of a foreign public official, a person must have acted on behalf of an enterprise with the intent to induce a foreign public servant or a servant of a public international organisation "illegally to perform or omit to perform an official act". According to Norway, it is not necessary to specify which person in the company acted intentionally, because it is presumed that there is intent on somebody's part when a bribe is paid. In addition, Norway states that where the person who gave the bribe on behalf of the company is identified, he/she would be prosecuted. There is no requirement that the person is authorised to bribe the public servant.

Norway states that the rank within the enterprise of the person responsible for the bribe does not affect the criminal liability of the enterprise. In theory, an employee's status or rank could affect the severity of the penalty. However, Norway states that as rank is one of several considerations in assessing a penalty, it is unlikely to affect the severity of a fine in any substantial way.

Moreover, in exercising the prosecutorial discretion granted by section 48a of the Penal Code, and in assessing a penalty, particular attention shall be paid to the following considerations listed in section 48b:

- a) the preventive effect of the penalty,
- b) the seriousness of the offence,
- c) whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence,
- d) whether the offence has been committed in order to promote the interests of the enterprise,
- e) whether the enterprise has had or could have obtained any advantage by the offence,
- f) the enterprise's economic capacity,
- g) whether other sanctions have as a consequence of the offence been imposed on the enterprise or on any person who has acted on its behalf, including whether a penalty has been imposed on any individual person.

Section 48b, paragraph g raises the following questions:

1. Are there other sanctions in relation to enterprises for the bribery of a foreign public official?
2. What effect does the imposition of a penalty on a natural person who has acted on behalf of an enterprise have on the liability of the enterprise?

With respect to the first question, the Norwegian authorities are not aware of other sanctions at the moment. As to the second question, they explain that the only situation where a penalty against a natural person would speak against criminal sanctions against the enterprise would be where the enterprise is very small, and the person who gives the bribe is the owner or a major shareholder. In

such a case there is such a close link between the person and the enterprise that it might not be necessary to impose a fine on the enterprise.

### **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject non-natural persons (e.g. corporations) to criminal responsibility, the Convention requires the Party to ensure that legal persons are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions.” The Convention also mandates that for natural persons, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. In any case, the Convention requires each party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### **3.1/**

#### **3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official**

Section 128 of the Penal Code subjects natural persons to the same penalties in relation to the bribery of domestic public servants and foreign public servants — “fines or imprisonment for a term not exceeding one year”.

Norway indicates that there is no upper limit to the size of the fine. In fact, so far fines have not been imposed under section 128, only imprisonment. Norway states that it is unlikely that only fines would be imposed and thus it is difficult to estimate the size of the fine that would normally be given.

The maximum term of imprisonment under section 128 is one year. The Norwegian authorities admit that this term is far too short. They explain that the prosecutorial authorities have suggested that it is increased to 6 years, which would bring it up to the same term as for private corruption, but any initiative in this regard will not take place until the Council of Europe Convention is completed.

In the case of an enterprise (legal persons), pursuant to section 48a of the Penal Code, it may be subject to a fine with no upper limit; and it may also be “deprived of the right to carry on business or may be prohibited from carrying it on in certain forms”. These penalty provisions are identical with respect to both domestic and foreign bribery. Guidelines for the assessment of a penalty are contained in section 48b of the Penal Code. Norway states that the amount of fines imposed on enterprises varies quite a lot. The trend is that fines are substantial, and most fines will be in the region of NOK 500.000 (EUR 59.700) to NOK 4.000.000 (EUR 480.000).

#### **3.3 Penalties and Mutual Legal Assistance**

Norway does not have legislation on mutual legal assistance. Instead, it relies entirely on bilateral and multilateral conventions (i.e. The European Convention on Extradition, and bilateral agreements with Australia, New Zealand and South Africa).

Norway states that, pursuant to Article 16 of The European Convention on Extradition and section 171 of the Criminal Procedure Act, a person’s liberty can be deprived to enable mutual legal assistance if certain conditions are met. The relevant provisions in the European Convention on Extradition deal with provisional arrest in the case of urgency where a Party to the Convention states that it intends to send a request for extradition.

