Siri Sofie Tveiten

Per Knut Asphaug Bernhardt

Master Thesis

BI Norwegian Business School

- Corruption -

-The boundary between customer relationship management and illegal corruption, bribery and trading in influence -

Supervisor:
Roy Kristen Kristensen

Campus:

BI Oslo

Examination code and name:

GRA 19003 – Master Thesis

Hand-in date:

26.08.2016

Program:

Master of Science in Business

Table of Contents

I Abbreviations / translations

Europarådskonvensjonen	The European Convention / The Criminal Law Convention on Corruption
Forskrift til skatteloven	FSSD
Hvitvasking	Self laundering
Høyesterett	Supreme court
Kvalifisert utilbørlig opptreden	Qualified undue conduct
Lagmannsrett	Court of Appeal
Legalitetsprinsippet	Principle of Legality
Norges Handelsorganisasjon (NHO)	Norwegian Trade Organization
Offentlig tjenestemann	Public official
Påvirkningshandel	Trading in influence
Reelle hensyn	Actual / real considerations
Simpel korrupsjon	Sordid corruption
Skatteloven	Taxation Act (TA)
Statistisk Sentralbyrå	SSB
”Stilling, verv eller oppdrag”	”Position, duty or assignment”
Straffeloven	Penal Code (PC)
Straffelovrådet	Penal Code Commission
Tingrett	District court
Tjenestemannsloven	Civil Service Act
Transparency International	TI
Urettmessig motytelse	Unlawful reciprocity
Utilbørlig fordel	Undue advantage
Utilbørlighetsprinsippet	The Impropriety principle
Økonomisk utroskap	Economic infidelity

1. Introduction

This Master Thesis examines the relationship between Customer Relationship Management, focusing on the interactions among businesses and customers, and illegal acts of corruption, trading in influence and facilitation payments.

Corruption offences are widespread and pose a risk to fair competition, political processes, public means and the efficient allocation of financials and resources. They are serious and socioeconomic problems that occur in both the private and public sector. Corruption crimes are often hard to detect and investigate which give rise to a significant number of unreported and undetected cases.

The difference between what is legal and what is not are in some cases obvious and apparent. Large-scale bribes to secure contracts or expedite processes are, with exceptions of course, often unmistakably undue within our legal system – the lower bounds of what is acceptable however are more inconclusive. Exerting influence, seeking advantages or planting the seeds for new and continued business relationships by maintaining or evolving client relations is a necessary business practice, and legal within the judicial framework. The means to achieving the end comes in all forms and might as well be a modest dinner or a branded merchandising item as a trip to a Formula-1 championship.

This thesis aims at providing a thorough reference into which frameworks govern these issues and what they mean, what their foundations are and how they are actually applied. It will provide background for the considerations that lawmakers use to draw a line and the limitations companies adhere to internally will be explored and articulated. Through using actual verdicts that establishes jurisprudence we will seek to establish some general guidelines and raise awareness around judicial “grey areas”.

2. Abstract

2.1 Findings

The impropriety principle is a central legal standard that should be determined by the courts in light of the prevailing ethical and moral perceptions in the society. To decide whether an advantage is undue, the preparatory work mentions some factors that should be part of the assessment: the economic value of the advantage, the giver and receiver's positions and their relationship, whether there is a public official involved, the purpose of the advantage, whether there has been transparency, whether internal guidelines or business practices have been breached, and finally the fundamental value behind the clause. The deed would also have to be clearly blameworthy[1].

It seems as though the element that is emphasized by the court is whether the active briber intends to influence the passive briber. If an advantage is meant to influence the receiver it would naturally be perceived as an undue advantage. This is illustrated in the verdict where a man tried to bribe two police officers with 500 kroner, and was convicted of corruption[2]. The same is illustrated in the Ruter verdict[3], where the operations manager was acquitted among other because he could prove that the dinners were not treated to influence him. A similar argument is found in the Unibuss case[4], where a defendant received "undue advantages", but was not a decision-maker and consequently could not reciprocate.

Since the changes in the Penal Code in 2003 corruption in the private and the public sector has been punishable by the same clause, § 276 a (continued as § 387 in the 2005 Penal Code), but there is still a practical difference to the two. As illustrated in verdicts such as the Ruter verdict, Unibuss and the Ullevål case[5] situations involving public means or people representing public companies are subject to stricter moral standards and regulations. This means that not only public officials directly, but also people with similar positions of

[1] Chapter 8 in this thesis
[2] Chapter 6.5.4 in this thesis
[3] Chapter 6.2 in this thesis
[4] Chapter 6.3 in this thesis
[5] Chapter 6.2, 6,3 and 6.4 in this thesis

power and people managing public means, can be subject to the same standards as public officials.

Trading in influence and corruption are two quite similar offenses, yet the maximum penalty for trading in influence is 3 years imprisonment, while gross corruption can be penalized by 10 years imprisonment. The difference between the two is therefore important to notice. The offence is described similarly in the legislation; however trading in influence involves a third party that might not even know that he is involved. Sordid corruption is when you bribe someone to influence them, while when guilty of trading in influence, you bribe someone to influence an external third party. In the Yara verdict the court stated that a situation cannot necessarily be characterized as trading in influence when the advantage is not paid directly to the decision maker. Corruption also includes indirect advantages, cf. the wording "for himself or others" in the Penal Code § 276 a (§ 387 in 2005 code)[6]. The real difference between trading in influence and sordid corruption is not in the assessment of the impropriety principle, but rather which group of people it applies to.

The Taxation Act forbids deduction for both representation and bribes, and therefore there is no clear distinction between the two[7]. We find that the lack of a clear boundary might not be problematic according to the Taxation Act, however it constitutes a problem when businesses are trying to avoid the "grey area" according to the Penal Code. Customer relationship management can be crucial for many businesses, and better guidelines on the matter may prevent many of the minor cases of corruption. This view is supported by NHO[8].

Facilitation payments have not been mentioned much in the preparatory work to the Penal Code, and according to the OECD convention the members are only obliged to incriminate facilitation payments by or towards foreign public officials. In the preparatory work the Department has stated that facilitation payments are to be considered as corruption as long as the advantage given in "undue". That is, the legal standard in § 387 applies. When deciding whether the advantage is undue, one should also consider whether the situation can be

[6] Chapter 5.4 and 9 in this thesis
[7] Chapter 10.4 in this thesis
[8] Chapter 11.3 in this thesis

categorized as black mail. In that case legal action should be made with caution[9].

Based on our findings, we have made a practical guide on where the line is drawn relating to different scenarios in chapter 12 in this paper. It is important to note that this is just an indication based on preparatory work, jurisprudence and other legal theory, and that it is only the court that can decide whether an advantage is undue or not.

3. Research question

Where do you set the boundary between customer relationship management and illegal corruption, bribery and trading in influence?

Customer relationship management becomes illegal corruption once it involves an "undue advantage" according to the Penal Code § 387. The question is then what constitutes an undue advantage, which is a question that is highly relevant for businesses globally. We want to look at different legal sources to see where they draw the line, and try to extract some sort of guidelines on the matter.

The Taxation Act prohibits deductions on bribes in § 6-4, and we want to see whether the legislation can help interpret the legal standard "undue advantage".

Since corruption in the public sector and the private sector is now punishable by the same paragraph, we look at whether there is still a difference between the two. In the same matter as the Taxation Act, the Civil Service Act might pose some guidelines as to what constitutes an "undue advantage".

In addition to this we will shortly present the difference between trading in influence and corruption.

3.1 Hypothesis

Lack of knowledge, discretionary interpretations of the legislation, high personal gains and small chances of getting caught outweighs the risk and disutility of punishment for corruption.

[9] Chapter 5.5 in this thesis

One of the big problems with corruption is that it is hard to detect and time consuming and costly to investigate. Payments tend to be made via third parties and hidden bank accounts, and often leaves no paper trail. At the same time the people involved in corruption often have great personal gains, whether it is large amounts of cash, services or trips to their personal advantage.

Transparency International stated, in a business survey from 2014, that lack of knowledge, ethical frameworks and anti-corruption measures constitutes a problem in Norwegian Businesses[10], and NHO argues that the guide lines as to what constitutes an undue advantage are too vague[11].

In the large cases where a decision maker receives 1 million in cash to change his mind about a decision, the crime is obvious, but we believe that in the smaller cases such as with an expensive bottle of wine, lack of knowledge and discretionary interpretation of the legislation might make people more prone to activities within the "grey areas" of legality.

Our main focus will be on interpreting the legislation, to set some boundaries for our research and to present the foundations for prevailing legal practices.

3.2 Objective

According to the annual Corruption Perception Index (CPI)[12] published by Transparency International Norway was, in 2015, the most corrupt country within the Nordic region. At the same time Norway has the strictest penalties among the Nordic countries[13]. This gives grounds to a suspicion that there may be weaknesses in the Norwegian framework, and our main objective in this paper is therefore to illuminate these weaknesses.

3.3 Method

Our aim has been to gain a thorough understanding of the actual considerations that form the foundations of legislation, jurisprudence and internal guidelines.

[10] Transparency International (2014), "Bedriftsundersøkelsen 2014 Sakte, men sikkert fremover", 14.05.2014
[11] NHO "Krever klarhet om korrupsjon (2014) cited in DN article, "Hvor dyr kan vinen være for det blir korrupsjon", 13.08.2014
[12] Transparency International (2015), "Corruption Perception Index 2015, Korrupsjonsutfordringer krever felles innsats "
[13] Transparency International (2015), "Corruption Perception Index 2015"

We started our process by looking at a significant number of investigations, allegations and verdicts relating to our topic. In order to put forward a consistent presentation of our findings we had to prioritize both which cases we dug into, but also what aspects of these cases we focused on. Many corruption cases are multi-faceted in that the offences have been systemic, translating into several indictments, and also highly complex with several implicated actors. As we focused on the boundary between what is acceptable and what is not, our offset was extracting cases setting precedence directly relevant to the issues. It is important to note that the method for this data sampling is subjective, in the sense that we have had to decide which sources to include, but that the cases have solid external validity by setting precedence.

The foundations for the relevant verdicts are primarily found within Norwegian legislations. Our primary legal sources were the Penal Code, The Taxation Act and The Civil Service Act. However, in order to gain more insight into how the relevant paragraphs were formed, we extensively pursued preparatory work such as propositions and conventions. We further used these different legal sources to present the concepts relevant to the thesis to highlight differences and emphasize similarities or conflicting views.

Within the legal framework there are discretionary concepts, exemplified by the "impropriety principle", that are highly significant in verdicts and preparatory work. We devoted time to present such concepts and substantiate upon them drawing on legal sources, articles and literature. We also looked at the underpinnings of the factors that aggravates or accentuates indictments and verdicts, such as the position of the giver or recipient, the economic value, active and passive forms of corruption or the implication of a public official. We used the Taxation Act and its definition of bribes and representation, and whether the legislation can help interpret the legal standard "undue advantage".

As a backdrop for emphasizing any weaknesses in the legislations, we developed a number of questions relating to the way businesses work on combating corruption, their views on the issues and internal statistics. This was sent out to several businesses and organizations such as Økokrim, Ruter AS, Transparency International and Yara ASA. The responses were mixed and

subsequently only Yara were willing to participate. On June 21st we had an hour-long talk with Ezekiel Ward, the Head of Compliance at the Yara headquarters in Oslo. We gained thorough knowledge of the problems Yara faced and their efforts to combat them, also in light of their implication in the corruption case to be discussed later in this thesis. We did however face an obvious sample selection problem by only having one respondent to the survey, and consequently decided to not include the interview or the questions we developed.

The interview did provide us with background knowledge into their internal views on Customer Relationship Management (CRM). We used their internal guidelines and the ones put in place by other large companies and public bodies to make a representation of the internal guidelines on gifts, hospitality and facilitation payment. Breaching such guidelines is emphasized as a deciding factor for incrimination in corruption related cases, and we therefore made efforts to present the essence of some central views.

We used our findings to make comparisons between legislation but also to highlight differences between for instance corruption and influence peddling. Following this, we present some perceived weaknesses within the legislation.

When we started our thesis work we had an impression that the rules, and non-statutory conditions, governing what constitutes the boundary were maybe too complex and perhaps unclear. We explored this issue and consequently tried to construct an informal framework for different CRM issues and their legality.

4. Pre-existing literature

Corruption as a topic is linked to a vast amount of available literature. In the following section we will present several sources that are of direct relevance to our research question.

4.1 Master thesis

We have found many Master thesis on the area of § 276 a in the 1902 Penal Code (PC), and a few on § 387 in the 2005 PC, covering some of the same

aspects as this thesis. One we found relevant was written by a student at the Faculty of Law at the University in Oslo named the "Lower limit for punishable corruption, cf. the Penal Code of 2005 § 387" [no: Nedre grense for staffbar korrupsjon, jfr. Straffeloven 2005 § 387][14]. The paper addresses all the conditions in § 387 on a technical level, and it also discusses the impropriety principle as a legal standard in connection with the Principle of Legality in the Norwegian Constitution § 96. It is written in 2015 and its focus is highly relevant to the new PC that was implemented the same year.

Another relevant thesis was written in 2009 by a student at the Faculty of Law at the University in Oslo. It focuses on the boundary between corruption and relation[15]. The paper is quite similar to the one on § 387, yet it is written on the bases of § 276 a in the 1902 PC. It is technical and similarly to the other paper it addresses the conditions in § 276 a ["in relation to position, duty or assignment", the "advantage", the impropriety principle, and subjective guilt] and the Principle of Legality according to the Norwegian Constitution § 96 and EMK article 7.

