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Theme I

Third Evaluation Round

Evaluation Report on Norway on Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

Adopted by GRECO
at its 41st Plenary Meeting
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I. INTRODUCTION

1. Norway joined GRECO in 2001. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2002) 3E) in respect of Norway at its 10th Plenary Meeting (12 July 2002) and the Second Round Evaluation Report (Greco Eval II Rep (2004) 3E) at its 20th Plenary Meeting (30 September 2004). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Norway from 10 to 12 November 2008, was composed of Mr Flemming DENKER, Deputy Director, Public Prosecutor for Serious Economic Crime (Denmark) and Ms Regina SIEH, Senior public prosecutor, Prosecution office Munich II, Permanent deputy to the head of the prosecution office Munich II, Head of Division "Corruption Crimes", prosecution office Munich I (Germany). The GET was supported by Ms Tania VAN DIJK from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2008) 5E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the Ministry of Justice and the Police, *Økokrim* (The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) and the judiciary, as well as prosecutors and investigators from local police districts. Moreover, the GET met with criminal defence lawyers and representatives of academia, the media and the Norwegian chapter of Transparency International
5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Norwegian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Norway in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2008) 6E, Theme II.

II. INCRIMINATIONS

Description of the situation

7. Norway ratified the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) on 2 March 2004. The Convention entered into force in respect of Norway on 1 July 2004. Norway did not make any reservations to the Criminal Law Convention on Corruption. The Additional Protocol to the Criminal Law Convention (ETS 191) (hereafter: the Additional Protocol) was ratified by Norway on 2 March 2004. It entered into force in respect of Norway on 1 February 2005. Norway did not make any reservations to the Additional Protocol to the Criminal Law Convention on Corruption.
8. New provisions on corruption and trading in influence were introduced into the Penal Code in July 2003. In the preparatory works to the 2003 corruption provisions in the Penal Code (hereafter: PC), it is explicitly stated that the provisions are introduced to implement Norway's obligations under international law, pursuant to the Convention and the Additional Protocol (as well as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions).
9. As regards the abovementioned preparatory works, the Norwegian authorities stress that they have an important role in the Norwegian legal system as a means of interpreting the wording of an act. In Norwegian legal tradition these preparatory works go beyond giving an explanation to the Parliament and are intended to give guidance (after adoption of the law) to persons interpreting the law (an issue of particular importance in the absence of any case law on the provisions). The Norwegian authorities explain that directions given in the preparatory works regarding the interpretation of new legal provisions will be taken into account by Norwegian courts. Where appropriate, this report will thus make (extensive) reference to the preparatory works to the 2003 corruption provisions [*Odelstingsproposisjoner No. 78 (2002-2003)*; hereafter *Ot.prp. No. 78 (2002-2003)*].
10. In addition, the Norwegian authorities point to Section 1 PC, which provides that "the criminal legislation shall apply subject to such limitations as derive from any agreement, with a foreign State and from international law generally". The Norwegian authorities stress that this section of the Penal Code ensures that the Convention and its Protocol have a strong position in the Norwegian legal system.
11. It must however be emphasised that, although both the preparatory works and Section 1 PC may widen the interpretation given to the letter of the provisions on corruption and trading in influence, this cannot go beyond the legality principle of Section 96 of the Constitution, which provides that no person may be convicted except according to the law.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

12. Active bribery and passive bribery of domestic public officials is criminalised by Section 276a PC.

Section 276a

Any person shall be liable to a penalty for corruption who

- a) *for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in connection with a post, office or commission, or*

b) gives or offers anyone an improper advantage in connection with a post, office or commission. By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country.
The penalty for corruption shall be fines or imprisonment for a term not exceeding three years. Any person who aids and abets such an offence shall be liable to the same penalty.

13. In addition, Section 276b PC criminalises aggravated corruption (or 'gross' corruption).

Section 276b

Gross corruption is punishable by imprisonment for a term not exceeding 10 years. Any person who aids and abets such an offence shall be liable to the same penalty.

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

14. As regards 'gross' corruption, the Norwegian authorities report that whether Section 276b PC is applicable depends on an overall evaluation of the circumstances of the case (as is also implied by the second part of this section). The elements of the offence in Section 276a PC must be present for Section 276b PC to be applicable and the factors¹ listed in the second part of Section 276b PC are taken into account in assessing whether a specific conduct constitutes an aggravated corruption offence. On the one hand, the preparatory works to the 2003 provisions stress that "an act of corruption shall not in itself be regarded as gross even if one or more of the conditions stated (...) are fulfilled. (...) Section 276b shall only be applicable in the case of qualified improper conduct".² On the other hand, the preparatory works also emphasise that the list is not meant to be exhaustive: "emphasis may be placed on factors other than those given in the draft, cf. *inter alia*".³ Whether an act can be regarded as 'gross' corruption pursuant to Section 276b thus depends on a concrete assessment in each case. The Norwegian authorities

¹ The preparatory works to the 2003 corruption provisions - *Ot.prp. No. 78 (2002-2003)*, pp. 58-59 – *inter alia* clarify that:

- the expression 'any other person in breach of the special confidence placed in him as a consequence of his post, office or commission' may include lawyers and senior employees of a private enterprise;
- as regards public officials, importance will also be attached to whether or not the person concerned holds a position of special trust;
- an exact indication of what constitutes 'considerable economic advantage' cannot be given. In this regard the preparatory works also indicate that "the Permanent Law Commission has adopted as a basis that, according to the current value of money, corruption involving bribes between 75,000 NOK and 100,000 NOK [approximately €8,200 and €11,000] shall normally be regarded as gross. In the Ministry's view, the assessment must take into account the definition of significant value that is applied in relation to other 'gross' profit-making crimes. In a decision reported in the Norwegian Supreme Court Reports 1999, page 1299, the Supreme Court found that 75,000 NOK [approximately €8,200] was not a sufficient amount for a charge of receiving to be regarded as gross." The GET was told that the Ministry of Justice assumes that at least an amount of approximately 100,000 NOK / € 11,000 would be sufficient to consider the act as 'gross' corruption. However, it is also assumed that if the bribery offence involved – for example – a judge the amount involved could still be considered as 'gross' corruption even if significantly lower;
- similarly an exact indication of what constitutes 'significant damage of an economic nature' cannot be given;
- the 'risk of significant damage' explicitly includes risks of damage of a non-economic nature (e.g. major damage to the environment etc.);
- as regards 'the risk of significant damage' it is not necessary that the damage has occurred;
- as regards 'false accounting information' (etc.), the commission of accounting offences described in Article 14 of the Criminal Law Convention on Corruption (ETS 173) in collusion with the corrupt act would likely be enough for the corrupt act to be considered to be 'gross' corruption.

² *Ot.prp. No. 78 (2002-2003)*, p. 59.

³ *Ibid.*

furthermore indicate that a legislative solution with similar wording is used in Sections 256, 271 and 276 PC (concerning respectively 'gross' embezzlement, 'gross' fraud and 'gross' breach of trust, which all use factors similar to those listed in the second part of 276b PC).