The maximum term of imprisonment is not a relevant factor in determining whether to provide mutual legal assistance, therefore Norway's maximum penalty of 1 year for the foreign bribery offence will not hamper its ability to give mutual legal assistance in these cases.

### **3.4 Penalties and Extradition**

Section 3.1 of the Extradition Act (13 June 1975 No. 39 - see attached) only permits extradition in cases where an offence is punishable under Norwegian law by imprisonment for more than one year. However, Norway explains that pursuant to section 3.2 of the Extradition Act, the King-in-Council may enter into bilateral and multilateral agreements with foreign states on extradition for acts even if the duration of imprisonment is shorter than one year. Norway states that the Convention is one of those agreements that the King-in-Council may enter for acts for which the duration of imprisonment is less than 1 year. Therefore, the current short duration of Norway's maximum term of imprisonment for the foreign bribery offence will not present a problem where a request for extradition is received from a Party to the Convention during the period before the maximum term is increased.

### **3.6 Seizure and Confiscation of the Bribe and of Its Proceeds**

Article 3.3 of the Convention requires each Party to take necessary measures to provide that "the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable".

Sections 34 to 37d of the Penal Code cover confiscation of the bribe and the proceeds of the bribe. Norway's definition of the proceeds of the bribery is equivalent to the definition in Commentary 21 on the Convention, which states that "the proceeds of the bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery".

To ensure confiscation under Section 34 to 37d the prosecution authority will seize bank accounts etc. or make a charge on property pending the outcome of a trial.

Sections 34 and 35 apply to the confiscation of both the bribe and the proceeds of the bribe. However, Norway states that in fact it may be difficult to identify the proceeds of the bribe.

Section 34 covers gains obtained by a criminal act. The bribe and the proceeds of the bribe will be seen as gains. Section 35 deals with objects as opposed to Section 34 which deals with gains without specifying the object. Money will fall under "objects" in section 35. This means the court can choose whether to apply section 34 or 35.

### **3.8 Civil Penalties and Administrative Sanctions**

Article 3.4 of the Convention requires each Party to "consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official".

Pursuant to its participation in the Council of Europe's Multidisciplinary Group on Corruption (GMC), and the Working Group on Civil Remedies (GMCC), Norway may impose civil sanctions such as compensation in addition to criminal sanctions.

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention explains that it is not necessary that there is "an extensive physical connection to the bribery act".

Norway exercises jurisdiction over all persons, including foreigners, if any part of the bribery of a foreign public official is committed in Norway. It does not require an extensive physical connection to the bribery. Norway will, for example, exercise jurisdiction if the briber made the payment in Norway or the intended purpose of the bribe materialised in Norway.

### **4.2 Nationality Jurisdiction**

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official". Commentary 26 on the Convention clarifies that where a Party's principles include the requirement of dual criminality, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

Pursuant to section 12.3.a of the Penal Code, Norway has jurisdiction over nationals for the offence of bribery of a foreign public official committed abroad. There is no requirement of dual criminality in the case of this particular type of offence.

Pursuant to section 12.3.a, Norway also has jurisdiction over "any person domiciled in Norway" for the offence of bribery of a foreign public official abroad.

In addition, under section 12.4.a Norway may establish jurisdiction over a foreigner for the bribery of a foreign public official abroad. However, pursuant to section 13 of the Penal Code, a prosecution under section 12.4.a is subject to the King's discretion, which, the Norwegian authorities explain, is rarely exercised. This provision is very theoretical, and its presence is a safeguard for exceptional circumstances.

### **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Norway is a party to the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No 73). Furthermore, it can consult with parties outside this convention regarding the transfer of a case, even if no specific treaty exists between the parties. Norway states, however, that there are no legal instruments requiring consultation and eventual transfer of a case to another Party.

## **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention requires that the investigation and prosecution of the bribery of a foreign public official be "subject to the applicable rules and principles of each Party". It also requires that each Party ensures that the investigation and prosecution of the bribery of a foreign public official "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".

Norway reports that the investigation and prosecution of the bribery of a foreign public official follows the normal rules for criminal investigation and prosecution. The prosecuting authority, which is independent from the Government and Parliament, has the discretion to initiate, suspend and terminate an investigation or prosecution. An investigation can be initiated where there are reasonable grounds to inquire whether a crime has been committed, and normally will be terminated or suspended where there is a lack of sufficient proof to indict. Norway believes that other situations where termination or suspension is possible would rarely be relevant in these cases.