Both master theses uses jurisprudence and preparatory work to enlighten their discussion, however the paper from 2009 is more based on preparatory work and directives, as the corruption clause was only included in the Penal Code in 2003.

A final master thesis that we found relevant is focused on the impropriety criteria in § 387 in the 2005 PC and its relationship to the Norwegian Constitution § 96 and the European Human Rights convention article 7, written by a student at the Faculty of Law at the University of Oslo in 2015[16]. The paper concentrates more on whether § 387 meet the requirements for clarity and predictability that the Principle of Legality imposes, and less on the technical aspect of the clause as in the two first mentioned theses.

[14] University in Oslo, Solvin, Kristiane Bjørkøy Fimland (2015), "Nedre grense for straffbar korrupsjon, jfr. Straffeloven 2005 § 387"
[15] University in Oslo, Aune, Marianne (2009), "Korrupsjon etter straffeloven § 276 a, Utilbørlighetsvilkåret – grensen mellom korrupsjon og relasjon"
[16] University in Oslo, Tandberg, Karoline (2015), "Utilbørlighetskriteriet i straffeloven § 387, Herunder forholdet til Grunnloven § 96 og Den europeiske menneskerettighetskonvensjonen art. 7"

The three theses' conclusion on the problems involved with using a legal standard according to the Principle of Legality is that § 276 a and § 387 fulfills the requirements due to the guidelines in the preparatory work and the evolving jurisprudence setting precedents on the matter. Neither of the theses can provide a clear lower boundary to corruption, which is difficult when the grounds for the discussion is a legal standard.

4.2 Legal Theory

There are three books we have found to have direct relevance to our paper.

Bjørn Stordrange's (2014) textbook "Forbrytelser mot vårt økonomiske system"[17] [Crimes against our economic system] addresses economic infidelity, bribes and investor fraud. The book is among other a collection of the current legislation on §§ 387, 388 and 399 with comments from many of the Norwegian and international legal commentators and authors such as Mads T. Andenæs and Johs. Andenæs. Stordrange presents the subjective and objective conditions for corruption, gross corruption and trading in influence, and also the more technical aspect of prosecution, complicity and penalty.

"Alminnelig strafferett"[18] [General criminal law] is a textbook by Johannes Bratt Andenæs (2004) that provides a comprehensive presentation of the general criminal law. He is quoted and used as a reference in all three master theses that we have read, and his writings are often used as reference of the litigants and even the Norwegian courts.

Sverre Faafeng Langfeldt and Tore Bråthen's textbook (2014) "Lov og rett for næringslivet"[19] [Laws and legislation in the business sector] addresses white-collar crime in its chapter 18. Corruption and trading in influence are presented from both a judicial and ethical point of view, and they are referring to jurisprudence and preparatory work in the discussion.

4.3 Guidelines and articles

NHO, the Norwegian Trade Organization has published several articles and behavioral guidelines relating to representation, customer relationship

[17] Stordrange (2014), "Forbrytelser mot vårt økonomiske system, 3. Edition"
[18] Andenæs (2004), "Alminnelig strafferett, 5. Edition"
[19] Langfeldt and Bråthen (2014), "Lov og rett for næringslivet, 21. Edition"

management and corruption. One of their publications headlined "…over streken?"[20] […over the line?] with the subtitle "Mye som før virket OK er i dag uakseptabelt" [Many things that previously seemed OKAY is unacceptable today", which is a guide line for businesses in their work on attitude and practices related to gifts and representation. The guide was published in 2005 by the Advisory Selection for Ethics and Social Responsibility in NHO and involves a presentation of the legislation implemented in 2003 (§§ 276 a, b and c) and how the business should guide and inform their employees on their ethical guidelines, an open culture and firm reactions. It exemplifies situations where an employee should proceed with care and situations that an employee should steer clear of when it comes to giving and receiving gifts.

Another publication from NHO is "Juss-info"[21] [Legal information] by lawyer Juha Seppola about representation, corruption and legal customer care. It focuses on the taxation aspect of representation, but also when customer care turns into corruption with referral to the Ruter verdict[22].

Transparency International publishes a collection of important verdicts of corruption yearly[23]. The collection consists of summaries of Norwegian corruption verdicts from 2003 to 2015, including verdicts that have set precedence. The latest version published in March 2016 includes among other the Ullevål case, the Unibuss case, the Yara case and the Ruter case, which our thesis will review.

The Corruption Perception Index (CPI) is an index annually ranking countries *"by their perceived levels of corruption, as determined by experts assessments and opinion surveys"*, is published by Transparency International yearly[24]. The index ranks 168 countries on the corruption level in their public sector on a scale from 100 (very clean) to 0 (highly corrupt). According to the CPI Denmark ranks first, Finland second, Sweden third and Norway fifth (shared with the Netherlands). At the bottom of the index, the countries that are perceived as most corrupt are North Korea and Somalia. The top countries are

[20] NHO (2005), «…over streken?»,
[21] NHO Troms og Svalbard (2014), "Juss-info, 5. Edition"
[22] Point 6.2 in this paper
[23] Transparency International (2016), "Domssamling 2016"
[24] Transparency International (2016) "Corruption Perception Index 2015":

characterized by their freedom of press, good access to budget data and transparency in public consumption, a well functioning market and high integrity among empowered people. The bottom countries are characterized by weak or absent public institutions, police and legal system that does not investigate corruption crime in a fair way and the lack of a free press.

"Protect your municipality – An anti-corruption handbook"[25] is also published by Transparency International (2015). According to the handbook it targets elected officials, managers and employees in local municipalities, county municipalities and municipal enterprises, in establishing practices and routines to prevent corruption. "Protect your business"[26] is a similar handbook for the Norwegian business sector, also published by Transparency International.

Økokrim (2016), the Norwegian department on white collar crime, publishes examples of corruption cases that they have investigated, such as the Ullevål case and the Yara case but also cases that have never been tried in court. These are mostly cases where the offenders have accepted fines issued by Økokrim[27].

4.4 Customer Relationship Management

"Customer relationship management (CRM) is the systematic oversight and maintenance of consumer relationships, and the data, sales, and engagements that go a long with it."[28]

This thesis focuses on how companies engage with customers to maintain or establish good relations, and when these actions become questionable and perhaps even illegal.

The practice of engaging in customer relationship management is principally completely legal, and arguably a necessity. Companies market themselves and their own financial interests by influencing others. They aim at establishing, maintaining or evolving relationships with customers, partners and also decision-makers such as public officials. Gifts are exchanged, dinners are held

[25] Transparency International (2015), "Protect your municipality: An anti-corruption handbook"
[26] Transparency International (2015), "Protect your business! Anti-corruption handbook for the Norwegian business sector"
[27] Økokrim (2016), "Corruption, last updated 25.04.2016"
[28] «What is CRM?», Microsoft.com

and invitations for trips and events are tendered. However, problems arise because exerting influence is also a central element of corruption.

There are numerous ways to engage in building relationships with customers. Gifts of "lesser value" such as a box of chocolates, flowers or similar are in most cases ok[29]. The fact is though that there is no set limit, in economic terms or other, for when such offerings cross over to not being ok, and consequently into the territories of corruption and gross corruption. Maintaining good relationships with customers may accidently, or often recklessly, cross into the murky waters of what is undue behaviour.

A natural offset when thinking about corruption is cash and advantages "exchanging hands", but "greasing the wheels" through undue engagements with customers and suppliers is often just as serious and can be a result of careless practices or lack of knowledge.

5. Existing legislation

5.1 Changes in the Penal Code of 1902 vs. 2005

In October 2015 the Penal Code (PC) of 2005 was implemented, and the paragraphs on corruption were slightly changed from the 1902 PC. The paragraph for simple corruption has nearly identical wording, but in § 388 in the 2005 PC on gross corruption there is a small change. In the 1902 PC one of the criteria that should be considered when discussing gross corruption is whether the action *has* given an undue economical advantage, while in the 2005 PC it is sufficient that the action *has or could have* given an undue economical advantage.

However in the preparatory work to the corruption paragraphs in the Penal Code of 1902[30] the department states that it is sufficient that the action *could have* lead to an undue economical advantage.

[29] NHO (2005), «…over streken?»
[30] Ot.prp.nr. 78 (2002-2003). 7.3.3

Also the participation clause is removed from the individual paragraphs, as § 15 in the 2005 PC regulate participation. This is not a substantive change, only technical[31].

Therefore there are no substantial changes in the 2005 Penal Code, and our discussion using the 1902 PC will be meaningful for the new paragraphs as well. This is also confirmed in the preparatory work to the PC of 2005, where it is stated that "the preparatory work to § 276 a and jurisprudence in relation to the clause is still relevant"[32].

5.2 Corruption

Corruption according to Norwegian law is regulated by the Penal Code. As mentioned above, the current legislation is §§ 387 and 388, while the verdicts we will be looking at are based on §§ 276 a and b in the 1902 Penal Code.

Sordid corruption according to PC (1902) § 276 a and PC (2005) § 387 is when *"a person who for himself or others demands, receives or accepts an offer for an undue advantage in relation to his position, duty or assignment, or gives or offers someone an undue advantage in relation to a person's position, duty or assignment."*

5.2.1 Position, duty or assignment

The terms *"position, duty or assignment"* are widely used and regards to all types of employment, duties and assignments given by private and public employers and principals.

Corruption in relation to a *"position"* is when the corrupt action is committed in relation to an ordinary employment relationship, whereas corruption in relation to a *"duty"* covers actions committed by or against a person with political duties, directorships or other elected positions.

The alternative *"assignment"* aims to cover contractors that are not in a permanent position or a long-term duty, such as lawyers and consultants with

[31] Ot.prp.nr. 22 (2008-2009). Page 342
[32] Ot.prp.nr. 22 (2008-2009). Page 471

an individual mission for a business or an organization that receives or demands undue advantages[33].

The second subparagraph states that the main rule also applies to *"position, duty and assignment"* abroad. This subparagraph is included in Norwegian legislation to uphold the wording in the European Convention and the additional protocol presents – the Departments believes that no further clarification is necessary as the main paragraph is adequate. This is because the subparagraph in § 276 a (with reference to the new § 387) actually affects a wider aspect of "position, duty and assignments abroad", as the European Conventions article 9 only addresses corruption perpetrated by or against public officials and other employees in intergovernmental organizations[34].

5.2.2 Passive corruption

According to § 387 (1) b the passive briber is the one that demands, receives or accepts an undue advantage in relation to his position, duty or assignment. There is no prerequisite that the bribe has actually influenced him – it is enough that there is a causal relation, see chapter 5.2.4. Subsequent rewards are also clearly punishable regardless of the actions' orders[35].

The alternative *"demands"* aims to catch situations where the passive briber exploits a position, duty or assignment to pressure someone to provide them with advantages. *"Demanding"* in this case can also be carefully requesting such an advantage, in a way that the action can give the briber the impression that a bribe is "in order"[36].

In cases where the advantage is given without a prior demand, the alternative *"receives"* applies. Whether the receiver or the giver initiates the advantage is not significant – the passive briber can be punished just by being passive.

[33] Ot.prp.nr. 78 (2002-2003). Page 53-54
[34] Ot.prp.nr. 78 (2002-2003). Page 58
[35] Ot.prp nr. 78. 2002-2003. Page 34
[36] Ot.prp.nr. 78. 2002-2003. Page 57

The alternative to *"accept an offer for an undue advantage"* has an autonomous meaning that the bribe is supposed to be received in the future. A promise to receive an advantage can also be perceived as an advantage[37].

For the active briber the crime is concluded once there is a unilateral offer that has come to the receiver's attention. The passive briber can only be punished once the offer is accepted. The acceptance can also be provided by passivity or by inferring accept.

5.2.3 Active Corruption

The active briber is according to § 387 (1) a the person who gives or offers someone an undue advantage in relation to one's position, duty or assignment.

To *"give"* is the equivalent to the alternative *"receive"* for the passive briber. The crime is then accomplished when the passive briber receives the advantage. The receiver in this alternative can also be a third party or another legal body, as long as the passive briber is the intended receiver[38].

The person *"offering"* someone an undue advantage is doing so to make them act in a certain way or as reciprocity for an action or omission that has already taken place. The criterion for this alternative is that the offer has been given in relation to someone's position, duty or assignment – no reciprocity has to be proven. The active briber can also be punished even though he has no plans to follow up on the offer[39].

The active briber that is *"offering"* has concluded the crime once the offer has come to the counterparty's attention. If the offer has been sent, but not yet come to the passive briber's attention; the active briber could still be punished for attempting to bribe the other.

In the European Convention article 2 the crime description includes the words *"promising", "offering"* and *"giving",* however the Department has concluded

[37] Kjerschow (1935), "Almindelig borgerlig straffelov av 22. mai 1902 og Lov om den almindelige borgerlige straffelovs ikrafttreden av 22. mai 1902". Page 328
[38] Ot.prp.nr. 78. 2002-2003. Page 57
[39] Ot.prp.nr. 78. 2002-2003. Page 57

that the word "promising" will have no autonomous meaning in addition to the alternative "offering"[40].

For the active briber the crime is accomplished once there is a unilateral offer that has come to the receiver's attention. The passive briber can only be punished once the offer is accepted. The acceptance can also be provided by passivity or by inferring affirmation[41].

5.2.4 Causality

There is a requirement of causation between the advantage and the position, duty or assignment. The clause only affects advantages that are offered, demanded or accepted *"in relation to"* the passive briber's position, duty or assignment. The advantage will normally be presented as a quid pro quo, with expectations that the receiver will act or omit in a certain way, but there is no requirement that the bribe can be linked to a particular action or omission. Cases of *"grease payments"* are also covered by this clause, given that the payment is undue and that it is clear that the payment is in relation to the receiver's position, duty or assignment[42].