15. The Norwegian authorities give examples of the following cases – not necessarily involving domestic public officials – in which the offenders were convicted for 'gross' corruption pursuant to Section 276b (in conjunction with Section 276a):
- in December 2007, a psychiatrist and psychologist were sentenced by the Court of First Instance⁴ to two years and six months' imprisonment for accepting money and other advantages for issuing incorrect medical certificates. The court emphasised in particular the position of special confidence the offenders occupied (as well as the fact that the offences had resulted in considerable economic advantage);
 - in February 2008, four persons working for an inter-municipal waterworks entity, as well as a legal person (an engineering company), were sentenced by the Court of First Instance⁵ to – respectively - prison sentences ranging from one year and eight months to eight years and a fine of 8 million NOK (approximately €875,000), as well as the order to pay compensation of 63 million NOK (approximately €6.9 million) and confiscation of eight properties in South Africa. The indictment for 'gross' corruption made reference to breach of special confidence and the considerable economic advantage obtained by the offenders;
 - in October 2006, a former director of a state-owned hospital was sentenced by the Court of First Instance⁶ for the receipt of improper advantages (cash payments, bank deposits and golfing and hunting trips) valued at NOK 220,000 (approximately €24,000) for the awarding of contracts related to the department he headed. In convicting the offender for 'gross' corruption the court emphasised the breach of special confidence and the considerable economic advantage obtained by the offender.

Elements/concepts of the offence

"Domestic public official"

16. Section 276a does not use the term 'domestic public official', but instead refers to the passive party's 'post, office or commission'. The preparatory works to the 2003 provisions⁷ explain that the terms 'post', 'office' and 'commission' have "a broad scope and include all types of employment, office and commission for public and private employers and principals". It was the intention of the legislator to establish unequivocally that corruption committed by or in relation to persons falling outside the old corruption provisions in the Penal Code – such as certain public employees not included in the concept 'public officials' – would be included in the new corruption provisions.
17. The preparatory works⁸ further outline that corruption in connection with a 'post' is meant to cover an act of corruption in connection with "ordinary service or employment"; corruption in connection with an 'office' covers "corruption committed by or in relation to a political office, board appointment or other position of trust". There is no requirement that the passive party receives

⁴ Court of First Instance, Oslo, judgment of 4 December 2007. The judgment was upheld by the Court of Appeal in October 2008.

⁵ Court of First Instance, Nedre Romerike Tingrett, judgment of 14 February 2008.

⁶ Court of First Instance, Oslo, judgment of 27 October 2006. Although this judgment rendered null – because one of the judges was disqualified –, on 27 January 2009 the person in question (i.e. the former director of a state-owned company) was convicted to two years' imprisonment, for – in essence – the same charges as in the 2006 case.

⁷ *Ot.prp. No. 78 (2002-2003)*, pp. 53-54.

⁸ *Ibid.* pp. 54-55.

remuneration for this office and it makes no difference if the passive party is appointed or elected to it. The term office covers “elected officers in associations and organisations (...), (...) members of the *Storting* [Parliament], municipal councillors and other popularly elected representatives. Judges (...) are also included (...)”. Corruption in connection with a ‘commission’ in turn covers acts of corruption in connection with “contractors” (for example, “a lawyer, consultant or an estate agent holding a single commission for an enterprise, an organisation or a public agency”).

18. The Norwegian authorities stress that all the functions/categories of persons mentioned in Article 1 (a) and (b) are covered by the use of the terms ‘post’, ‘office’ and ‘commission’ in Section 276a: public officials/public officers, including prosecutors, are covered by the term ‘post’; mayors, ministers, judges and (other) holders of judicial offices are covered by the term ‘office’.

“Promising, offering or giving” (active bribery)

19. Section 276a, subsection (b) PC uses the terms ‘gives or offers’. The preparatory works outline that the term ‘offer’ covers both situations in which the briber “offers anyone an advantage in return for a specific act to be performed and in which s/he offers an advantage for an act of omission that has already taken place. In some cases, it may be difficult to associate the offer with a specific act or omission by the passive party. The active party may, for example, offer anyone a sum of money without making it clear that something is required in return. If the offer concerns an improper advantage and is made in connection with a post, office or commission, such an attempt at ‘oiling the palm’ may also constitute grounds for prosecution. The preparatory works to the law point out explicitly that the active party may be liable even if he did not intend to follow up the offer by giving the passive party an improper advantage”.⁹ An offer that has not yet come to the knowledge of the bribe-taker would be attempted bribery, pursuant to Section 49 PC.
20. Furthermore, the Norwegian authorities report that in the proceedings leading up to the adoption of the new provisions on corruption in the Penal Code, the Permanent Commission on Criminal Law had proposed that a ‘promise’ of an improper advantage should also be explicitly covered. However, as stated in the preparatory works, the Ministry of Justice could not see that the term ‘promise’ would have any independent significance in a Norwegian penal provisions on corruption in addition to the term ‘offer’, and proposed that to omit ‘promise’ from the text of the Act, since this conduct would already be covered by the term ‘offer’. The GET was informed that situations in which the active party promises to give the passive party an improper advantage in reaction to a request by the passive party (i.e. in which the initiative did not come from the active party as the term ‘offer’ would suppose) would still be covered by the term ‘offer’ in Section 276a, subsection (b) PC.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

21. Section 276a, subsection (a) PC uses the terms ‘requests or receives’ and ‘accepts an offer’. The preparatory works explain that the term ‘requests’ is “primarily intended to cover situations where the passive party exploits a post, office or commission to persuade another person to offer advantages. Punishment pursuant to this alternative may nevertheless be imposed even if the request has apparently been put forward more as a cautious request than as a demand for a bribe. For example, it may be that the passive party presents an invoice to another person in a manner that clearly implies that the latter is expected to pay. The decisive factor is whether the act, interpreted in the light of the circumstances, is likely to give the addressee the impression that the passive party wishes to obtain something in the form of an improper advantage for

⁹ *Ibid.* p. 57.

him/herself or other persons.”¹⁰ The preparatory works furthermore explicitly state that “the request need not relate to a specific advantage. It is sufficient to express an expectation that some or other improper advantage will be provided by the other party, either for oneself or for others”.¹¹ If the request has not yet come to the attention of the active party, the passive party can be prosecuted for attempted bribery (pursuant to Section 49 PC). In case the passive party withdraws his/her request before it has reached the potential bribe-giver, it may constitute an abandoned attempt (pursuant to Section 50 PC) for which s/he is not liable. The preparatory works clarify that “once the request has come to the attention of the addressee, the addressee’s response to it is immaterial”: the passive party may be prosecuted “even if the addressee of the request has chosen to ignore the request”.¹²

22. As regards ‘receives’, the preparatory works make clear that this covers situations in which “no request for or offer of such an advantage has been made in advance or when it cannot be proven that an offer has been made”.¹³ It is immaterial who took the initiative for the giving of the improper advantage. The recipient of the improper advantage may be liable even if s/he only passively receives. However, as is indicated in the preparatory works, “a certain discretion must be exercised in situations such as these. If the circumstances give reasons to believe that the recipient intended to hand over or inform his/her employer about the bribe, it may be that s/he should be allowed some time before the act can be said to constitute a breach or attempted breach of the penal provisions”.¹⁴
23. The inclusion of the expression in Section 276a PC ‘accepts an offer of’ is meant to cover situations in which the passive party receives and accepts an offer of an improper advantage that is to be provided at a later date. As before (see paragraph 20 above), this expression is also meant to cover the acceptance of a promise.