The prosecutorial authority has discretion with respect to all the stages of a case. Norway asserts that it gives corruption high priority and that it is thus unlikely that a case within the scope of the Convention would not be investigated and prosecuted on the basis of discretion. It further contends that, as required by article 5 of the Convention, the investigation and prosecution of the bribery of a foreign public official cannot be influenced by the considerations listed therein. Several decrees and guidelines have been issued by the Prosecutor General regarding enforcement.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

Section 67 of the Penal Code prescribes that the limitation period is two years when the "maximum penalty is fines or imprisonment for a term not exceeding one year" — the relevant period for the bribery of a foreign public official. Section 67 states that "the period of limitation begins to run from the date the criminal activity has ceased".

It appears that a period of 2 years would not be adequate to meet the requirements of the Convention. Norway explains that when the maximum penalty for foreign bribery is increased to 6 years imprisonment, there would also be a corresponding increase in the statute of limitations to 10 years.

## **7. ARTICLE 7. MONEY LAUNDERING**

Article 7 of the Convention requires that where bribery of a Party's domestic public official is a predicate offence for the application of money laundering legislation, it must do the same for bribery of a foreign public official, regardless of where the bribery occurred.

Section 317 of the Penal Code criminalises the receiving or obtaining of any part of the proceeds of a criminal act, as well as aiding and abetting the securing of such proceeds for another person. Aiding and abetting includes "collecting, storing, concealing, transporting, sending, transferring, converting, disposing of, pledging or mortgaging, or investing the proceeds". The concept of aiding and abetting is also applicable in negligence cases. Section 317 applies to both domestic and foreign bribery, and it does not matter where the bribery occurred.

The punishments for the offences under section 317 are fines or imprisonment for a term not exceeding three years, and six years imprisonment in the case of an "aggravated" offence. In determining whether a particular offence is "aggravated", special importance shall be attached to, amongst other considerations, "what kind of criminal act the proceeds are derived from". Norway states that in most cases bribery of a foreign public official will be deemed an aggravated offence.

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery.

Section 2-1 of the Accounting Act requires the registration, without groundless delay, of all information in the accounting system which is of importance for the size and composition of property, debts, income and expenditure. Section 2-2 of the Accounting Act requires that all information regarding accounts with creditors and debtors must be specified on the opposite party. Under section 8-5, violations of the Accounting Act are punishable by fines or imprisonment. The possible terms of imprisonment vary from 3 months to 6 years depending upon the significance of the violation and the presence of aggravating circumstances. Participation is also punishable in the same way. Additionally, the Accounting Act pertains to almost all types of economic activities, including all companies with limited liability. The Norwegian authorities explain that all types of businesses have to register their accounts.

In conclusion, the Accounting Act indirectly prohibits the making of falsified or fraudulent accounts in the ways specified in the Convention (i.e., establishment of off-the-book accounts, etc.). However, it appears that certain bribes could escape the accounting requirements of the Accounting Act if they are not of "relevance for the size and composition of property, debts, income and expenditure".

Further control over the activities subject to the Accounting Act exists in the Auditing Act. Section 5-1 of the Auditing Act requires the auditor to ensure that the accounts are correct, and that the company manages its capital in a prudent way and with satisfactory internal controls. It is also the auditor's responsibility to detect irregularities and errors. Violations of the Auditing Act are punishable by fines or imprisonment up to one year. Additionally, the Banking, Insurance and Securities Commission (Kredittilsynet) is required to withdraw the licence of an unsuited or unqualified auditor. Auditors are supervised by the public.

The auditor is under no duty or requirement to report violations of the Accounting Act to the authorities. He/she may report violations, as there is no element of secrecy in this respect. The auditor is, however, required to state in the annual report if the annual result is drawn up in accordance with laws and regulations, and the report is public.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

### **9.1 Laws, Treaties, Arrangements Enabling Mutual Legal Assistance**

#### **9.1.1 Criminal Matters**

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

Norway is a Party to the following relevant conventions: the European Convention on Mutual Assistance in Criminal Matters (ETS No 30) and the 1978 Additional Protocol (ETS No 99); the European Convention on Extradition (ETS No 24) with the two additional protocols (ETS No 86 and ETS No 98); the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No 73); and the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No 141). Norway indicates that its ability to give mutual legal assistance is not confined to the countries covered by these agreements.