The receiver can be penalized even though he could not act in any other way according to the frames of current legislation[43].

5.3 Gross corruption

Gross corruption is regulated in § 388 in the Penal Code (PC). § 276 b says that to determine whether corruption is gross some of the assessment factors should be

- Whether the action is perpetrated by or against a public official or any other by breaching the trust that follows by his position, duty or assignment
- Whether it has given a substantial economical advantage
- If there was high risk of substantial economical or other damage

[40] Council of Europe (2002), "The Criminal Law Convention on Corruption, Article 2"
[41] Ot.prp.nr. 78. (2002-2003). Page 57
[42] Ot.prp.nr. 78. (2002-2003). Page 54
[43] Ot.prp.nr. 78. (2002-2003). Page 55

- If there was registered false accounting information, produced false accounting information or false annual reports

This list is not exhaustive or cumulative, and the perpetrator has to represent qualified undue conduct[44].

5.3.1 Public Official

The first assessment factor underlines that corruption in the public sector is more likely to be considered gross then in the private sector. It should also be considered whether the public official is in an especially entrusted position[45]. If so, the action could be gross even if it does not involve substantial values or there was risk of substantial damage involved. The perpetrator has to represent a clear deviation from what is appropriate, seen as a whole. The type and value of the advantage that is involved, and whether there were any possible negative side effects, will be emphasized in this discussion[46].

5.3.2 Substantial economic advantage

There is no exact limit as to when an economical advantage is substantial, however the Penal Code Commission has assumed that based on the value of Norwegian kroner in 2002 corruption that involves bribes between 75.000 and 100.000 kroner will normally be considered gross. The Department believes that it should also be considered where the boundary is set according to other gross economical criminal offenses. In Rt-1999-1299 the Norwegian Supreme Court decided that 75.000 kroner was not enough to make self laundering gross[47]. Hence a bribe of 75.000 kroner will most likely have to be seen in relation to the other assessment factors for it to be considered gross.

5.3.3 Economic or other damage

When there is a substantial economic advantage involved in corruption, there will often also be a substantial economic damage. The discussion on whether the economic damage is substantial will be based on the discussion in chapter 5.3.2.

[44] Ot.prp.nr. 78 (2002-2003). Page 60
[45] Ot.prp.nr. 78 (2002-2003). Page 45
[46] Ot.prp.nr. 78 (2002-2003). Page 45
[47] Norwegian Supreme Court (1999), "Rt-1999-1299"

Corruption often involves the risk of harming the society even though the action is not suited to give a substantial economic advantage or lead to a great economic loss. These consequences are considered in the third assessment factor by "or other damage", which can be damage such as polluting and environmental damage. Any corrupt action that involved a risk of severe injury, environmental damage or other non-economic damage will normally be considered gross. Also it is not required that the damage or injury actually happened – the risk of it happening is sufficient[48].

5.3.4 Falsified accounting information

According to the European Convention article 14 Norway is obliged to criminalize behavior that includes "making or using an invoice or another accounting document or –book that contains falsified or incomplete information" or "to illegally restrain from book keeping" when the violation is willfully committed and is conducted "to commit, hide or cover the criminal relations mentioned in article 2 to 12". If the perpetrator has behaved in such a way that is described in the European convention article 14 or contributed to that offense, the relation will most often be considered gross[49].

5.4 Trading in influence

Undue influence peddling, or trading in influence, is a criminal offense punishable subject to § 389 in the Penal Code (PC), replacing § 276 c in the Penal Code of 1902;

"By fines or imprisonment up to 3 years will be punished he who

a) *for himself or others receives or accepts an offer for an undue advantage to influence the exercise of someone's position, duty or assignment, or*
b) *gives or offers someone an undue advantage to influence the exercise of someone's position, duty or assignment.*

By position, duty or assignment in the first subsection refers also to position, duty or assignment abroad. "

[48] Ot.prp.nr. 78 (2002-2003). Page 59
[49] Ot.prp.nr. 78 (2002-2003). Page 60

According to Innst. O. nr. 105 (2002-2003) the term is not commonly used in the Norwegian language.

Trading in influence is, according to the Council of Europe[50], when a person belonging to the political party, family or social circle of a decision maker, or by other reasons claims to be able to influence the decision maker, leverages this in order to demand, receive or accept an offer for an undue advantage. The person who demands, receives or accepts such an undue advantage is guilty of passive trading in influence. The person tendering or providing the undue advantage is guilty of active trading in influence.

In the Penal Code, both passive and active forms of trading in influence are punishable by up to three years imprisonment[51]. The law incriminates undue influence on the exercising of a person's position, duties or assignment. The new law of 2005, as well as the one it replaces from 1902, regulates undue influence on such positions, duties or assignment exercised abroad. In the PC of 1902, it is explicitly stated that aiding in acts of undue influence peddling is punishable to the same extent, a curtailment that is included in the new legislation.

The Penal Code regarding trading in influence is not limited to decision makers in the public sectors but go beyond the standard set in the European Convention, article 12, by also incriminating undue influence peddling towards decision makers in the private sector[52].

In many cases, seeking to influence the outcome of a decision is not illegal, for instance through legitimate lobbying. By a recommendation[53] from the justice-committee, the deciding factor in determining the boundary between such lobbying and corruption must as a general rule be whether or not the person seeking to influence the decision maker has been open about their motives. If lobbyists concede their motives, they are liable to be committing an act of corruption or exerting undue trading in influence. It can however, be difficult deciding what constitutes undue usage of network and motives to achieve a

[50] Ot.prp.nr. 78 (2002-2003), chapter 6.1
[51] Norwegian Penal Code of 2005, § 389
[52] Innst.O.nr. 105 (2002-2003)
[53] Innst.O.nr. 105 (2002-2003)

desired outcome. A key determinant in defining whether or not an act of trading in influence is undue, is consequently if the person who exerts influence has been open about his motives.

In Ot.prp.nr 78[54] Transparency International Norway raises the issue that a number of cases revealed through Norwegian media has shown that any relation between those who seek to influence a decision and the actual decision-maker can in fact be undue even if their intentions and motives are out in the open.

An assessment of what constitutes trading in influence in a given case will also include the value and the nature of the advantage, and importantly, towards which decision-maker it is aimed.

It is important to note that incrimination is not contingent on success as a prerequisite. This is in accordance with article 12 from the European Convention, and thus means that unsuccessful attempts to exert undue influence are punishable to the same extent. Norwegian legislation is in many ways stricter than the guidelines from the convention, for instance in that it incriminates acts of purporting to exert influence on another person's position, duties or assignments, in addition to actually undertaking them.

5.5 Facilitation payments

Transparency International defines such payments as "any payment made to secure or expedite the performance of a routine or necessary action to which the payer of the facilitation payment has legal or other entitlement to"[55]. It is not uncommon that public officials in some countries refuse to carry out their work, unless facilitating payments are made[56]. An example could be that an official refuses to process an application for a public permit, even though the applicant is entitled in accordance to all prevailing rules and applicable law. Facilitation Payments is not a term commonly used in the everyday Norwegian language[57].

[54] Transparency International (2002), cited in Ot.prp.nr. 78 (2002-2003), page 40
[55] Transparency International (2016), FAQ, "Hva er korrupsjon"
[56] Ot.prp.nr. 78 (2002-2003)
[57] Ot.prp.nr. 78 (2002-2003), chapter 5.3.5

In Ot.prp. nr. 78 (2002-2003) the Norwegian agency NHO raises the question of facilitation payments in relation to foreign public officials as important[58]. They argue that in a number of societies in which Norwegian companies operate, such payments are of systematic importance in order to be able to conduct business, and that they in some cases make up part of the salaries received by foreign public officials.

Transparency International has expressed that "*whether extorted or not, facilitation payments are bribes, albeit small in business terms and at the lower end of the spectrum of bribery"* [59]. The extortion argument should not allow the true nature of facilitation payments as bribes to be obscured". Transparency International refers to facilitation payments as "*speed money*"[60] and argues that the threshold for an act to be recognized as an undue advantage is set too high in the new criminal legislation.

Norway is not obligated to penalize facilitation payments by the OECD-conventions of 21. November 1997[61]. By the conventions of the European Council, facilitation payments are not regarded as an offence as they do not fall within the scope of what is regarded as undue (improper)[62]. However, article five of the convention imposes criminalization of corruption acts committed by or towards foreign public officials. It further states, "*member states who wishes to put in place a condition for criminalization that the active briber has sought to influence an official towards acting, or refraining from acting, in breach of his duties (unduly), must subsequently publish a declaration according to article 36, point 4.5"*.

On page 36 in Ot.prp.nr. 78, The Norwegian Department of Justice points to it being unfortunate to include such a condition in Norwegian legislation. However, this does not consequently mean that all forms of facilitation payments paid to foreign public officials gives grounds for incrimination. The defining factor is whether or not the advantages offered are "undue".

[58] NHO (2002-2003), cited in Ot.prp.nr. 78 (2002-2003), page 31
[59] Transparency International (2002-2003) cited in Ot.prp.nr. 78 (2002-2003), page 31
[60] Transparency International (2002-2003) cited in Ot.prp.nr. 78 (2002-2003), page 31
[61] Ot.prp.nr. 78 (2002-2003), page 36
[62] Ot.prp.nr. 78 (2002-2003), page 36

In some situations, facilitation payments would thus not automatically be illegal, and would most likely not be penalized[63]. For instance:

- In a situation characterized as blackmail
- Paying to retrieve your passport
- Paying to be allowed to leave the country

The interpretation of what constitutes an undue advantage is of central importance according to the conventions fifth article. "*Undue, for the purposes of the convention should not be interpreted as something that the recipient is not lawfully entitled to accept or receive". Undue, as an adjective, consequently "aims at excluding advantages permitted by law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts"*[64].

The condition for an advantage or consideration to be "undue" in context with facilitation payments has not been included as a criminal liability condition in Norwegian Penal legislation. Ot.prp.nr. 78 page 36 does however recognize that in determining what constitutes an undue advantage, the assessment must emphasize whether or not it is something the recipient is not lawfully entitled to accept or receive, or if obtaining such an advantage has been sought. The threshold for penalizing advantages to which the recipient has a lawful claim should thus be set high. The Norwegian Government (2011) has issued a statement clarifying that facilitation payments are bribes, and hence illegal[65].

Our neighboring Denmark and Finland explicitly prohibit and penalize facilitation payments. [66] In a global scope it is of interest to look at how facilitation payments are viewed by leading world economies. The Foreign Corrupt Practices Act (FCPA) in the United States formulates that facilitation payments constitute one of the few exceptions from anti-bribery prohibitions of the law[67]. The UK however, through its bribery act, states that *"facilitation*

[63] Ot.prp.nr. 78 (2002-2003), page 36
[64] Council of Europe (1999), "Criminal Law Convention on Corruption", article 5, point 38
[65] Regjeringen (2011), "Næringslivets ansvar å bekjempe korrupsjon"
[66] Ot.prp.nr. 78 (2002-2003), page 31
[67] FCPA Compliance and Ethics, (2011) "When does a grease payment become a bribe under the FCPA?"

payment is a type of bribe and should be seen as such. A common example is where a governmental official is given money or goods to perform (or speed up the performance of) an existing duty"[68].

5.6 The Taxation Act on gifts and corruption

The bribery clause was first incorporated to the TA in 1996, and before this a business could in most cases deduct bribes on their tax reports, as long as the bribe was desired business expenditure[69]. § 44 from 1996 is continued in the current TA as § 6-22.

According to the TA § 6-22 deduction is not given for bribes and other deeds that are given as a compensation for wrongful reciprocity or that aims to achieve such reciprocity. The reciprocity is wrongful both when it conflicts with general business morals or accepted administrative practices at the location where the reciprocity took place or was supposed to take place, and if it conflicts with general business morals or accepted administrative practices in Norway. The alternative "general business morals" aims to cover reciprocity in the business sector, while "accepted administrative practices" covers the demands for correct appearance in public administration[70].

The wrongful reciprocity can be both passivity and active service, such as sharing privileged information, making a decision or influencing someone's decision-making. It is not a condition that the briber achieves the wanted reciprocity or that a direct reciprocity can be proved. As long as the payment is motivated by a desire to achieve such results, no deduction for the payment can be given. It does not matter whether the payment comes before, at the same time or after the reciprocity is received. "Wrongful" should also be seen in relation to an ethical standard as there is no criterion that the reciprocity is illegal according to the law[71].

"Wrongful reciprocity" [NO: urettmessig motytelse] is a legal standard that should be seen in the light of the prevailing moral standard at any time. An example of a situation that does not entitle the briber to a tax reduction is when

[68] Serious Fraud Office (2012), "Bribery Act Guidance"
[69] Ot.prp.nr. 76 (1995-1996), page 5
[70] Ot.prp.nr. 76 (1995-1996), page 15
[71] Skatteetaten (2016), "Lignings-ABC (2015/16). Page 1332"

A pays B to neglect C's legitimate interests in A's advantage. This situation will involve a wrongful reciprocity from B to A. Normally both the payment and the reciprocity will be wrongful, however the criteria for tax reduction refusal is only that the reciprocity is wrongful. Hence there is no demand that the payment is wrongful[72]. The legal standard mainly aims at wrongful reciprocities against one's employer or principal. Normally it would only be wrong for B to undertake reciprocity towards A against payment if the reciprocity is contrary to B's duties towards his principal C. It is also a criterion that the wrongful reciprocity is associated with B's execution of tasks for C[73]. This means that if a leader or the sole owner of a company bribes someone for the purpose of being favored it does not automatically fall within the boundaries of this clause. The preparatory work to the Taxation Act of 1911 however states that even leaders and sole owners of a company can be refused tax reduction on the grounds of this paragraph if the reciprocity is unethical or goes against the prevailing moral standards at any time[74]. It may also go against competitive legislation and rules about creditor protection.