“Any undue advantage”

24. Section 276a PC refers to ‘improper advantage’. According to the preparatory works to Section 276a PC, everything, which is considered to be an advantage by the passive party (or which he or she finds useful), shall be regarded as an advantage pursuant to Section 276a PC. This could be an advantage of ‘independent economic value’ (such as money or services¹⁵), but may also be of a non-economic nature. Examples given in the preparatory works of advantages of a non-economic nature include a decoration, admission to a private school for the passive party’s children, sexual services and insider information (which is of no value in itself but which may be useful when buying or selling shares).
25. An advantage may only constitute grounds for a conviction for corruption if this advantage is deemed to be ‘improper’. The preparatory works give further guidance as to how this notion should be interpreted. It is explicitly recognised that what is improper may vary from sphere to sphere, from enterprise to enterprise and from agency to agency. The preparatory works¹⁶ state a number of factors which could be taken into account in assessing the impropriety of an advantage, including:

¹⁰ *Ibid.* p. 56.

¹¹ *Ibid.*

¹² *Ibid.* p. 57

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ The preparatory works mention that persons who buy legal services on behalf of an employer, will run the risk of being convicted of corruption if they receive free legal advice from a law company from which the employer buys or will possibly buy legal services.

¹⁶ *Ot.prp. No. 78 (2002-2003)*, p. 55.

- the economic value of the particular advantage¹⁷. It is however emphasised that no general rule can be formulated as to from what value an advantage is to be regarded as improper. Much will depend on the circumstances;
- the post or positions of the parties concerned and the relationship between them.¹⁸
- the purpose of the provision of the advantage, which will be a central factor when assessing whether or not it is/was improper. If it can be proven that the advantage was intended to influence the performance of the passive party's post, office or commission, it will generally be improper (provided – at least as regards the passive party - that s/he was aware of this intention or at least regarded such an intention as highly probable);
- the customary level of openness between the employee and his employer or principal. In the private sector, it may be unusual for a valuable gift to be regarded as improper if the employer or principal is made aware of it. In the public sector, the same gift may more readily be regarded as improper even if the recipient has made his superiors aware of it.
- any internal guidelines or a statement on acceptance of gifts in a contract for a commission. This is not to say that any breach of internal rules on the acceptance of advantages would constitute a breach of Section 276a PC, but merely that a violation of internal rules will more readily point to the impropriety of the advantage.

However, none of the abovementioned factors is decisive in assessing whether a particular advantage is to be considered 'improper'. The impropriety of the advantage is to be assessed on a case-by-case basis.

26. The Norwegian authorities give the example (see also paragraph 15 above) of a case of passive bribery involving a former director of a state-owned hospital. The advantages (cash payments, bank deposits and golfing and hunting trips) valued at NOK 220,000 (approximately €24,000) were considered to be improper *inter alia* because they were hidden from the employer, their value was in breach of internal guidelines and because of the defendant's position.

“Directly or indirectly”

27. The relevant provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. However, the Norwegian authorities indicate that the wording of Section 276a PC makes the method by which the corrupt act is committed irrelevant and that the person bribing through an intermediary will be held liable for corruption. This is also outlined in the preparatory works by mentioning that it is “irrelevant whether the active party uses another person, for example a person who resides in the passive party's home country, to carry out the corrupt act”.¹⁹ According to the Norwegian authorities, the same applies to the passive party: the use of an innocent intermediary, whether domestic or foreign, will not have any impact on the criminal liability of either the bribe-taker or the bribe-giver.

“For himself or herself or for anyone else”

28. The provision on passive bribery in Section 276a PC, subsection a, mentions explicitly that the undue advantage can be 'for himself or other person'. Although this phrase is absent from the

¹⁷ E.g. advantages of little value, advantages received as a natural expression of credit for work carried out or received in accordance with custom or in connection with normal representation will rarely be deemed to be improper.

¹⁸ E.g. a judge who receives a gift from a lawyer shortly after the judge has passed a judgment in favour of one of the lawyer's clients, the gift may be deemed as improper even if the gift is of little value. If the gift is given immediately before the judgment is passed, it will normally be considered to be improper (unless there was a natural reason for the gift, such as the judge's sixtieth birthday). Employees in the service sector may on the other hand often receive relatively valuable gifts from customers without this being regarded as improper.

¹⁹ *Ot.prp. No. 78 (2002-2003)*, p. 58.

provision on active bribery in Section 276a, the preparatory works state that this is covered by the term 'anyone'. Furthermore, the preparatory works outline that "even advantages donated to charitable organisations may constitute grounds for punishment pursuant to Section 276a PC".²⁰

"To act or refrain from acting in the exercise of his or her functions"

29. Although not expressly specified in Section 276a PC, this Section covers both acting and refraining from acting in the exercise of a person's duties. Section 276a PC concerns advantages offered, requested or received 'in connection with' the post, office or commission of the passive party to bribery and would thus normally involve a benefit provided in return for something that the passive party to the bribery will do or omit to do in connection with the performance of his duties, or for an act or omission that has already taken place. However, it is explicitly provided in the preparatory works that "it is not required that the bribe can be connected to a specific action or omission: cases of 'oiling' are covered if the advantage can be deemed to be improper and it is clearly associated with the passive party's post, office or commission".²¹
30. Section 276a only requires that the bribery has taken place 'in connection with' the passive party's post, office or commission. The preparatory works state that "punishment pursuant to the Penal code section 276a may therefore be imposed even if the passive party could not have acted otherwise within the framework of current legislation. However, characterisation of [the advantages provided in return for] such acts as improper requires a stronger case than otherwise."²²
31. Advantages offered, requested or received by the passive party as a private person are not associated with that person's post, office or commission and thus fall outside the scope of Section 276a.

"Committed intentionally"

32. The conduct described in Section 276a and b is only a crime when committed intentionally.

Sanctions

33. Both active and passive bribery pursuant to Section 276a PC carry a sentence of a fine²³ or a maximum of three years' imprisonment. Aggravated corruption pursuant to Section 276b PC carries a sentence of a maximum of 10 years' imprisonment.
34. In addition, 'deprivation of rights' pursuant to Section 29 PC can be imposed on "any person who has committed a criminal act, which shows that the person in question is unfit for or may misuse any position, enterprise or activity". When it is in the public interest, "a person may be deprived of the position or the right to hold any position or to carry on any enterprise or activity in future". 'Deprivation of rights' may be imposed as an additional or main sentence for corruption offences. Pursuant to Section 33a PC, the sanction can be imposed for a maximum term of five years or,

²⁰ *Ibid.* p. 55.

²¹ *Ibid.* p. 54.

²² *Ibid.*

²³ The Norwegian authorities report that there is no prescribed upper or lower limit for fines. As regards corruption, fines of two million, five million and eight million NOK (approximately €220,000, €550,000 and €875,000) have been issued. When assessing the level of the fine, Section 27 PC is to be taken into account, which provides: "When a fine is imposed, due consideration should be given not only to the nature of the offence but also especially to the financial position of the convicted person and to what he can presumably afford to pay in his circumstances. The fine shall accrue to the State Treasury."

when special reasons²⁴ apply, for an indefinite period; removal from office as a member of a municipal board, county council or the *Storting* [Parliament] may however only be effected for an electoral term.

35. The applicable sanctions for other comparable crimes are: up to three years' imprisonment for embezzlement, fraud and breach of trust (Sections 255, 270 and 275 PC). 'Gross' or aggravated embezzlement, fraud and breach of trust offences (Sections 256, 271 and 276 PC) carry maximum penalties of up to six years.

Bribery of members of domestic public assemblies, foreign public officials and members of foreign public assemblies (Article 4, 5 and 6 of ETS 173)

36. Section 276a PC (and in appropriate cases Section 276b PC on 'gross' corruption) is also applicable to members of domestic public assemblies, foreign public officials and members of foreign public assemblies.