Pursuant to section 15.1 of the Extradition Act (13 June 1975 No 39), coercive measures may be used to further an investigation to the same extent "as in cases of offences of a similar nature prosecuted in Norway". This is the only instance that Norway requires dual criminality in the provision of mutual legal assistance to another Party. As mandated by the Convention, dual criminality will be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. In all cases, Norway will comply with requests for mutual legal assistance from a Party to the Convention, even where the Party is not covered by one of the agreements listed above. Where there is no applicable agreement and the request is not made by a Party to the Convention, there will be no legal requirement for compliance. But Norway states that even in these cases assistance would be denied only under exceptional circumstances.

Moreover, Norway affirms that it is not possible for it to decline to provide mutual legal assistance for criminal matters within the scope of the Convention on grounds of bank secrecy.

### **9.1.2 Non-Criminal Matters**

Norway is a party to the Lugano Convention (1988) and will comply with its regulations.

It is also possible to make use of the Norwegian courts by using the normal rules for civil cases.

## **10. ARTICLE 10. EXTRADITION**

### **10.1 Extradition for Bribery of a Foreign Public Official**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

(See discussion above under 3.4 on "Penalties and Extradition".)

### **10.3/10.4 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Section 2 of the Extradition Act forbids the extradition of Norwegian nationals. However, Norway confirms that cases involving the bribery of foreign public officials will be submitted to the prosecutorial authorities.

## **10.5 Dual Criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

With respect to extradition, Norway requires dual criminality in two instances. Firstly, it requires that the offence for which extradition is sought is punishable under Norwegian law for more than one year, unless, pursuant to section 3.2 of the Extradition Act, the King-in-Council has entered into an extradition agreement permitting a shorter period of imprisonment. Secondly, section 15.1 of the Extradition Act permits the use of coercive measures to "ensure extradition" to the same extent "as in cases of offences of a similar nature prosecuted in Norway". Norway confirms that dual criminality will be deemed to exist where coercive measures are necessary to ensure extradition and the offence for which extradition is sought is within the scope of the Convention.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

### **11.1 Designation of Authorities**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The corruption unit at ØKOKRIM (The National Authority for Investigation and Prosecution of Economic and Environmental Crime) is designated as the central authority for receiving and making requests, and shall serve as the channel of communication. It consists of special investigators and a senior public prosecutor who are specialists in the field of international corruption.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

The revised Recommendation urges Parties to deny the tax deductibility of bribes to foreign public officials.

The Norwegian 1911 Tax Law, Section 44, first paragraph, litra a, subparagraph 5 declares that bribes and similar payments are not tax deductible if they were made to obtain "wrongful consideration".<sup>2</sup> The term "wrongful consideration" means not only illegal consideration, according to the Penal Code, but also consideration that is contrary to "general business ethics" and ethics in the "public administration" of Norway. The term "general business ethics" refers to ethics in business transactions, and the term "public administration" refers to proper behaviour in the public administration, etc. In each case consideration must be given to what is reasonable to demand from a person according to the general business ethics and customs in public administration.

Tax deductibility is denied where the consideration is "wrongful" in Norway or in the place where such consideration was given or expected to be given. Norwegian legal standards will be used to evaluate whether consideration is wrongful in Norway and the place where it was given or expected to be given. Even if both the payment and the benefit in return take place abroad, the evaluation will be made the same

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2. This Act was amended in 1995 to ban tax deductibility of bribes and similar payments.

way. Norway indicates that the interpretation of the provisions does not take into consideration that general business ethics and customs in public administration may be more relaxed in some countries than in Norway.

## EVALUATION OF NORWAY

### General Remarks

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

### Specific issues

#### 1. Definition of foreign public official

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

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

#### 2. Third persons

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

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

#### 3. Corporate liability

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

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

#### **4. Sanctions and statute of limitations**

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

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