The preparatory work to the bribery clause in the Taxation Act of 1911 also clarify that the clause does not apply to a reciprocity that is wrongful due to poor contracting or price- or marketing legislation.[75]

Direct cash payments are the main focus in this clause, however paid discounts, and indirect services are also covered by the rule. Whether the taxpayer acts on his own or through a proxy is also irrelevant[76].

Where a payment is made without the intention of a consideration, the payment is classified as a gift and is therefore not covered by the clause. Deduction for gifts is regulated in chapter 6 in the Taxation Act[77]. Gifts to customers, business associates or business associates' family and customers cannot be deducted according to § 6-21, cf. FSSD § 5-21-4. The Department has also decided that there is no need for a clear boundary between bribes and

[72] Ot.prp.nr. 76 (1995-1996), page 15
[73] Ot.prp.nr. 76 (1995-1996), page 17
[74] Ot.prp.nr. 76 (1995-1996), page 17
[75] Ot.prp.nr. 76 (1995-1996), page 15
[76] Ot.prp.nr. 76 (1995-1996), page 16
[77] Taxation Act of 1999, chapter 6

representation in the Taxation Act, as § 6-21 in the Taxation Act refuses tax reductions on representation. The sets of rules should be seen side by side[78].

According to the preparatory work to the current Taxation Act[79], if corruption and bribes are used to promote commercial interests, the general conditions on deduction in § 6-1 may apply. This creates room for interpretation, similarly to the corruption clause in the Penal Code.

5.6.1 Representation

Representation is regulated in the Taxation Act § 6-21;

"Deduction is not given for costs related to representation…"

Further completion and implementation is regulated by the Department in the taxation regulation (FSSD) § 6-21 and the following, where some forms of representation costs are deductable.

Representation is defined in FSSD § 6-21-1 (2) as *"measures aimed at external people, businesses etc. that are not attached to the business".* In § 6-21-2 the regulation allows deduction for costs related to modest entertainment for customers or business connections, when the entertainment takes place during business hour or in relation to negotiations or demonstrations of goods or services, and at the offices of the business or nearby if the office is not suitable. Alcohol is not deductable, and if liquor is served, meals are not deductable at all. The Tax Directorate yearly publishes rules governing the monetary limit which the entertainment must not exceed. For the income year 2015 this limit was NOK 440 per person[80]. If the amount exceeds the limit, no deduction is given for the entertainment.

FSSD § 6-21-4 decides that no deduction is given for costs related to gifts in any form to customers or business connections or their families, employees or customers. § 6-21-5 regulates commercial effects and gifts, and says that objects that have a company's logo or name on them can be deductable as commercial costs, as long as the objects are made with commercial intent in a

[78] Ot.prp.nr. 76 (1995-1996), page 18
[79] Ot.prp.nr. 86 (1997-1998), chapter 7.6, remarks to § 6-22 on Bribes
[80] Tax Directorate's valuation rules § 2-3-6 (1), cf. FSSD § 6-21-2 (1)

larger number of copies. The object cannot exceed the monetary limit set by the Tax Directorate in their valuation rules (NOK 240 per item in 2015[81]). Smaller courtesies to business connections that do not exceed NOK 240 per case[82] (2015) are also deductable, cf. FSSD § 6-21-6.

5.7 The Civil Service Act on gifts

The Civil Service Act applies to employees of the state[83] and § 20 was incorporated in the legislation in 1977 due to strict requirements regarding the impartiality and objectivity that was expected from public officials[84].

§ 20 in the Civil Service Act reads;

"No senior official or civil serviceman should for himself or others receive gifts, provisions, services or other considerations that are suited to, or intended by the giver to, influence his duties, or that he by regulations is not allowed to receive.

Violations can lead to disciplinary measures or dismissal."

The relations that are coved by this clause are often referred to as "bribes", "buttering" or "corruption", however the clause only apply to relations that intends or are suitable to influence the public official. That is, only undue advantages are covered by the clause. According to the preparatory work whether the official is influenced or not is not essential – the surroundings' perception is crucial[85].

When assessing whether an advantage is undue, the same criterions as for corruption are used. The value of the advantage should be the starting point, and the preparatory work[86] mentions insignificant gifts with low value and normal flower gifts as clearly outside the punishable boundary.

According to the preparatory work to the PC § 20 in the Civil Service Act could be a guideline for determining where the boundary should be set when

[81] Tax Directorate's valuation rules § 2-3-6 (2), cf. FSSD § 6-21-5 (1)
[82] Tax Directorate's valuation rules § 2-3-6 (3), cf. FSSD § 6-21-6
[83] The Civil Service Act (1983), § 1 (1)
[84] Ot.prp.nr. 67 (2004-2005), page 71
[85] Ot.prp.nr. 67 (2004-2005), page 71
[86] Ot.prp.nr. 67 (2004-2005), page 71

assessing undue advantages in the public sector. However a gift that violates § 20 in the Civil Service Act is not necessarily a violation of § 387 in the PC[87].

5.8 Preparatory work

Preparatory work is a collective term for prepositions, legislative drafts and proposals used as a foundation to interpret the legislation.

5.8.1 Ot.prp.nr. 78 (2002-2003)

The preposition describes the changes to the penal provision against corruption in the 1902 Penal Code (PC) and the purpose and interpretation of the provisions. Previous to the additions in 2002, corruption in the public sector was criminalized mainly by §§ 112 and 113 for passive corruption and § 128 for active corruption. In the private sector §§ 275 and 276 on economic infidelity were used. Some penal provisions were also found in §§ 105, 106, 114, 287 and 373, and also in the Companies Act.

Due to the continuance of the penal provision in the 2005 PC, this preposition is highly relevant to the interpretation of both Penal Codes.

5.8.2 Ot.prp.nr. 22 (2008-2009)

This is a preposition on the changes to the 2005 PC. It states that the meaning of §§ 276 a, b and c in the 1902 PC is continued in §§ 387, 388 and 389 in the 2005 PC. Hence the preparatory work to these paragraphs is relevant for §§ 387, 388 and 389 in the 2005 PC.

5.8.3 Ot.prp.nr. 76 (1995-1996)

The preposition describes the addition of a clause that refuses deduction on bribes and "buttering" in the TA. It is based on the grounds from Ot.prp.nr. 57 (1994-1995) where the Department gives its assessment on the boundary between legal promoting of commercial interests and bribery.

5.8.4 Other

- Ot.prp.nr. 86 (1978-1998): Preposition to the Taxation Act of 1999
- Ot.prp.nr. 67 (2004-2005): Preposition to the changes in the Civil Service Act of 1983

[87] Ot.prp.nr. 78 (2002-2003), page 57

- Ot.prp.nr. 53 (2005-2006): Preposition on the changes done in the PC of 1902 through implementation of the UN Convention against corruption.
- Innst.O.nr. 105 (2002-2003): A recommendation from the Committee of Justice regarding the changes to the PC of 1902
- NOU 2002:22: The grounds for Ot.prp.nr. 78

5.9 Internal guidelines and business practice

The following does not represent a selection to be used empirically, and is subjectively selected based on the availability of internal materials.

Most listed companies publish a set of internal ethical guidelines. We have looked at issued guidelines from five of Norway's largest listed companies (by revenue), within five different business sectors. Statoil ASA (oil and gas), Telenor ASA (telecom), Norsk Hydro ASA (aluminium), Yara (fertilizers) and DNB ASA (bank and finance). We have further looked at the guidelines issued by the largest public healthcare organization in Norway, Helse Sør-Øst, and the largest commune, Oslo commune. The guidelines are similar in that they highly restrict undue behaviour, that the threshold for what is acceptable is set low and that there is a limited degree of openness for discretionary decisions in questions of representation, gifts and customer relations' management.

All organizations maintain a zero tolerance for corruption, active or passive, both in the private and public sector. This includes bribery and trading in influence. Facilitation payments are described separately. All acknowledge the need to maintain good relationships with customers and suppliers. The companies all share similar viewpoints on what constitutes an undue advantage, but recognizes that the assessment may in some cases prove difficult.

5.9.1 Gifts

All companies and organizations maintain a general rule of not offering or accepting gifts, except for promotional items of minimal value.

Telenor Group does not have any general limit on the maximum value of a gift, but such gifts should be of modest value. Expensive gifts should not be given

or received. Cash or equivalents shall never be given or received. Irrespective of the value concerned, a gift that has the appearance of undue influence shall never be given or received. Gifts received in connection with contractual negotiations and gifts to public officials are mentioned in this regard[88].

DNB as a parent company do not have a set limit for gifts, however some subsidiaries do. Employees should refrain from giving or receiving undue advantages. The value, the purpose, if it is out in the open, the relation between parties, and the situation in which the advantage is given (contract negotiations etc.) can be used to assess if something constitutes an undue advantage. Gifts of moderate or symbolic value can be given or received, such as flowers or profiled merchandise. Cash or equivalents are never allowed. Gifts for jubilees or similar with a value less than 500 kr. does not have to be reported to the management, but whether or not it could induce undue influence on the recipient should be assessed. Gifts that employees cannot accept should be returned to the giver. In some cases, where returning gifts is not possible under special circumstances, the gifts should be passed on to a superior who will arrange for them to be on display or sold to the benefit of charity[89].

Yara acknowledges that in some cultures and to some occasions it is customary to receive or offer gifts. Employees can thus decide themselves whether to accept gifts, contingent on them being of a value up to 75 USD and in accordance with the code of conduct. Yara prohibits offering or receiving gifts that could create, or could be perceived to create, undue influence between parties. The frequency of such gifts, if they are connected to a procurement process, if is regarded as inappropriate or if it is of a cash-based nature, are also elements to be considered. Receiving or giving gifts exceeding a value of 75 USD are subject to approval from superiors and the Ethics and Compliance department. Such gifts can never be kept by the employee and must be shared with colleagues or donated to charity[90].

[88] Telenor (2015), "Anti-Corruption Handbook", page 13
[89] DNB (2016), "Think twice! An anti-corruption guide", page 9
[90] Yara (2015), "Code of Conduct"

The guidelines issued by *Statoil* only state that gifts may be accepted if they are of reasonable value, where it would clearly give offence to refuse and if they are handed over to Statoil immediately[91].

Norsk Hydro states that no employees should request, accept or receive any form of undue advantage that could impact their decision-making. All offering, promising or giving anything of economic value or other undue advantages to a public official or another to influence his position, duties or assignment is prohibited. Gifts or other favours to public officials or business contacts can only be of modest value, limited in numbers and are to be in accordance with locally accepted good business conduct. The purpose of any gifts or expenses towards representation or other must under no circumstances be of a nature that could influence the recipient to carry out their duties unduly[92]. Employees are not allowed to receive gifts or benefits from business contacts if they are of a nature that could, or could be perceived to, influence their integrity or independence. Employees receiving such benefits or advantages shall notify superiors immediately.

Helse Sør-Øst guides that gifts of "lesser value" are not recognized as undue advantages, but special consideration must be taken if such gifts are received frequently. Undue advantages are not just material objects, but can also be personal discounts or borrowing equipment for personal use free of charge. Borrowing equipment from suppliers must not violate existing procurement contracts, and must not represent "undue advantages" that has the potential to influence future or relating procurements. Particular care should be exercised before and after a procurement process[93].

Employees of *Oslo commune* shall not obtain personal benefits from its resources, being financial assets, properties or other assets[94]. Employees cannot, for themselves or others, receive gifts, provisions, favours or other benefits in relation to procurement or contract negotiations, or when they aimed at influencing the recipients' position, duties or assignment. This

[91] Statoil (2016), "Code of Conduct", page 30
[92] Norsk Hydro (2013), "Vårt etiske ansvar – Hydros regler for arbeidsetikk", point 4.2
[93] Helse Sør-Øst (2012), "Etiske retningslinjer for innkjøp og leverandørkontakt"
[94] Oslo Kommune (2007), "Etiske regler for ansatte I Oslo Kommune", point 4

includes favourable gains from travel and hospitality[95]. Gifts such as flowers, a box of chocolates, wine or similar are normally acceptable. Unless the gift is of "lesser value", employees have an obligation to renounce gifts and bequests from user within the care service, even if the gift does not influence their duties. Offering of receiving customary gifts in relation to delegations or representation with no link to communal procurement is allowed when kept within a reasonable scale[96].

5.9.2 Representation and Hospitality

Telenor allows employees to arrange or attend customary business related arrangements, to which costs are kept within reasonable limits. What is reasonable is dependent on the situation and should be discussed with the immediate leader. Telenor, as a main rule, do not allow employees to attend arrangements where third parties pay the travel costs[97]. Telenor requires employees to exercise extra caution with respect to gifts and arrangements involving public officials, including international organizations and NGOs. Any appearance that Telenor attempts to influence public officials shall be avoided[98].

DNB employees can only participate in representation of minimal value. All travel and hospitality expenses affiliated with representation for employees are covered by DNB. The company does not pay such expenses for others when tendering invitations. Employees should assess if there is a clear factual and serious reason for participating in cases of representation. DNB encourages employees to make an overall assessment[99].

Yara separates between four forms of hospitality and entertainment;

- *Business related meals or receptions* within the issued code of conducts guidelines are normally acceptable and not subject to approval from superiors.