37. As regards members of domestic public assemblies, as indicated above (see paragraph 17), the preparatory works to the 2003 corruption provisions outline that the term 'office' in Section 276a PC is intended to cover any political office, board appointment or other position of trust, irrespective of whether the bribe-taker receives remuneration for this office and if s/he was elected or appointed to it. Furthermore, they expressly state "Elected officers in associations and organisations fall into this category, as do members of the *Storting* [Parliament], municipal councillors and other popularly elected representatives".²⁵

38. As regards foreign public officials and members of foreign public assemblies, Section 276a PC explicitly provides that "by post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country". The preparatory works illustrate this by referring to offices in foreign parliamentary assemblies. The term 'office' is thus also intended to cover foreign public officials, members of a foreign parliament, foreign municipal councillors and other popularly elected representatives in another jurisdiction.

39. It is also stated in the preparatory works that it would not have been strictly necessary to include such a specification in the text of the provisions as foreign public officials would have already been covered by the first paragraph of Section 276a PC. However, as is stated therein, the Ministry of Justice wished to make unequivocally clear that Section 276a PC (and in appropriate cases 276b PC on 'gross' corruption) "is directed at corruption committed by or in relation to persons holding all the posts, offices and commissions prescribed by the Council of Europe Convention and the Additional Protocol".²⁶

40. The Norwegian authorities however also mention that when assessing whether a certain act can be considered corrupt or not, the fact that the bribe-taker is a foreign public official may come into play. It is stated in the preparatory works "business and civil service ethics and customs may vary considerably from country to country. (...) [T]he assessment of whether something is improper cannot remain uninfluenced by the circumstances in the country where a bribe is received or given or where the passive party operates. It is, for example, not unusual that public officials in a

²⁴ Section 33a PC does not specify what these special reasons would be. The Norwegian authorities indicate that in assessing the length of the period for which deprivation of rights is to be imposed, the court would take the character and seriousness of the crime, the consequences for the offender (i.e. will it mean that the offender will lose his livelihood or not) and the time that has passed since the crime took place into account.

²⁵ *Ot.prp. No. 78 (2002-2003)*, p. 54.

²⁶ *Ibid.* pp. 57-58.

number of countries refuse to carry out their work unless they receive payment to do so” (i.e. facilitation payments). These facilitation payments may be covered by Section 276a PC, “but only if the advantage offered or given to the foreign official is improper.” The main example in the preparatory works concerns situations in which there is an element of extortion (for example, a person feeling forced to pay a foreign public official money in order to get his/her passport back or to be permitted to leave the country): in such situations the person giving the payment would clearly not be criminally liable. The preparatory works furthermore state that “it is important to exercise a form of discretion that primarily regards the amount paid and whether the payment involves a breach of law or established practice (...)”.²⁷ In this regard, the preparatory works also refer to paragraph 38 of the Explanatory Report to the Convention.²⁸ To provide further guidance on the applicable legal provisions to Norwegian companies operating abroad a brochure was issued by the Ministry of Foreign Affairs in 2005 (revised in January 2008). In this brochure ‘*Si nei til korrupsjon – det lønner seg*’ (‘It pays to say no to corruption’) it is, *inter alia*, stated: “According to Norwegian law, all forms of corruption are prohibited. This also applies to Norwegian citizens and person domiciled in Norway who are engaged in business abroad. Also so-called facilitation payments, which means paying for a service that one is lawfully entitled to without extra payment, are to be considered corruption”. The Norwegian authorities indicate that if such an issue came before the court, the court would be obliged to take the custom in the foreign country into account.

41. With regard to ‘gross’ corruption pursuant to Section 276b PC involving foreign public officials or members of foreign public officials, the GET was informed that in as far as the factors listed in Section 276b PC pertained to the foreign jurisdiction this would also be taken into account (for example, the courts would look at the risk of significant economic or other damage in the other jurisdiction and/or if the passive party was a public official or any other person in a position of special trust in the foreign jurisdiction in question).
42. The elements of the offence and the applicable sanctions detailed in paragraphs above as regards bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies, foreign public officials and members of foreign public assemblies. There have not been any cases involving bribery of members of domestic or foreign public assemblies; since the entry into force of the 2003 penal provisions there has been one case of bribery of foreign public officials, which resulted in an acquittal by the Court of First Instance.

Bribery in the private sector (Articles 7 and 8 of ETS 173)

43. As indicated before (see paragraphs 16 and 17 above), the terms ‘post, office or commission’, as used in Section 276a PC, have a broad scope and are meant to cover all types of employment, office and commission whether in the public or private sector. Section 276a PC therefore does not limit the corrupt conduct to that carried out ‘in the course of business activity’ but solely requires that the improper advantage was given, offered, requested and/or received “in connection with a post, office or commission”. Section 276a PC does furthermore not expressly require a breach of duties. As mentioned above (see paragraph 30) a person may be convicted for bribery even if s/he could not have acted otherwise.

²⁷ *Ibid.* p. 56.

²⁸ This paragraph states “What constitutes and ‘undue’ advantage will be of central importance in the transposition of the Convention into national law. ‘Undue’ for the purpose of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafter of the Convention, the adjective ‘undue’ aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts”.

44. However in assessing whether an advantage received, requested, offered or given is improper, the fact that the conduct took place in the private sector may be a factor of relevance. In this regard, as also mentioned in paragraph 25 above, the preparatory works consider that “in private undertakings it is rarely natural to characterise even a valuable gift as improper if the employer or principal is made aware of the gift having been received. In the public sector, such a gift may more easily be envisaged as improper even if the recipient has made his superiors aware of it. (...) [C]onsideration must be given to what is normal practice within the sphere of life or activity concerned. Particularly in the private sector, there may be considerable variations in practice from trade to trade and from enterprise to enterprise. (...) In general, it must be a basic principle that public officials must tolerate being subjected to a stricter norm than employees of private undertakings”.²⁹ As regards the impropriety of an advantage, the Norwegian authorities report that in private sector bribery cases to date the courts have considered advantages (in the form of hunting trips, televisions, excursions etc.) with a value of approximately €1000 to be improper.
45. Other than as regards the assessment of the impropriety of the advantage, the description of the elements of the offence and the applicable sanctions detailed in the paragraphs above as regards bribery of domestic public officials also apply to bribery in the private sector.
46. The Norwegian authorities furthermore indicate that under the old provisions of the Penal Code there have been a number of cases of private-to-private bribery, which were prosecuted as ‘gross’ breach of trust. As indicated in paragraph 44 above, there have also been several cases concerning private sector bribery since the entry into force of Section 276a PC.

Bribery of officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts (Article 9, 10 and 11 of ETS 173)

47. Officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts are also covered by the terms ‘post’ (for officials of international organisations and officials of international courts) and ‘office’ (for members of international parliamentary assemblies and judges of international courts) in Section 276a PC. The Norwegian authorities indicate that it is made clear in the preparatory works that coverage of these categories is one of the objectives of the 2003 amendments. As is illustrated in the preparatory works³⁰, even if a post or office is with an international organisation or court, being an official of an international organisation, a member of an international parliamentary assembly or a judge or an official of an international court would still involve ‘a post, office or commission in a foreign country’ (or in appropriate cases: a post, office or commission in Norway).
48. It should be noted, that – unlike Article 9 of the Convention³¹ – it was the Norwegian legislator’s explicit intention to also cover acts of corruption committed in connection with posts, offices or commission in international non-governmental organisations such as the Red Cross and Amnesty International: “Although this is not necessary for the fulfilment of Norway’s obligations pursuant to Article 9 of the Council of Europe Convention, the Ministry wishes that acts of corruption committed in connection with such organisations shall also be covered by the proposal.”³²

²⁹ *Ot.prp. No. 78 (2002-2003)*, p. 56.