[95] Oslo Kommune (2007), point 6
[96] Oslo Kommune (2007), point 6
[97] Telenor (2015), "Anti-Corruption Handbook", page 15
[98] Telenor (2015), "Anti-Corruption Handbook", page 17
[99] DNB (2016), "Think twice! An anti-corruption guide", page 10

- Superiors must always approve *business related hospitality and entertainment*, which does not have a set economic limit, but is subject to the rules of the code of conduct.
- *Non-business related hospitality and entertainment*, such as sports events, concerts or other cultural events, are often hard categorize. Discussing business at such events does not necessarily make them business relevant activities. Falls under gifts and guidance from code of conduct and superiors should be sought.
- *Business travels* are subject to strict judgment, and must not be of a nature to, or possibly being perceived to, unduly influence parties. Yara always pays its own expenses for travel and hospitality when representing Yara.

Yara does, as a main rule, not pay travel costs or hospitality for business partners or others. Extraordinary circumstances could force deviation from this rule, but are subject to approval from the Ethics and Compliance department. Special caution must be taken when offering gifts, hospitality and entertainment and expenses to public officials. Such offering must take place to obtain a license, permit or other benefits. Yara can in some cases pay expenses for public officials to visit a facility or a laboratory for the purpose of legitimate approvals. Guidance from the Ethics and Compliance is in such cases a necessity[100].

Norsk Hydro can in some cases cover reasonable expenses for meals, travel, hospitality and entertainment on behalf of public officials or business contacts, but only if they are directly linked to campaigns, demonstrations or orientations for Hydro products or services. Employees should refuse to participate in activities reminiscent of or that could be perceived to be corruption, bribery or facilitation payments[101].

The Statoil code of conduct states that accepting or offering hospitality prerequisites ensuring that it is in line with internal requirements, that it is well documented and that there is a clear business reason to participate. The company always pays its own costs related to travel, accommodation and other

[100] Yara (2015), "Code of Conduct"
[101] Norsk Hydro (2013), "Vårt etiske ansvar – Hydros regler for arbeidsetikk", point 4.2

related expenses and in general not for others. Employees are to ask themselves how others would perceive an acceptance or offer[102]. Statoil covers reasonable and legitimate expenses of public officials when they are related to the promotion or demonstration of products or services or the execution of a contract with a government[103].

Employees of *Oslo commune* cannot make use of its discounts or purchasing agreements when ordering privately[104]. Participating in or offering dining, entertainment or cultural events in relation to delegations or representation with no link to communal procurement is allowed when kept within a reasonable scale[105].

Within *Helse Sør-øst*, travel expenses in academic context are to be covered by national educational funds or by the concerned employer. When collaborating on research – and development projects with suppliers, special consideration is to be taken to prevent them intermixing with procurement processes[106].

5.9.3 Facilitation payments

All companies have similar codes regarding facilitation payments with the exception of *Yara*.

Facilitation payments shall never be paid on behalf of Yara. Yara explicitly state that they are willing to use extra time, cost and effort to avoid such payments[107].

Telenor, Statoil, Norsk Hydro and DNB guides that asking to accept, receive or give a bribe or facilitation payment is explicitly prohibited, unless your own or others life, health or property is in danger, to which circumstances dictate them justifiable. In such incidents, employees must always notify superiors[108].

[102] Statoil (2016), "Code of Conduct", page 31
[103] Statoil (2016), "Code of Conduct", page 38
[104] Oslo Kommune (2007), "Etiske regler for ansatte I Oslo Kommune", point 7
[105] Oslo Kommune (2007), point 6
[106] Helse Sør-Øst (2012), "Etiske retningslinjer for innkjøp og leverandørkontakt"
[107] Yara (2015), "Code of Conduct"
[108] Yara (2015), "Code of Conduct"

5.10 OECD

Norway is a founding member of the Organisation for Economic Co-operation and Development (OECD). The organisation continuously publishes material relating to the issues of corruption and bribery, focusing especially on international bribery and bribery of foreign public officials.

A convention was passed in 1997 under the title "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions". The convention deals only with so-called "active" cases of bribery and corruption, which means it is focused on the offence made by the person who promises or gives the bribe. However, it acknowledges that the recipient of undue advantages stemming from such acts will often have induced or pressured the briber thereby being actively involved[109].

The convention[110] acknowledges bribery as a *"widespread phenomenon in international business transactions"* and an issue *"which raises serious moral and political concerns"*. "Other undue advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements[111].

The convention does not incriminate "small facilitation payments"[112]. It does however address such payments as a corrosive phenomenon, and recommends that member countries should periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon. It also recommends member countries to discourage or prohibit companies the use of facilitation payments.

The OECD convention includes a number of good practice guidelines for companies relevant in relation to the issue of customer relations' management.

[109] OECD (2011), "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", page 14
[110] OECD (2011), "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", page 6
[111] OECD (2011), page 14
[112] OECD (2011), page 15

Summarized, it states that companies should put in place ethics and compliance programmes or measures designed to prevent and detect foreign bribery on the following areas[113]:

- Gifts
- Hospitality, Entertainment and Expenses
- Customer Travel
- Political contributions
- Charitable donations and sponsorships
- Facilitation payments
- Solicitation and extortion

OECD, by the convention, recommends that all member countries should take effective steps towards combating the issue of bribery of foreign public officials and corruption.

OECD reports on Norway

The organisation has made three monitoring reports concerning the implementation of the anti-bribery convention in Norway during the period 1999 to 2011 with a follow up on the third report in 2013. In 1999 the OECD stated that Norway did not fulfil their obligations according to the convention's article 3. This report laid the foundations for updating the legislation in 2003[114].

5.11 Criminal Law Convention on Corruption[115]

Norway signed the European Convention against corruption January 27th 1999.

It follows by the European Convention article 17 that through ratification of the convention the states are obliged to have effective, proportionate and preventative penal sanctions for corruption offenses that are committed in Norway. This also applies for actions that are committed by Norwegian citizens abroad or if the relation involves a Norwegian civil servant, as well as

[113] OECD (2011), pages 30-32
[114] NOU 2002:22, page 14
[115] Council of Europe (1999), "Criminal Law Convention on Corruption"

corruption in private businesses[116]. Further the European Convention imposes the states to have clauses for undue trading in influence in the public sector.

The convention aims to fight more forms of corruption than the OECD convention. While the OECD convention's main goal is to ensure fair competition in international business relationships, the European Convention targets both passive and active corruption, in the private as well as the public sector.

The definition found in the convention is not the same as the OECD definition, as mentioned. The Penal Code Commission has chosen to emphasize the definition as it emerges in the Criminal Law Convention on Corruption[117].

These convention obligations are incorporated into the Penal Code, as it follows by § 6[118] that the legislation applies to all actions that Norway by agreements with foreign states or by public international law are entitled and obligated to prosecute[119].

While incorporating these convention obligations, the Department has chosen to have somewhat stricter regulations than what is mandatory by the convention. While article 2 and 3 does not aim to criminalize undue advantages that are given or received after the service is performed, as long as there were no demand, offer or promise of such undue advantage while the public official were on duty, § 387 criminalizes bribery regardless of the time line[120].

With regards to trading in influence the Norwegian legislation also goes further than the convention. The convention article 12 applies where the perpetrator is, or claims to be, able to influence the decision maker. The Norwegian legislation incriminates actions where no particular decision can be influenced, such as a person getting paid to influence his journalist wife to write about a certain company, political party or a movie. Also the convention does not

[116] Innst. O. nr. 105 (2002-2003)
[117] NOU 2002:22, page 32
[118] The Norwegian Penal Code of 2005 § 6
[119] Ot.prp.nr. 22 (2008-2009). Page 343 and Ot.prp.nr. 78 (2002-2003)
[120] Ot.prp.nr. 78 (2002-2003). Page 19. See point 5.2.

incriminate trading in influence in the private sector, while the Norwegian legislation equates trading in influence in the public and private sector[121].

5.12 United Nations Convention against Corruption

The United Nations Convention against Corruption was passed on October 31st 2003 due to the UN General Assembly's recognition of the many harmful impacts of corruption. The purpose of the convention is to promote international cooperation in preventing and fighting corruption[122].

In December 2003, Norway signed the convention and it was ratified in July 29th 2006. The convention can be separated into four categories; rules about measures to prevent corruption, an obligation to criminalize corrupt actions, provisions on investigation and international cooperation in corruption cases, and finally rules on reversal of assets that originates from corruption.

While all obligations by the convention are fulfilled through ratification, Norwegian legislation goes further that what the convention demands on some points. Article 15 demands that both passive and active bribery of a national public official should be criminalized, while article 16 obliges the states to criminalize active bribery of a foreign public official. The states are encouraged, but not obliged, to consider criminalizing passive bribery of foreign public official. According to the Norwegian Penal Code of 2005, both passive and active corruption is punishable, cf. § 387. The provisions on corruption can also be applied to actions committed internationally by Norwegian citizens, cf. § 12 (1) number 3 letter a, and corrupt actions committed by foreigners internationally, regardless of whether the action is punishable according to the national legislation in the country where the action took place, cf. § 12 (1) number 4 letter a. Hence the Norwegian legislation has a wider field of application than the convention demands in article 15 and 16[123].

[121] Ot.prp.nr. 78 (2002-2003). Page 61
[122] United Nations (2003), "United Nations Convention against Corruption"
[123] Ot.prp.nr. 53 (2005-2006), chapter 4.2

6. Cases of corruption

6.1 The Yara-case[124]

Yara International ASA, or Yara, is a Norwegian fertilizer and chemical company with operations and sales in over 150 countries. The Norwegian government is the company's biggest owner with 36,02% of the shares[125].

In 2015 four of Yara's former top leaders were prosecuted for gross corruption in Oslo District Court[126]. All four got convicted and sentenced to between two and three years imprisonment, with legal grounds in § 276 a, c.f. b in the 1902 Penal Code.

6.1.1 Legal grounds

According to § 276 a corruption is when someone gives or receives an undue advantage in relation to his position, duty or assignment. This also includes position, duty or assignment in foreign countries. See point 5.2 for a more thorough review on the conditions.

Letter b in § 276 states that to decide whether corruption is gross the following should be considered; if the action is perpetrated by or against a public serviceman or someone who's exceptional trust in relation to his position, duty or assignment has been breached, if it has involved a remarkable economic advantage, if there were potential for considerable damage of economical or other nature, or if there were registered inaccurate accounting information, compiled false documentation or inaccurate statements. This list is not exhaustive or cumulative. See point 5.3 for a more thorough review on the conditions.

6.1.2 Background

The background for the conviction was negotiations with a Libyan state owned company, NOC, regarding a cooperative agreement in the fertilizer production sector in Libya from 2004 to 2009. Yara's Chief Legal Officer signed an

[124] TOSLO-2014-22670
[125] Oslo Stock Exchange / Yara ASA (subject to changes)
[126] TOSLO-2014-22670

agreement on behalf of Yara in early 2007 to pay USD 5 million to the son of the Libyan oil minister and Chairman in NOC. The payments were delivered to a Swiss account through a third party, and split up into partial and advanced payments. The payments were made in the same time period as Yara and NOC were conduction their final negotiations. Three of the top leaders in Yara affiliated the completion on the agreement, and one of them recommended that a third party should be involved to disguise the payments.

In the years 2006 to 2008 Yara were also negotiating a cooperative agreement with a state owned Indian company KRIBHCO, which also specialized in fertilizer production. Yara's Chief Legal Officer and Chief Operating Officer offered, on behalf of Yara, in 2007 an agreement to pay the son of one of the board members in KRIBCHO USD 250 000 with the condition that the agreement would be signed. The offer also included a provision based salary to the board member's son based on Yara's future sales in India. This provision clause was later replaced with a onetime payment of USD 3 million. A payment of UDS 1 million were later executed through a third party. Yara's CEO affiliated to the completion of the agreement.

6.1.3 Objective Guilt

"Undue advantage"

"Undue" is a legal standard that sets the boundary between the punishable and the non-punishable. Each case should be analyzed individually and consider the overall picture of the situation, where several elements play a role. The advantage's purpose, type and value, to what extent there has been transparency in the matter, which set of rules that are implemented in the company or the business in general, whether the relation involves a public serviceman and what positions the giver and receiver of the advantage has, are some of the elements that should be included in the discussion. The assessment should also be seen in the light of the general perception in today's society with regards to actual considerations [no: reelle hensyn] and the fundamental values behind the clause[127]. The Penal Code Commission has also

[127] NOU 2002:22, s. 39

stated that it is not sufficient to say that an action is blameworthy – it takes more than that for an action to be unlawful.

The court's discussion on whether the act fits the legal definition of the offense, determines whether the objective guilt is present.

- The offence is *clearly blameworthy*, which the involved parties were fully aware of due to the latest media coverage of the Statoil-case and other corruption cases in the actual time period.
- The *purpose of the advantage* was to get advice and information from the receiver of the undue advantage for usage in negotiations with NOC, and to ensure the right influence in relation to the negotiations with Kribcho.
- The *size of the payment* was USD 1,5 million (plus three million under certain circumstances) as well as USD 1 million per year for three years. The court came to the decision that the fees in no way were proportionate to the services that the receivers delivered.
- When it comes to the *degree of openness* the court found that both deals were disguised to the negotiating counterparties. There was also demonstrated high creativity in disguising the payments.
- Both the agreement and the payment were in violation with Yara's *own ethical guide lines*, and it was obviously a problem for Yara that the agreement was publically known in retrospect.
- Corruption is a *part of the culture* in the receiver's home country, where using consultants are common to get access to persons with influence and power to sign on to agreements on behalf of the Libyan and Indian state organs. This should be part of the assessment, but should not be put much weight on, according to the court.
- Some business areas may have formed *customary negative culture* such as accepting undue advantages. These customs should be part of the assessment, but should not be decisive in regards to where the line should be drawn.
- The court also emphasized that the *purpose of the provision* is to frame systematized corruption, such as in this case.

The court's conclusion was that it is obvious that Yara had offered and given an undue advantage in both Libya and India, c.f. § 276 a.

"Position, duty or assignment"

The court has emphasized the importance of the distinction between influence peddling and corruption. If the person that receives the advantage is part of a decision maker's political party, family or circle of acquaintances, the offence will most likely be seen as influence peddling. Corruption on the other hand is when the advantage is given in relation to the receiver's position, duty or assignment[128].

The OECD convention and the European convention determine that the clauses against corruption cover both direct and indirect advantages via a third party. Even though the prejudice to the Penal Code mentions nothing of this, Norway has ratified both conventions. In Ot.prp.nr.78 (2002-2003) it is also stated that the legislator intended that "for himself of other" should have the same meaning as "direct and indirect".

The undue advantage had to be given in relation to the receiver's position, duty or assignment, c.f. § 276 a. According to the court's perception of the clause, it was not necessary that the undue advantage in Libya accrued the fathers, as long as the fathers could control who the receiver was, c.f. the wording in the clause "for himself or others".

The Libyan agreements were formally concluded by the sons of the decision makers, and hence the defense argued that the offence was influence peddling, and not corruption. They stated that the advantages were not given in relation to someone's position, duty or assignment. If the court had found that the sons were paid to influence their fathers, the defense would be correct, however influence peddling cannot be argued in all cases where the bribe is not paid directly to the decision maker. If the person who receives the payment is a middleman that only channels the payment to the decision maker or someone that the decision maker has pointed out as the receiver, it is not natural to call the offence influence peddling. It is then called an indirect advantage. The

[128] NOU 2002:22, page 39

same was the case in India, where the payment ended up in the family of the decision maker.

The court found that the son's role was to gather advice and information from his father to pass it on to Yara. His role was not to influence his father – he was only the messenger.

After an overall assessment of the relations the court's conclusion was that the consultant agreements and the payments in both cases were undue advantages given in relation to someone's position, duty or assignment and were therefore covered by the objective content of the deed.

6.1.4 Gross corruption

§ 276 b lists some of the variables that should be considered to decide whether corruption can be classified as gross. The court has emphasized the following:

- Both deeds involved an eminent civil serviceman or someone who's exceptional trust that followed his position, duty or assignment had been compromised.
- There were big economical advantages involved. The court has also emphasized the work that was put into keeping these payments hidden, and that Yara involved a third party that they were doing business with to cover the payments.
- There were risks of significant economical and other damage.
- Yara registered false accounting information, produced false accounting information or false annual reports.

We will not be discussing the subjective guilt in this case, as it does not contribute to our thesis.

6.1.5 Sentencing

It appears in § 276 b that the maximum sentence for gross corruption is 10 years. In deciding the penalty for the four Yara leaders, the court has discussed the following:

- The case involves corruption committed abroad in the form of offering and paying bribes to foreign public official. This kind of corruption was

and is wide spread in the countries that this case concerns. There may be big differences from country to country on business morals, administrative practices and customs, and the department states that these conditions should be included in the assessment of the impropriety principle[129]. The court put little or none emphasis on this, however it should be considered in the sentencing.

- On the other hand corruption leads to big problems and constitutes a threat against the legal system, the democracy, human rights and social justice. It also leads to competitive distortions among businesses[130]. Strong general preventive considerations are therefore applicable in the sentencing.
- Norway has ratified the OECD convention on obstruction of bribery against foreign civil servicemen in international business relations, the European convention against corruption and UN's convention on transboundary organized crime. To uphold the Norwegian commitments according to these conventions the maximum sentence for gross corruption was intensified in the new corruption clauses from 2003.
- Based on jurisprudence[131] the normal sentencing would be somewhere between 5 and 7 years imprisonment, however the court found that there were special circumstances in this case that separates it from the other cases. The lack of documentation of personal gain for the active briber was the main factor, compared to the other cases. This factor was extenuating to the sentencing.
- Due to the limited practice on corruption committed in foreign countries, the court's opinion is that the penalties should be much lower than for corruption committed against a public official in Norway.
- Other elements that were emphasized were that the risk of detection is so low that the uncovered cases should be punished strictly, the perpetrators were all members of the corporate management, the company's anti corruption measures were compromised, the defendants

[129] Ot.prp.nr. 78 (2002-2003) cf. NOU 2002:22, pt. 5.3.4.
[130] Ot.prp.nr. 78 (2002-2003), pt. 2.1.1
[131] Rt-2008-1473, Rt-2010-1624, Rt-2012-243, TOSLO-2013-195526, TOSLO-2009-187431

had the opportunity to put a stop to the corrupt behavior and finally the chief legal officer limited the risk of detection rather than taking the responsibility to stop the illegal actions.

All four Yara leaders were found guilty and sentenced to between two and three years imprisonment.

6.2 The Ruter-case[132]

Ruter AS is a Norwegian state owned company responsible for the public transportation in Oslo and Akershus. They decide fares and routes for the subway, trams, buses and ferries. Contracts for buses and boats are assigned by competitive bidding[133].

In 2013 Ruter AS's former operation manager (2009-2011) was convicted for passive corruption and sentenced to a fine of NOK 24 thousand by the Oslo District Court. The advantage he had been given was also forfeited and he had to pay the courts costs.

The verdict was appealed to Borgarting Court of Appeal later in 2013, and the operation manager was acquitted. The prosecuting authority then appealed the Court of Appeal's verdict to the Supreme Court, but the appeal was discarded.

6.2.1 Legal grounds

See chapter 6.1.1.

In this case the prosecutors have put emphasis on the aggravating condition when involving public officials. They state that the boundary should be narrower than what can be acceptable in private businesses. The majority of the court agrees on this statement, as this view is emphasized in the remarks to § 276 a[134]. On the other hand corruption in private sector is also highly harmful to the society, and the department has therefore chosen to have a common criminal regulation of corruption in the public and private sector. The difference between public and private should therefore be assessed individually in each case. See chapter 8 in this paper on "Public vs. Private".

[132] HR-2014-1779-A – Rt-2014-786
[133] Wikipedia.org (2016), "Ruter"
[134] Ot.prp.nr. 78 (2002-2003), Chapter 12.1

6.2.2 Background

The operation manager was employed in Ruter AS between 2009 and 2011 and he was responsible for drafting and implementing the tendering documents for acquisitions of bus services. In 2009 and 2011, by three occasions, he was treated for dinners by a bus supplier that was going to or had given an offer to Ruter AS. The dinners totaled to an amount of NOK 4 739.

6.2.3 Objective guilt

See chapter 6.1.3.

"Undue advantage"

According to the District Court the advantages were given in relation to competitive bidding, and they were kept hidden for the employer. Participation in the dinners also went against internal ethical guidelines in Ruter AS. The District Court therefore meant that the dinners were undue advantages.

Further Ot.prp.nr. 78 (2002-2003) states that if it would go against the common awareness of the law to criminalize some sorts of less valuable gifts and other advantages, then the advantages should not be seen as undue. The District Courts meant that the dinners were not of the type described above, because the cost and content went beyond the boundary of what is commonly accepted.

Since there were several bus companies involved in the bidding, the court found that Ruter should not have been in contact with any of the companies in a way that could be perceived as "buttering".

Based on the discussion above, the District Court found that the dinners constituted an undue advantage.

The Appeal Court on the other hand did not agree that the advantage was undue. The chairman of the board in Ruter AS witnessed in the appeal court, and said that he had encouraged the operation manager to get to know the bus marked and the actors in it. The court believed that this formed the operation manager's view on his position and what was expected from him. They also disagreed on the statement that the advantages were given in relation to competitive bidding, as Ruter AS at all times were involved in some sort of

competitive bidding, and that the company that paid for the dinners were not involved in any competition at the time of the dinners.

The argument that the dinners were kept hidden from the manager's employer was also commented by the Appeal Court. They stated that there was no proof that the manager tried to hide the dinners from his superiors or colleagues, and that he believed that it was not necessary to report the dinners as they were part of his regular work commitments. The argument that they were against internal ethical guidelines, should be assessed in the same way as if the dinners were hidden from the employer.

The purpose of the dinners was according to the manager and the paying company to talk about academics and socialize, and the court could not find that any other purpose had been proven. The dinners could not be seen as abnormal business culture in similar companies, and the court believed that the dinners were individual events.

Finally the economical value of the advantage was discussed. The amount per person lied between 1370 and 1700 Norwegian kroner, which were not abnormal amounts for a business dinner. This could not be compared to business trips, concert tickets and tickets to sports- or other entertainment. The economical value was therefore seen as rather modest by the Court of Appeal.

"Position, duty or assignment"

The defendant admitted that the dinners were treated in relation to his position, and while he did not admit any guilt, the law only demands that the passive briber believe they will benefit from the advantage[135]. Ot.prp.nr. 78 (2002-2003) also underlines that it is not necessary that the bribe can be connected to a certain action[136]. The District Court accordingly found that the undue advantage was given in relation to the operation manager's position.

The Appeal Court agreed on the fact that the advantage was given in relation to the manager's position, but they did not agree that the advantage was undue. Hence the operation manager was acquitted by the Appeal Court.

[135] Matningsdal (2010), "Spesiell Strafferett", page 440
[136] Ot.prp.nr. 78 (2002-2003), page 54

The Prosecutors' appeal to the Supreme Court was later dismissed.

6.3 The Unibuss-case[137]

Unibuss AS (former Sporveisbussene AS) is a public transport bus operator, wholly owned by Oslo commune (municipality). The company provides transportation awarded from public bidding and operates and purchases buses according to specifications set forth by Oslo commune and Akershus County.

The Unibuss case is multi faceted. It involves six individuals, who were all convicted for their involvement in Oslo District Court in December 2014. All six appealed their involvement to the Borgarting court of Appeal which gave its ruling in January 2016. As of 14.08.16, the sentencing for three of the involved has been appealed to the Supreme Court but the questions of guilt has been upheld.

6.3.1 Case background

MAN is a German-based industrial conglomerate involved in manufacturing of buses through MAN Bus Gmbh. In 2009, German police and prosecutors revealed that MAN had initiated a program making use of bribes to a number of countries, including Norway. The bribes were paid to key decision-makers at potential customer companies to boost sales. In 2011 the management at Unibuss were made aware of the German case, and that there had been found links to Norway. The company alerted Norwegian police and launched an internal investigation. The investigation revealed additional offenses at Unibuss, including employees receiving construction materials and work to the benefit of their private residences from suppliers, making use of hired cars paid by suppliers, kick-back provisions from the sale of used buses to customers as well as trips and hospitality on several occasions.

For this thesis, only the indictments concerning the trips for defendants A, E and F are relevant, as the verdict from Oslo District Court establishes jurisprudence into when customer relationship management crosses over to becoming corruption.

[137] LB-2015-69201-1 – LB-2015-9388 – TOSLO-2013-195526

A: Head of acquisitions / technical director at Sporveisbussene AS / Norgesbuss AS from 2002 to 2004, Head of acquisitions / technical director at Unibuss AS from 2004 to September 2011.

- During the period from 2006 to 2011, the defendant received multiple trips to Budapest paid for by Company 03 AS,
- In both 2009 and 2010, the defendant received trips to Rupholding paid for by Company 05 AS.

E: Executive officer of Unibuss AS from 2006 to 2011.

- In the years of 2007 to 2008, the defendant received two trips to Budapest paid for by Company 03.
- In both 2009 and 2010, the defendant received trips Rupholding paid for by Company 05 AS.

F: Employee of Unibuss AS, responsible for maintenance of Unibuss facilities

- In 2010, the defendant received a trip to Budapest, paid for by Company 03 AS.
- In 2010, the defendant received a trip to Rupholding, paid for by Company 05 AS.

Trips to Budapest

Every year from 1999 to 20, Company 03 AS arranged trips to the annual Formula-1 championship in Budapest, targeting personnel within the industry. The company was a supplier of tires to Unibuss. Representatives of Unibuss participated from 2006. After each trip concluded, Company 03 billed all participants or their companies / employers except Unibuss.

The court found that the trips had in fact included professional content for Unibuss and other participants, but that this took place over approximately two hours in the lobby and on the terrace of the hotel and that no separate conference room was ever booked.

6.3.2 Legal grounds

Based on § 276 a (1)-letter a, which states that a person who *"for himself or others demands, receives or accepts an offer for an undue advantage in relation to his position, duties or assignments"*.

Jurisprudence from the Ruter case[138] is emphasized as relevant. The verdict states that a special threshold becomes relevant when establishing a lower boundary for the corruption regulations in relation to benefits (advantages) of a nature similar to regular representation, and the advantage is not of permanent nature. The foundation for this argument is found on page 56 of Ot.prp.nr. 78 (2002-2003).

The judge in the Ruter case contends that when an advantage is not permanent in its nature and when it is consumed in connection to the event, which in itself is relevant to the employees' position, there will, normally, not be grounds for using the corruption provisions. Further, the relation to other forms of normal and traditional customer relationship management means that the threshold for when an event becomes so lavish that participation in it is deemed undue must be set high.