³⁰ *Ibid.* p. 47.

³¹ See paragraph 61 of the Explanatory Report to the Convention, which *inter alia* states: “It also means that international non-governmental organisations (NGOs) fall outside its scope (...)”

³² *Ot.prp. No. 78 (2002-2003)*, p. 47.

49. The elements of the offence and the applicable sanctions detailed above in the paragraphs on bribery of domestic public officials apply accordingly to bribery of officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts. The Norwegian authorities mention one case involving bribery of officials of international organisations (involving passive bribery of a former chief buyer working for an UNICEF office in Denmark), as well as a case involving the Norwegian branch of an international humanitarian organisation. However, both cases took place before the entry into force of the 2003 corruption provisions and were in fact prosecuted as 'gross' breach of trust.

Trading in influence (Article 12 of ETS 173)

Definition of the offence

50. Trading in influence is a criminal offence under Norwegian law and is covered by Section 276c PC:

Section 276c

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

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

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

The penalty for trading in influence shall be fines or imprisonment for a term not exceeding three years.

Any person who aids and abets such an offence shall be liable to the same penalty.

Elements/concepts of the offence

"Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]"

51. The preparatory works³³ to Section 276c explain that "the influencing agent must give an impression that he or she intends to attempt to 'influence the performance of' a post, office or commission. Punishment pursuant to Section 276c, first paragraph (a) may be imposed even if the influencing agent is not acquainted with or has no practical possibility of making contact with the person that he or she claims to be able to influence, but is merely pretending to be capable of influencing the person concerned. Nor is punishment conditional upon a genuine attempt by the influencing agent to influence the decision-maker. It is sufficient that he or she requests, receives or accepts an offer of an improper advantage 'in return for' doing this. No requirement may be inferred from this concerning a genuine intention on the part of the perpetrator. It is sufficient that the influencing agent *pretends* to the active party that he or she intends to influence the performance of a person's duties in a post, office or commission."

Other concepts/elements

52. The constitutive elements of the bribery offences (i.e. 'improper advantage', 'requests', 'offers', 'accepts an offer' etc.) also apply with regard to active and passive trading in influence. In this regard it should also be noted that as Section 276a PC on corruption is quite broad, certain

³³ *Ibid.*, p. 60.

cases of what can be regarded as trading in influence would fall within the remit of the ordinary provision on bribery in Section 276a PC and not Section 276 PC. As outlined in the preparatory works: “If the influencing agent receives an improper advantage in connection with his or her *own* post, office or commission, the legal basis for possible criminal liability must be sought in Section 276a PC. (...) However, if an attempt is made to influence a person who has not association with the influencing agent’s undertaking, agency or organisation, it is, on the other hand, Section 276c PC that shall be applied”.³⁴

53. Moreover, it is noteworthy that in three respects Section 276c PC is broader than prescribed by Article 12 of the Convention. First of all, unlike Article 12 of the Convention it is not restricted to influence over certain officials in the public sector, but instead refers to ‘a post, office, or commission’ regardless of whether this is a post, office or commission in the private or public sector. Secondly, in contrast to Article 12 of the Convention Section 276c PC does not limit the offence to influence over the *decision-making* of certain persons but instead refers to the broader concept of influencing the performance of a post, office or commission. Influence on acts and omissions, which cannot be characterised as decisions, may therefore also – depending on the circumstances – constitute grounds for liability under Section 276c PC. The preparatory works³⁵ mention as an example that a person married to a journalist, who receives payment to influence his/her spouse to write about a certain enterprise, political party, film or theatrical production. Thirdly, Section 276c PC does not require that the influence itself has an improper character, but solely that the advantage has an improper character.

Sanctions

54. The sanction applicable to active and passive trading in influence is a fine or a maximum prison sentence of three years. In addition, ‘deprivation of rights’ (see paragraph 34 above) pursuant to Sections 29 and 33 PC can be imposed.
55. There has been one case of trading in influence in Norway. In June 2004, ØKOKRIM issued penalty notices³⁶ to a Norwegian oil company and the company’s former international executive vice president, for failing to terminate (as soon as possible after the entry into force of the provision on trading in influence in the Penal Code in July 2003) the agreement the company had, to pay a foreign citizen \$15.2 million over a period of 11 years for ‘consultancy services’ to influence (or have others influence) the decisions of relevance to the company’s commercial activities in the foreign jurisdiction (this included the awarding of contracts in the oil and gas sector). The advantage provided to the foreign citizen was considered to be improper, *inter alia*, because of its amount and the fact that the true purpose of the agreement was a secret. The company was fined 20 million NOK (approximately €2.2 million) and the vice-president in question 200,000 NOK (approximately €22,000). Both fines were accepted.

Bribery of domestic and foreign arbitrators and domestic and foreign jurors (Articles 1-6 of ETS 191)

56. Section 276a PC – and in appropriate cases Section 276b PC on aggravated corruption – is also applicable to domestic and foreign arbitrators and domestic and foreign jurors. Arbitrators and jurors are covered by the term ‘office’ in Section 276a PC (or in the case of arbitrators also by the term ‘commission’). To this end, the preparatory works outline: “Through the alternative ‘office’,

³⁴ *Ibid.* p. 59.

³⁵ *Ibid.* p. 60.

³⁶ Penalty notices are optional fines. If the fine is not accepted by the offender, it will function as a replacement for an indictment after which the ordinary court proceedings in criminal cases will proceed.

the proposal covers corruption committed by or in relation to persons with political office, board appointments or other positions of trust. It is not a requirement that the passive party to bribery receives remuneration for the position of trust, and it is of no consequence whether the person concerned occupies the position by virtue of election or appointment. (...) Judges, lay judges, jury members and arbitrators are also included, although it may be more natural to say that an arbitrator has a 'commission' for the litigating parties".³⁷ Furthermore, as indicated above, 276a PC explicitly provides that by 'office' or 'commission' in the first paragraph is also meant an office or commission in a foreign country, thereby also covering bribery of foreign arbitrators and jurors. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic and foreign arbitrators and jurors. There have not been any court decisions/case law concerning bribery of arbitrators and jurors.

Other questions

Participatory acts

57. Section 276a, Section 276b on aggravated corruption and 276c on trading in influence all mention explicitly in the text of the relevant provisions that "any person who aids and abets such an offence shall be liable to the same penalty".

Jurisdiction

58. Norway has established jurisdiction over (*inter alia*) all bribery and trading in influence offences committed on its territory (territoriality principle), pursuant to Section 12, first paragraph PC. Furthermore, Section 12, paragraph 3, subsection (a) PC establish jurisdiction over (*inter alia*) all bribery and trading in influence offences committed abroad by Norwegian citizens (nationality principle) or persons residing in Norway.³⁸ In addition, the Penal Code also provides jurisdiction over bribery and trading in influence offences committed abroad by a foreigner, pursuant to Section 12, paragraph 4, subsection (a), regardless of whether the act is criminalised in the legislation of the country where it is committed (universal jurisdiction). Prosecution of foreigners under the latter provision can however only be instituted on the basis of a decision of the King (as stipulated by Section 13 PC).