The advantages were not of lasting or permanent nature in that there were no lasting economic values for participants to bring home. The court, however, found that the trips, with minimal professional content, taking place abroad and including exclusive tickets to a Formula-1 event, exceeded what constitutes normal customer relationship management. The verdict also argues that the participants from Unibuss probably would not have made the trip at their own expense.

6.3.3 Objective Guilt

<u>"Undue advantage"</u>

- The court found that actors from Unibuss participated *knowing* that they received a personal economic benefit from a supplier in light of their *positions* within the company.

[138] Rt-2014-786 paragraph 46

- The participants *knew* that the minimal professional content gave no reason for the professional content not to be held in Oslo.
- Unibuss did not pay for the trips, despite having put in place an *internal ethical framework* in 2005 including formulations like; *"all costs in connection to travels are to be paid by Sporveien"* and that *"no employees can participate in travels paid for by suppliers to Sporveien"*.
- There was no *openness* about the trips internally in the company or towards the board of directors.

A did not acknowledge guilt due to the trips containing professional content, and that he had received an oral approval to participate from E.

Oslo District Court asserted the following:

- Undue in light of the elements mentioned above
- He was *instrumental to all purchasing* of tires from Company 03 AS.
- He engaged in other criminal offences with E, and thus knew that E was corrupt.
- The economic benefit for each trip was around 12 000 NOK with the 2006 trip being obsolete according to law.
- The five remaining trips (2007-2011) represented corruption cf. § 276 (1) a with a total economic benefit of NOK 63 681 – upheld by Borgarting Court of Appeals

E did not acknowledge guilt due to the trips containing professional content.

Oslo District Court asserted the following:

- Undue in light of the elements mentioned above
- *Instrumental to all purchasing* of tires from Company 03 AS.
- Was well aware of the ethical guidelines, as he himself had signed off on information about them directed to employees.
- Brought along his partner and son on the trips, without paying for hotel expenses.
- The economic benefit for each trip was around 12 000 NOK.

- The two trips (2007-2008) represented corruption ref. § 276 (1)-a with a total economic benefit of NOK 25 258. – upheld by Borgarting Court of Appeals

F did not acknowledge guilt, and the prosecutor moved for acquittal.

Oslo District Court asserted the following:

- Undue in light of the elements mentioned above
- Had a subordinate position and *had no influence on purchasing* tires from Company 03 AS.

An essential determinant for corruption is whether or not there is an element of undue influence present.[139]. Although participating on the 2010 trips conflicted with internal ethical guidelines and represented an undue advantage for F, he was not a decision-maker who could influence any purchasing agreements between Unibuss and Company 03. The participation was consequently not corruption, and F was acquitted of the charge. Prosecutors did not appeal the acquittal.

6.3.4 Trips to Rupholding

Company 05 AS through I, in 2009 and 2010, organized trips to the World Cup in Biathlon taking place in Rupholding, Germany. The company was an agent for a Czech bus manufacturer and invited Unibuss employees, as their employer was a potential customer. Professional content had been prepared on both occasions, but was not held due to lack of interest from participants and large travel distances. Consequently, the auditor of Company 05 did not allow expensing the costs and the company issued billing to A, E and F. I chose to reimburse A and F and paid the bill issued to E himself.

The elements asserted by the court are similar to those with regard to the trips to Budapest. The trips were found to constitute undue advantages, taking into consideration that no professional content was included at all in these cases.

- A pleaded guilty and was convicted of two cunts of corruption ref. § 276 (1)-a with a total economic benefit of NOK 21 918 – upheld by Borgarting court of Appeals.

[139] Rt-2014-786, paragraph 35

- E did not acknowledge guilt due to a professional content having been prepared. The court found that the reason E was invited was on the prospect of Company 05 supplying buses to Unibuss. He was convicted of two counts of corruption ref. § 276 (1)-a with a total economic benefit of NOK 21 918. – upheld by Borgarting court of Appeals.
- F pleaded not guilty due to having been invited by his superior A at no personal expense and that he was never meant to participate in the professional content. Prosecutors moved for acquittal.

The same considerations as in relation to the Budapest trips are relevant here. There were no possibilities to influence F, as he had no direct or indirect influence on any purchasing of buses. Without the element to influence, the court finds no criminal corruption to have taken place and F was thus acquitted. Prosecutors did consequently not appeal the acquittal.

The core element in acquitting F for his participation on both trips were that he was not found to be in a position to influence decisions to the benefit of either Company 03 or Company 05. Many of the other elements point towards what constitutes the foundations for corruption offences. In other words, corruption should perhaps be viewed as transaction based. At least in this case, without any possibilities for transactions due to Fs position, there are consequently to offence either.

6.4 Ullevål University Hospital[140]

The Oslo District Court verdict notes that the case represents the first time in which the boundaries of what constitutes an "undue advantage" is tested after the introduction of the so-called "impropriety principle" into new legislation.

The defendant (A) headed the division in charge of the estates and facilities owned by Oslo University Hospital (UUS) from August 2003 to September 2004. While he was employed by Oslo University Hospital he was accused of several acts of corruption and mismanagement through articles in the daily paper Aftenposten. The case involves criminal offences committed during his

[140] Borgarting lagmannsrett - LB-2009-35191, Oslo tingrett - TOSLO-2005-134006

tenure at both UUS and former employer NSB BA Eiendom (renamed Rom Eiendomsutvikling in 2001).

The case was first tried in Oslo District Court, finding the defendant guilty of multiple cases of gross corruption. The case was appealed by the defendant to Borgarting Court of Appeals, again finding the defendant guilty of multiple cases of gross corruption. An attempt by the defendant to appeal the case to the Norwegian High Court was rejected. A final verdict from Borgarting Court of Appeals became enforceable in June 2010.

For this thesis, the indictments regarding two trips and bribes totalling NOK 180 000 are relevant. The trips because they provide jurisprudence into which conditions prove aggravating in cases of corruption. The bribes are relevant because they assert when an economic advantage becomes "significant", which is one of the conditions for gross corruption. We look at the indictments for the recipient, A.

6.4.1 Legal grounds

Norwegian Penal Code § 276 a (1) a cf. 276 b for having received an improper advantage in relation to his business, duty or assignment. The acts are viewed as being gross because the economic payoff has been significant, and because of the special trust relating to his position, duty or assignment.

6.4.2 Background

During his tenure as head of the estates at Oslo University Hospital, A received improper advantages totalling at least NOK 200 000 from various suppliers to the hospital. He received these advantages while being entrusted with specifying and making decisions relating to appropriation of contracting work. The advantages were deemed improper because they were of significant economic value, they were hidden from his employer, they represented a breach of internal guidelines and because they were contingent on A awarding contracts to the suppliers.

- In October 2003, A participated on a hunting trip to Kiruna, totalling at least 9500 kr. in value. X AS paid the trip in full.

- In February 2004, A participated on a golfing trip to Malaga, totalling at least 11 500 kr. Y Engineering AS paid the trip in full.
- In March 2004, A received 30 000 kr. in cash and a bank deposit from B, a representative of Z Entreprenør AS (Z).
- In June 2004, A received a bank deposit of 40 000 kr. from B
- In July 2004, A received a bank deposit of 30 000 kr. from B
- In August 2004, A received a cash sum of 80 000 kr. from B

6.4.3 First indictment – bribes

The court treated the payments under one. A admitted to receiving 180 000 kr. from B, a representative of Z Entreprenør AS in exchange for awarding contracts at UUS. Both admitted to it being corruption.

Objective guilt

"Undue advantage"

- The payments were in clear violation of the *internal guidelines* of Ullevål University Hospital, which states that employees shall avoid personal advantages of a nature that can influence or possibly influence actions, case preparations or decisions.
- The court finds that the *size of the payments* in conjunction is significant, and that it constitutes giving and receiving an undue advantage respectively.
- A prerequisite of § 276a is that the giver or receiver of an undue advantage does so in light of his *position, duties or assignment*. This is in accordance with Ot.prp.nr. 78 s. 34. Both A and B admitted to the money being in exchange for awarding contracts to Z.
- The court found that the violations were made *with intent*, as they both without doubt knew that the payments constituted an undue advantage.

Gross corruption

- § 276b requires an act to *yield significant economic* value. The sum of 180 000 kr. was found to be significant.

- The defendant acted *intentionally,* knowing that the bribes / transfers were undue advantages.
- A had a particularly *entrusted position* and was *managing public means* on behalf of UUS, and committed severe breaches of trust towards UUS.
- The defendant made efforts *to conceal* the offences through fraudulent billing and accounting.

The court found that the corruption acts perpetrated by the defendants were gross based on these arguments.

6.4.4 First indictment - trips

A admitted to participating on two trips, paid for by two separate suppliers to UUS. The court treated these under one as they shared similar characteristics and because they raised many of the same issues. A did not admit to corruption in either case, arguing that they were both within the boundary of the advantages you may receive without committing an offence because of their value not being significant. The values were 9 500 kr and 11 500 kr respectively.

The court argues that ascertaining that these trips were in fact illegal was harder than for the first part of the indictment, as incrimination of so-called "gifts of a lesser value" or in line with what is customary should not be the case. However, the court remarks that as the trips were in line with A`s personal interest, hunting and golf, the "real value" of the trips is deemed higher towards the point of what should be regarded as undue. Gifts of a lesser value would be more along the line of a bottle of wine or a box of chocolates and would more likely be given in special occasions.

Objective guilt

<u>"Undue advantage"</u>

- A was employed by a company *managing public means*. Because of this, many of the strict moral standards and laws governing public officials are applicable.
- A did inform his employer about the two trips, but had not given information about *who were paying* for them. The employer noted a

general distaining attitude towards suppliers paying trips for his employees.

- The trips were distinctively *tailored towards A personally*, and yielded no documented utility for UUS. Professional content is a necessity to justify such trips. This is highlighted in a guide issued by NHO that characterizes expensive trips and events with little professional content and which are paid for by other than your employer as unacceptable.
- A was found to be in breach of *internal guidelines* at UUS, put in place from January 1. 2003. As a leader in an entrusted position, A would be expected to familiarize himself with such guidelines.
- The trips took place in the autumn 2003 and spring 2004, not long after the *new penal codes on corruption* were put in place. This means that customary practice should be taken into consideration.

Based on these arguments, the court found the trips were acts of corruption, even though they were of limited economic value. The court argued that the two trips, without doubt, were undue also in light of them taking place not long after implementation of new legislation. They were awarded due to his position at UUS, and the personal natures of the trips were likely to influence his decision-making. The court finds that both objective and subjective conditions for criminal liability are fulfilled according to § 276a.

Gross corruption

- § 276b requires an act to yield *significant economic value*. This was not found to be the case.
- According to Ot.prp.nr. 78 s 58, the value *does not need to be significant* if someone in a *particularly entrusted position* perpetrates the act.
- Possible damages should be taken into consideration, in this case towards a public hospital, managing public means and operating on a strict budget.

The court consequently found the two trips to be gross corruption. The verdict underlines that a trip without professional content and tailored to the personal interests of an individual, may have a "real value" higher than the actual economic value. It also asserts that advantages, such as trips, of limited

economic value can be viewed as gross corruption when involving a person who manages public means.

6.5 Other cases

6.5.1 Uniprawn Holding AS[141]

HR-2006-657-A – Rt-2006-449 is one of the few cases where § 6-22 (former § 44) in the TA has been used. A Norwegian holding company, Uniprawn Holding AS, was refused deduction for costs associated with bribery due to a wrongful reciprocity. The wrongful reciprocity in this case was a promise from the passive party to maintain the business connection with Uniprawn, as he admitted that the business connection would not be continued had he not gotten a provision agreement with Uniprawn. According to the court the reciprocity in itself was not wrongful, however since the passive party were convicted of fraud against his own employer due to this business connection, the provision agreement that totaled to an amount of NOK 2 424 623 was a compensation for a wrongful reciprocity.

The court also pointed out that the payments were attempted hidden and that the provision agreement had a high economical value[142].

6.5.2 The Onninen case[143]

A former department manager in Onninen AS was sentenced by confession to 90 days imprisonment in Toten District Court in 2006 for gross economical infidelity, corruption and violation of the Tax Administration Act.

The case involved a representative from the state owned company Forsvarsbygg and a paid trip for him, his wife and in-laws. The value of the trips was 23 000 kroner, and the department manager had informed the region manager who approved of the trip. He argued that there was a *"widespread travel- and buttering culture in the business"* and that competition is sharp.

The District Court put weight on the fact that Forsvarsbygg is a public company, and that the known "buttering culture" could not make up for that.

[141] HR-2006-657-A
[142] HR-2006-657-A
[143] TTOTE-2006-33035

The total transparency towards his regional leader was not extenuating in this case, and the District Court commented that every manager should take responsibility when it comes to the boundary between legal customer treatment and corruption.

6.5.3 The Siemens case[144]

Three leading employees in Siemens AS were acquitted for corruption indictments in Oslo Disctrict Court in 2009, for inviting leading employees in the Norwegian Defence on golf trips to Spain. Both hotel and golf were paid for by Siemens AS.

The court assumed when assessing whether the trip was an undue advantage that the employees from the Norwegian Defence *"in no way were attempted influenced directly or indirectly during the golf trip*". This is not a crucial criterion in the assessment, but they put great weight on it.

As the leading employees from Siemens AS were found to not have acted judiciously, the court decided that they did not act clearly blameworthy, and hence not undue. The lack of intent to influence was a deciding factor to this conclusion.

6.5.4 Bribing a police officer[145]

A man was in 2012 convicted in Sør-Østerdal District Court for attempting to bribe two police officers with 500 kroner to get his way out of a "driving under influence" charge (DUI).