Section 12

Unless it is otherwise specially provided, Norwegian criminal law shall be applicable to acts committed:

1. *in the realm, including*
 - a) *any installation or construction placed on the Norwegian part of the continental shelf and used for exploration for or exploitation or storage of submarine natural resources,*
 - b) *constructions for the transport of petroleum resources connected with any installation or construction placed on the Norwegian part of the continental shelf,*
 - c) *the security zone around such installations and constructions as are mentioned under a and b above,*
 - d) *any Norwegian vessel (including a Norwegian drilling platform or similar mobile installation) in the open sea, and*
 - e) *any Norwegian aircraft outside such areas as are subject to the jurisdiction of any State;*
2. *on any Norwegian vessel or aircraft wherever it may be, by a member of its crew or any other person travelling on the vessel or aircraft; the term vessel here also includes a drilling platform or similar mobile installation;*
3. *abroad by any Norwegian national or any person domiciled in Norway when the act*
 - a) *is one of those dealt with in chapters 8, 9, 10, 11, 12, 14, 17, 18, 20, 23, 24, 25, 26 or 33 of this*

³⁷ *Ot.prp. No. 78 (2002-2003)*, p. 54.

³⁸ Sections 276a, 276b and 276c are included in Chapter 26 of the Penal Code, which is explicitly mentioned in Section 12, paragraph 3, subsection (a) PC.

code or sections 135, 141, 142, 144, 145 second paragraph, 145 b, 147 a, 147 b, 162 c, 169, 192 to 199, 202, 203, 204 a, 222 to 225, 227 to 235, 238, 239, 242 to 245, 291, 292, 294 No. 2, 317, 326 to 328, 330, last paragraph, 338, 342, 367 to 370, or 423 and in any case when it

b) is a felony or misdemeanour against the Norwegian State or Norwegian state authority,

c) is also punishable according to the law of the country in which it is committed, or

(...)

4. abroad, by a foreigner when the act either

a) is one of those dealt with in sections 83, 88, 89, 90, 91, 91 a, 93, 94, 98 to 104 a, 110 to 132, 147 a, 147 b, 148, 149, 150, 351 a, 152 first cf. second paragraph, 152 a, 152 b, 153 first to fourth paragraphs, 154, 159, 160, 161, 162 c, 169, 174 to 178, 182 to 185, 187, 189, 190, 192 to 195, 217, 220 second and third paragraph, 221, 222 to 225, 227 to 229, 231 to 235, 238, 239, 243, 244, 256, 258, 266 to 269, 271, 276 to 276 c, 291, 292, 324, 325, 328, 415 or 423 of this code, or sections 1, 2, 3 or 5 of the Act relating to defence secrets,

(...).

In cases in which the criminality of an act depends on or is influenced by any actual or intended effect, the act shall be regarded as committed also where such effect has occurred or is intended to be produced.

Statute of limitations

59. Pursuant to Section 67 PC, the limitation period is calculated on the basis of the maximum sentence for the offence:
- 2 years for offences with a maximum sentence of 1 year imprisonment;
 - 5 years for offences with a maximum sentence of 4 years' imprisonment;
 - 10 years for offences with a maximum sentence of 10 years' imprisonment;
 - 15 years for offences with a maximum sentence of 15 years' imprisonment, and;
 - 25 years for offences with a maximum sentence of 21 years' imprisonment.
- Consequently, the limitation period for corruption (Section 276a PC) is five years; for 'gross' corruption (Section 276b PC) ten years and for trading in influence (Section 276c PC) five years. If a person has committed two or more offences by the same act, the longest limitation period is to apply to all offences.
60. Pursuant to Sections 68 and 69 PC, the limitation period begins to run from the date the criminal activity has ceased and is interrupted by a legal proceeding entailing that the suspect be given the status of a person charged.

Defences

61. The Norwegian Penal Code does not provide for the possibility to invoke any special defences as regards the commission of bribery and trading in influence offences.

Data

62. The Norwegian authorities report on the following cases relating to bribery and trading in influence:

Year	Cases	Clear up rate (%)	Fine	Indictment
<i>Section 276a (corruption)</i>				
2007	10 1 abroad ³⁹	93,8 100 abroad	3 -	10 -

³⁹ The term 'abroad' in this table refers to cases involving a 'post, office or commission in a foreign country' (pursuant to the second paragraph of Sections 276a and 276c).

2006	7 4 abroad	100	1	1
2005	6 2 abroad	28,6	3	2
<i>Section 276b ('gross' corruption)</i>				
2007	20 1 abroad	100 100 abroad	1 1	20 1
2006	9	85,7	1	4
2005	6	75		3
<i>Section 276c (trading in influence)</i>				
2007	3 3 abroad	0 0 abroad		
2006	- 4 abroad	0 0 abroad		
2005	3 4 abroad	0 0 abroad		
<i>Corruption cases under pre-2003 legislation (Section 275 and 276)</i>				
2006		100		1
2005		100		1

Legislative amendments

63. The Norwegian authorities state that a proposal for a new General Civil Penal Code is being prepared. The first part of this Code comprising the general provisions was already adopted in 2005 (but is not yet in force). An *Odelstingsproposisjon* containing proposals for new penal provisions, including provisions on economic crime such as corruption and trading in influence, was sent to the *Storting* by the end of 2008. The GET was informed that changes to the provisions on corruption and trading in influence are of a technical nature and would not change the substance of the provisions.

III. ANALYSIS

64. Sections 276a, 276b and 276c of the Penal Code (PC), on respectively corruption, 'gross' corruption and trading in influence, were introduced in the PC in July 2003. The GET was informed of several shortcomings in the old provisions, in particular concerning private sector corruption, which had led to a practice in which Sections 275 and 276 on breach of trust and 'gross' breach of trust were used more often to prosecute bribery offences than the provisions on bribery. As becomes clear from the preparatory works to the new provisions, apart from remedying the aforementioned shortcomings, it was the intention of the legislator that with the new provisions Norway would comply fully with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Both the Convention and the Additional Protocol were subsequently ratified in March 2004.
65. A characteristic of Sections 276a, 276b and 276c PC is that they neither distinguish between public and private sector offences⁴⁰, nor between corruption (or trading in influence offences) committed by persons holding a post, office or commission in a foreign jurisdiction and offences committed by persons holding such positions in Norway itself. The corruption and trading in influence provisions themselves are phrased in general terms, but are supplemented by the preparatory works to the 2003 amendments, which are considered as secondary source of legislation and provide practitioners with further guidance on the interpretation of the provisions

⁴⁰ Although in practice, as will be outlined below, the fact that a certain conduct took place in the private sector will have a bearing on the assessment of whether a particular advantage can be regarded as improper or not.

(subject to subsequent interpretation by the courts). As such the offences criminalised by Sections 276a, 276b and 276c PC cover a wide range of corrupt behaviour and offenders, and – as will be explained further below – in some respects even go beyond the standards set by the Convention and the Additional Protocol. The GET welcomes in particular that as regards the provisions themselves practitioners were almost unanimous in their positive assessment, which appears to be underscored by a steady rise in corruption cases adjudicated under these provisions. In this connection, some interlocutors nevertheless mentioned that the resources made available to prosecutors and investigators at local level to fight corruption were insufficient. Notwithstanding this, the GET shares the positive assessment of the practitioners met and considers that the provisions on corruption and trading in influence in the Norwegian Penal Code are clearly of a high standard.

66. Concerning the subject of the bribery offence – the range of offenders –, Section 276a PC (on ‘ordinary’ corruption) does not contain an exhaustive list of functions, but instead refers to acts of corruption committed “in connection with a post, office or commission”. Even though the preparatory works state that “*it was not strictly necessary to include such a specification*”, the second part of Section 276a PC explicitly provides that this is also meant to include posts, offices and commissions in a foreign country. In this regard it is immaterial whether the post, office and commission is in/with a foreign administration or company or with an international organisation in a foreign jurisdiction. The preparatory works explain that “*the Ministry wishes to make it quite clear that the proposed amendment is directed at corruption committed by or in relation to persons holding all the posts, offices and commissions affected by the Council of Europe Convention and the Additional Protocol.*” As such, Section 276a PC not only covers the categories of persons and functions mentioned in Articles 1 and 4 to 11 of the Convention and Articles 1 to 6 of the Additional Protocol, but also persons working for international non-governmental organisations, such as Amnesty International or the Red Cross, a category of persons not covered by the Convention or the Additional Protocol. The GET welcomes this.
67. As regards the object of bribery, the GET examined in detail the meaning of the term ‘improper advantage’ (or ‘*utilbørlig fordel*’ in Norwegian) in Section 276a PC, bearing also in mind that Section 276c PC on trading in influence contains a similar term. As is indicated in the preparatory works “*an advantage may only constitute grounds for punishment if it is improper*”. The notion of impropriety is thus the central factor in assessing whether a particular conduct can be regarded as bribery (or trading in influence). In this respect, the GET did have some understanding for the argument put forward by a few interlocutors that the wording of Section 276a PC did not offer much legal certainty, as the central notion of the corrupt conduct, namely the impropriety of the advantage, remains undefined in the law. However, the GET also noted that the preparatory works contain an extensive explanation of what is to be considered an ‘improper’ advantage – indicating, *inter alia*, that the advantage does not have to have an independent material value and may only be of value for the person receiving it. Recognising furthermore that “*the threshold for impropriety may vary from sphere to sphere, from enterprise to enterprise and from agency to agency*”, the preparatory works contain a (non-exhaustive) list of criteria – such as the posts or positions of the parties concerned and the relationship between them, the purpose of the advantage, the openness in the relationship between the employee and his/her employer (i.e. if the employer was made aware of the advantage⁴¹) and the internal rules, applicable contract or

⁴¹ In this regard, the preparatory works explain “*In private undertakings, it is rarely natural to characterize even a valuable gift as improper if the employer or principal is made aware of it. In the public sector, it may more easily be envisaged that an advantage may be said to be improper even if the recipient has made his superiors aware of it. Particularly in the private sector, there may be considerable variations in practice from trade to trade and from enterprise to enterprise.*” The preparatory works add “*in general, it must be a basic principle that public officials must tolerate being subjected to a stricter norm than employees of private undertakings*”.

normal practice within the sphere of life or activity concerned – which are to be taken into account when assessing whether an advantage is improper or not. Moreover, taking into consideration the guidance⁴² provided in the codes of conduct for the various sectors as to which advantages may or may not be accepted (and the legislation applicable to these advantages), as well as the fact that the term ‘improper’ is not an uncommon term in the Norwegian Penal Code⁴³ and that it is common in the Norwegian legal tradition that the exact meaning of certain terms is further defined in case-law – which allows for the possibilities to reflect shifts in societal attitudes towards certain conduct over time –, the GET concludes that the notion ‘undue advantage’ used in the Convention is satisfactorily covered by the term ‘improper advantage’ in Section 276a PC.

68. Turning to the key elements of the bribery offence, an issue of concern to the GET is the absence of the terms ‘promising’ and ‘acceptance of a promise’ from Section 276a PC (and Section 276c PC on trading in influence). The Norwegian authorities emphasised that Section 276a PC could not be regarded as more limited than the Convention and referred to the preparatory works where it is clearly stated that the term ‘promise’ was deliberately omitted from the text of Section 276a PC (and Section 276c PC) as “*The Ministry cannot see that the alternative ‘promises’ would have any independent significance in a Norwegian penal provision against corruption in addition to the alternative ‘offers’ (...)*”. The interlocutors met by the GET found it obvious that both situations in which the active party promises to give the passive party an improper advantage in reaction to a request by the passive party (i.e. in which the initiative did not come from the active party as the term ‘offer’ would suppose) and in which the active party commits him/herself to give an undue advantage later would indeed be covered by the terms ‘offers’ and ‘accepts an offer’ in Section 276a PC (and Section 276c PC). In light of this and the clear explanations provided on this point in the preparatory works, it is accepted that the ‘promise’ of an undue advantage and the ‘acceptance of a promise’ of such an advantage are adequately covered by Section 276a PC (and Section 276c PC).
69. The relevant provisions contained in the Penal Code do not expressly provide for indirect commission of bribery offences, but both the explanation provided in the preparatory works – that it is “irrelevant whether the active party uses another person (...) to carry out the corrupt act” and statements of the interlocutors on site did not leave the GET with any doubt that use of an intermediary by either the passive or the active party to the corrupt act was sufficiently covered.
70. As regards the beneficiaries of the bribe, the GET noted that both the provision on passive bribery in Section 276a PC, subsection a, and on passive trading in influence in Section 276c, subsection a, mention explicitly that the undue advantage can be ‘for himself or other person’. This phrase is absent from the subsections on active bribery in Section 276a PC and active trading in influence in Section 276c, but according to the Norwegian authorities would be covered by the term ‘anyone’ in the two sections. Although in the view of the GET the word ‘anyone’ is clearly less specific than the phrase used in the subsections on passive bribery and passive trading in influence, the interlocutors met on site were unanimous in their conviction that third party beneficiaries would indeed be covered by the term ‘anyone’ and also pointed to the preparatory works where it is stated that “even advantages donated to charitable organisations may constitute grounds for punishment pursuant to Section 276a PC”. The GET accepts the explanation that the term ‘anyone’ covers third party beneficiaries.

⁴² In this regard, the GET took note of the “Ethical Guidelines for the Public Service”, which contain a chapter on the acceptance of gifts.

⁴³ The term ‘improper’ is *inter alia* also used in Sections 105 (influencing voters), 127 (felonies caused by public officials), 222 (forced marriage) and 224 (sexual exploitation) PC.

71. Turning to trading in influence, the GET welcomes that Norway has introduced this offence in its Penal Code in 2003. Section 276c PC provides that a person who requests, receives or accepts an offer of an improper advantage in return for influencing the duties related to the performance of a post, office or commission (or provides or offers an improper advantage to have someone else do so) is liable to a fine or a maximum of three years' imprisonment. In three respects this Section goes further than Article 12 of the Convention, namely (1) Section 276c PC does not limit the offence to the exertion of influence over decision-making, but instead refers to influence over the performance of a post, office or commission; (2) it does not restrict the offence to influence over (the decision-making of) domestic and foreign public officials, members of domestic and foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts, but simply refers to the influence over the performance of a post, office or commission in Norway or a foreign country, regardless of whether this post, office or commission is in the public or private sector; and (3) instead of referring to both an 'undue advantage' and 'improper influence', it solely requires the advantage to have an improper character.
72. It should be noted that as Section 276a PC on 'ordinary' corruption has a wide scope, certain cases of trading in influence would fall within the remit of this Section instead of Section 276c PC: if – for example – a person receives an improper advantage to influence his/her superior, Section 276a PC would apply; only if s/he receives an improper advantage to influence someone who has no association with his/her own office, post or commission would the offence fall under Section 276c PC. Since the entry into force of Section 276c PC in 2003, there has been one case⁴⁴ in which a Norwegian oil company and its former vice-president were fined respectively 20 million NOK (approximately €2.2 million) and 200,000 NOK (approximately €22,000) for trading in influence, involving payments to another person to have him influence individuals who were involved in decision-making relevant to the oil company's commercial activities in Iran. This case underscores the broad scope and usefulness of Section 276c PC. However, it also drew the attention of the GET to the fact that, unlike with regard to 'ordinary' corruption – which has an aggravated component in Section 276b PC and which allows for the use of special investigative means –, no provision on 'gross' or aggravated trading in influence had been included in the Penal Code. In the opinion of the GET there may be situations where a provision on aggravated trading in influence could be useful. In this regard the GET wishes to stress that as trading in influence poses particular investigative and evidentiary challenges, the introduction of a provision on 'gross' trading in influence in the Norwegian Penal Code with a sanction which would allow for the possibility to use special investigative means would be a valuable complement to the existing provisions. In light of this reasoning, the GET recommends **to consider introducing a provision on 'gross' or aggravated trading in influence in the Penal Code**.
73. The sanctions for active and passive bribery and active and passive trading in influence are the same: fines or up to three years' imprisonment. For aggravated bribery ('gross' corruption) the maximum sentence can be up to 10 years' imprisonment. Section 276b PC concerning 'gross' corruption provides a list of factors to be taken into account when deciding whether a particular act can be regarded as 'gross' corruption, which includes the economic advantage acquired, the position of the bribe-taker and the risk of economic or other damage as a result of the corrupt act. The GET was informed that the qualification of a particular conduct as 'gross' corruption depends on a concrete assessment of each case: even if one or more of the factors mentioned in Section 276b were present, it could be that the conduct would nevertheless not be qualified as 'gross' corruption. Similarly the list of factors was not exhaustive and factors other than those mentioned

⁴⁴ See for this case paragraph 55 above. The company and its former vice-president received penalty notices (optional fines, see footnote 36 above), which they accepted.

in Section 276b could be taken into account. The GET welcomed that in assessing whether a particular act would constitute 'gross' corruption, not only material factors, such as the value of the improper advantage or the economic benefit for the bribe-giver, but also non-economic concerns would be taken into account, including – in cases of transnational bribery – the risk of significant (economic or other damage) in a foreign jurisdiction.

74. Although it would thus appear that the level of sanctions as *such* for corruption, 'gross' corruption and trading in influence is satisfactory, the GET has serious concerns that Norway's compliance with Article 19 of the Convention *in practice* as regards the offence of 'gross' corruption can be hampered by its rules of criminal procedure. Specifically, these concerns refer to situations in which a verdict on 'gross' or aggravated corruption is being appealed. Whereas in a case of 'gross' corruption the Court of First Instance is composed of both professional judges and lay judges (including lay judges with special expertise if so decided by the court⁴⁵), the Court of Appeal in such cases is composed of a jury of ten persons (without special expertise), who decide on the question of guilt of the indicted person (with at least seven out of the ten jury members having to find him/her guilty).⁴⁶ Although the two appeal cases involving 'gross' corruption in 2008 ultimately resulted in a conviction (in one case, however, only after the acquittal by the jury was overturned by the court), the GET agrees with a number of practitioners that the effectiveness of the provision on 'gross' corruption could be undermined in cases of appeal and could lead to unjust court decisions.⁴⁷ In discussing one particularly complex corruption case, which had been adjudicated under the old corruption provisions, one practitioner indicated to the GET that if a similar case were to be adjudicated today under the new provisions the conviction would be "very difficult" and "more or less impossible" to uphold on appeal before a panel of laymen without any special expertise. The GET is concerned that Norway's compliance with Article 19 of the Convention, which requires parties to provide for effective, proportionate and dissuasive sanctions and measures for corruption offences, could be undermined by the aforementioned rules on appeal cases. The GET therefore recommends **to consider taking appropriate measures to ensure that cases of 'gross' corruption are not being adjudicated on appeal by a panel of only laymen, in order to ensure full compliance with Article 19 of the Criminal Law Convention on Corruption (ETS 173).**
75. Finally, the GET was pleased to note the broad provision on jurisdiction in Section 12 PC. As regards territorial jurisdiction, apart from establishing jurisdiction over all offences committed on Norwegian territory, Section 12 allows Norway to also assume jurisdiction in cases in which the effects of the committed offence occur or are intended to be produced on Norwegian territory and the criminality of the act depends on or is influenced by the actual or intended effects of the act. Furthermore, Norway has established jurisdiction over corruption and trading in influence committed by nationals and residents of Norway abroad without making this subject to a dual criminality requirement. Finally, Norway can also assume jurisdiction over bribery and trading in influence offence committed abroad by a foreigner, regardless of whether the act is criminalised

⁴⁵ Pursuant to Section 262 of the Code of Criminal Procedure, the prosecuting authority shall – if it is of the opinion that a case should be tried by expert lay judges – state this when the indictment is forwarded to the court, together with a summary of the evidence it will produce. The President of the Court subsequently decides whether lay judges with special expertise are to be involved in the case, pursuant to Section 277 of the Code of Criminal Procedure

⁴⁶ However, it should be noted that, pursuant to Section 376a, if – in spite of the jury's verdict acquitting the indicted person – the court finds that s/he is nevertheless undoubtedly guilty, the court may unanimously decide that the case shall be retried before other judges. In those situations, the case shall be retried before a composite court (i.e. involving both professional judges and lay judges)

⁴⁷ The GET was informed that some interlocutors had also expressed these concerns in the context of a public hearing concerning possible measures to facilitate a more expedient handling of criminal cases and had proposed to make an exception for cases of 'gross' corruption. This consultation process has not been finalised yet.

in the legislation of the country where the act has been committed (universal jurisdiction).⁴⁸ The GET welcomes the breadth of Section 12 of the Norwegian Penal Code.

IV. CONCLUSIONS

76. The relevant provisions on corruption (both 'ordinary' and aggravated corruption) and trading in influence in the Norwegian Penal Code and, in particular, the interpretation given to the letter of these provisions in the preparatory works, are of a high standard and fully in line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Nevertheless, GRECO recommends to give consideration to amending the Penal Code and Code of Criminal Procedure on two issues, to prevent possible problems in the application of the law in practice and to fine-tune the existing provisions. First of all, the law could benefit from the introduction of a provision on 'gross' or aggravated trading in influence, in particular as the sanction for such an offence would be likely to allow for the use of special investigative means. Secondly, it is strongly supported to consider amending the Code of Criminal Procedure, to preclude that panels of laymen without special expertise decide on the guilt of an offender in appeal cases involving 'gross' or aggravated corruption.
77. In view of the above, GRECO addresses the following recommendations to Norway:
- i. **to consider introducing a provision on 'gross' or aggravated trading in influence in the Penal Code** (paragraph 72);
 - ii. **to consider taking appropriate measures to ensure that cases of 'gross' corruption are not being adjudicated on appeal by a panel of only laymen, in order to ensure full compliance with Article 19 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 74).
78. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Norwegian authorities to present a report on the implementation of the above-mentioned recommendations by 31 August 2010.
79. Finally, GRECO invites the authorities of Norway to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.

⁴⁸ Prosecution of foreigners pursuant to this subsection of Section 12 PC can however only be instituted on the basis of a decision of the King (see paragraph 58 above).