The court stated that even though the economical value of the advantage should be the starting point when assessing the impropriety principle, the value should not solely decide on the matter. According to the preparatory work an advantage that was meant to influence the passive briber's exercise of his position, duty or assignment will normally be undue[146]. This was the court's main argument to the matter, and they found that the defendant was guilty of active bribery according to the 1902 PC § 276 a.

[144] TOSLO-2008-171401
[145] TSOST-2012-107692
[146] Ot.prp.nr. 78 (2002-2003), page 56

7. The Impropriety principle

7.1 Introduction

"Undue" is a legal standard that sets the boundary between the punishable and the non-punishable. Each case should be analyzed individually and consider the overall picture of the situation, where several elements play a role. The advantage's purpose, type and value, to what extent there has been transparency in the matter, which set of rules that are implemented in the company or the business in general, whether the relation involves a public official and what positions the giver and receiver of the advantage have, are some of the elements that should be included in the discussion. The assessment should also be seen in the light of the general perception in today's society with regards to actual considerations and the fundamental values behind the clause[147]. The Penal Code Commission has also stated that it is not sufficient to say that an action is blameworthy – it takes more than that for an action to be unlawful.

The following list of assessment factors is not exhaustive, cf. the wording in the preparatory work to the Penal Code *"..etc."*[148].

7.2 The economical value

If the advantage has an economical value, the value should be a natural starting point for the impropriety principle, according to the preparatory work[149]. Less valuable gifts and other advantages would not be considered undue as long as the normal perception in the society would not say otherwise. An advantage that would be a reasonable provision for "good work" would in no way be considered undue, such as a wine bottle or a box of chocolate for Christmas. Representation or commercial effects will most likely not be seen as undue advantages, but the line would have to be set individually in each case. In the Ruter case the District Court found that dinners that totaled to a value of NOK 4 739 could not be seen as "less valuable gifts and other advantages", and the value therefore contributed to the conclusion that the dinners were undue advantages. The Court of Appeal in the same case disagreed and stated that the

[147] NOU 2002:22, page 39
[148] NOU 2002:22, page 39
[149] Ot.prp.nr. 78 (2002-2003), page 56

amount per person was not abnormal for a business dinner, and found the value of the advantage rather modest. Business trips, concert tickets and tickets to sports- or other entertainment are more likely to be undue, according to the Court of Appeal in the Ruter case[150]. In the Ullevål University Hospital case, the court found it harder to set the boundary for impropriety when it came to the value of the trips, compared to the direct payment of 180 000 kroner. They stated that the values were much lower, about 10 000 kroner for each trip, however it is less valuable gifts that are accepted by the people in general that should not be framed by the clause. Examples of less valuable gifts that were mentioned was a bottle of wine, a box of chocolates and similar gifts. The trips were much more expensive than that[151], and the court came to the conclusion that the economical value of the trips alone crossed the line for impropriety.

A company's ethical guideline often sets a maximum value for gifts and other advantages that employees can accept. Since what is perceived as an undue value differs from business area to business area, the internal ethical guide lines can be a good indication for what is acceptable. For example Yara's employees can give and accept gifts under normal circumstances with value less than 75 USD[152] which is about NOK 650[153]. Employees at Yara that accepts gifts of higher values that 75 USD would be breaching the internal guidelines, which will contribute to the gift being considered undue *(see chapter 5.9.1 in this paper).*

Though the natural starting point of the assessment is the advantage's economical value, it is not a criterion that the value can be measured in money[154], and the value aspect should not be the deciding factor alone.

7.3 Giver and receiver's position and their relationship

The preparatory work to the changes in the PC[155] mentions that the impropriety assessment can depend on the parties' positions and the relationship between them. If a wine bottle is given from an attorney to a judge, and this happens

[150] HR-2014-1779-A – Rt-2014-786
[151] Chapter 6.4 in this thesis
[152] Yara (2015), "Code of Conduct"
[153] Currency adjusted, The Norwegian Central Bank website, July 8, 2016
[154] Ot.prp.nr. 78 (2002-2003), page 35
[155] Ot.prp.nr. 78 (2002-2003), page 56

shortly after the judge has ruled in favor of the attorney's client, the relation can easily be perceived as undue. If the bottle of wine is given prior to the ruling in favor of the attorney's client, it will normally be seen as undue if no other occasion can justify the gift, such as an anniversary or a 60th birthday. The same problem was discussed in the Ruter case, where the District Court believed that the dinners were treated at the same time as important tenders were ongoing. The Court of Appeal disagreed, and stated that the parties were involved in important tenders at all times, and that the relationship between the giver and receiver was innocent on that matter.

Persons with especially entrusted positions and with controlling positions, such as the police or customs' agents, would be subject to a stricter norm, while persons in certain occupations such as in the service sector most likely can receive more expensive gifts without it being perceived as undue[156]. In the Ullevål University Hospital case the court found that the passive briber *"received the advantages in occasion of his position as real estate manager making him a central premise provider and/or decision maker allocating assignments for the property department"* and that he had a central position with great power and significant power of influence[157]. This was central to the conviction.

The commercial effect of an advantage can also make more valuable advantages such as field trips, courses and conferences proper, as long as the content of the trips, courses and conferences are within reasonable boundaries and there is full transparency *(see chapter 8.5 in this paper).* Paying for a secret cruise with a business connection on the other hand will most likely be an undue advantage[158].

7.4 Public or private

In the new legislation from 2003 the legislators decided to punish public and private corruption by the same clause. However in the preparatory, it is stated that the demands for actors in public businesses should be stricter that in the

[156] Ot.prp.nr. 78 (2002-2003), page 56
[157] LB-2009-35191, page 12
[158] NOU 2002:22, page 40

private sector[159]. The advantage will more likely be seen as undue if a public official is *involved*, which is also an assessment criteria for gross corruption by the wording in § 378.

This is emphasized in a verdict from 2012, where a man was convicted for sordid corruption for attempting to bribe two police men. The economic value was only 500 kr., yet the court stated that the advantage was undue because it was given to influence the passive briber's exercise of duties and the fact that the passive briber was a public official[160]. The preparatory work states that if an advantage is offered or given in order to *influence a public official*, it is most likely undue[161].

In the Ullevål University Hospital case the court stated that a stricter norm can apply to non officials as well; "[…] he was not a public official, but employed in a business that is substituted from the public, such that a lot of the same considerations apply. To accept that sort of advantages raises doubt on whether the community's means are managed in a justifiable way"[162].

7.5 The purpose of the advantage

The purpose of the advantage is a central criterion in the assessment. If it can be proven that the advantage was meant to influence the receiver's position, duty or assignment, and the receiver understood or at least found it highly probable that the motive was influence (cf. PC 1902 §§ 40 and 42), it would normally be an undue advantage[163]. It is not a prerequisite that the purpose of the advantage was to influence the receiver, however in the Siemens case[164] the court stated that the lack of intentional influence should be emphasized in the impropriety assessment. This is also found in the Unibuss case, where one of the defendants was acquitted based on him not being in a position to influence on procurement processes[165].

[159] NOU 2002:22, page 34
[160] TSOST-2012-107692 cited in Chapter 6.5.4 in this thesis
[161] Ot.prp.nr. 78 (2002-2003), page 57
[162] LB-2009-35191, page 12
[163] Ot.prp.nr. 78 (2002-2003), page 56
[164] TOSLO-2008-171401
[165] LB-2015-69201-1 – LB-2015-9388 – TOSLO-2013-195526, cited in Chapter 6.3 in this thesis

More valuable objects can be justified by the commercial effect, as mentioned in chapter 8.3 in this paper, especially if the objects have the firm's logo on them or something else that clearly shows the commercial function of the object[166]. Contributions from citizens to a political party are also legal in most cases.

7.6 Degree of openness and internal guidelines

An open dialogue with one's employer or principal will often entail that the advantage is not perceived as undue. More valuable gifts in private practices can also be proper, as long as the employer or principal is well known of the gift. Gifts and other advantages that are given with full transparency in the private sector will in most cases be prohibited by regards to free competition rather than § 276 a[167]. In the public sector on the other hand, telling your superior about a gift is less likely to make it proper due to stricter regulations in the Civil Service Act § 20.

If a company has a zero tolerance on receiving and giving gifts, an advantage will more likely be seen as undue if an employee breaches these internal guidelines. This goes hand in hand with the principle of transparency.

In the Ullevål University Hospital case[168] the court emphasized that the advantages were conflicting with the hospitals guidelines on gifts, and that the superiors were not correctly informed of the trips.

7.7 Business moral, administrative practices and customs

According to the Department the customs in the country where the bribe takes place or where the passive briber works has to have some say in the impropriety assessment. So-called "facilitation payments" are more common in some countries and industries, and some Norwegian based companies still does not have a zero tolerance against it. Yara International ASA implemented a zero tolerance in November 2015[169], while Kongsberg Gruppen ASA still allows facilitation payments if "absolutely necessary"[170]. According to the

[166] NOU 2002:22, page 40
[167] NOU 2002:22, page 39
[168] LB-2009-35191, TOSLO-2005-134006, Cited in Chapter 6.4 in this thesis
[169] Yara (2015), "Code of Conduct"
[170] Kongsberg Gruppen (2014), "Etiske retningslinjer"

preparatory work to the Penal Code[171], such facilitation payments can be justified in situations where for example a person feels forced to pay a foreign public official a small amount to get his passport back or to be allowed to leave the country. Each situation should be dealt with discretion, and the advantage's value should be central in the assessment. Legislation and customs in the country concerned should also be part of the assessment[172].While the preposition leaves some doubt about the legality of facilitation payments, the District Court stated in the Yara case that customs in the foreign country should not be put much weight on. The Norwegian Government has also stated that all facilitation payments are corruption, and is therefore illegal[173].

The administrative practices in a certain business sector should have some weight in the assessment; however it should not be decisive. Bad business practices and cultures may have evolved in some sectors, and such cultures should be restrained[174].

7.8 Policy considerations and the fundamental value behind the clause

The corruption clause has been added to the PC to protect different interests, and if an act is especially threatening to those interests, it would more likely be perceived as undue. The preamble to the European Convention corruption states that *"corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economical development and endangers the stability of democratic institutions and the moral foundations of society"*[175].

Bribes involving public officials will ruin people's trust for the government's impartiality and integrity. An essential consideration to the criminalization of corruption is the consideration for the public's trust to the governmental operations in all its forms, and that trust is fundamental to a stable democracy. In the public sector a ban on corruption can be reasoned by the consideration of a functioning public administration. In the private sector employees guilty of corrupt actions are perceived as disloyal and fraudulent towards their

[171] Ot.prp.nr. 78 (2002-2003), page 57
[172] Ot.prp.nr. 78 (2002-2003), page 57
[173] Regjeringen (2011), "Næringslivets ansvar å bekjempe korrupsjon"
[174] Ot.prp.nr. 78 (2002-2003), page 55
[175] Council of Europe (1999), "Criminal Law Convention on Corruption"

employer. The contract of employment gives the employee a responsible to ensure and promote the employer's interests, and receiving bribes will normally infringe upon these interests. Further it can lead to business deals being less gainful and harm the business' reputation and trust. The ban on active and passive corruption in the business sector thereby prevents any acts harming the free competition and promotes a well functioning market.

Corrupt actions often lead to more corruption and other forms of crime, such as black mail, threats, forgery, and accounting offenses. In that way the clause also fights the unfortunate black economy[176].

7.9 Clearly blameworthy

The Norwegian Department of Justice has stated that the relation must be clearly blameworthy for § 387 to apply – it is not sufficient that it is perceived as censurable from an ethical or moral view[177]. The assessment may vary from area to area, and finally the court should draw the line between what is legal and what is punishable in each case[178]. It is emphasized in the preparatory work that a stricter norm should be the grounds for public officials[179].

According to the European Convention the advantage must be "undue", which implies that the advantage is something that the receiver is not legally entitled to[180].

In TOSLO-2008-32091 two passive bribers were prosecuted for the exact same relation, and while one of them was convicted, the other was acquitted. The person who got convicted admitted that he regarded a trip to Austria as a "buttering trip" – a pure personal advantage related to the ongoing contracting negotiations. He did not commit to the academic program on the trips, and he did not inform his employer. The other person had been informed and had it as a clear prerequisite that the offer was a business trip with significant academic content. The focus would be on building relations and exchanging experience, and the trip would be carried out in a professional and business related way. He

[176] NOU 2002:22, page 31
[177] Ot.prp.nr. 22 (2008-2009), page 55
[178] NOU 2002:22, page 32
[179] Ot.prp.nr. 78 (2002-2003), page 56
[180] Council of Europe (1999), "Explanatory Report to the Criminal Convention Law on Corruption", point 38

informed his employer about the trip, and also decided to pay for some of the trip himself when he understood that it was *"unserious with a lot of alcohol involved"*. He was therefore acquitted on the grounds of good faith. The District Court emphasized that his intentions were to participate on a fully legal, professional and serious trip with significant academic content, and that his expectations were according to the information that he had gotten from the active briber prior to the trip.

The corruption clause requires that the action was willfully committed; however in HR-2009-302-A the Supreme Court found that the defendants could be convicted for corruption even though there was no demand or expectations for a consideration for the bribes – that is, no intent proven.

8. The distinction between public and private

Prior to the general rule in § 387 of the 2005 Penal Code, corruption involving public officials receiving an improper advantage to either refrain from doing their duties or to undertake an administrative action in breach of their duties was penalized by the now obsolete, § 113[181]. One difference between the two is that § 387 does not require that the public official acts in breach of his duties.

Chapter 7.3.3 of Ot.prp.nr 78[182] lists a number of characteristics in judging what constitutes corruption and gross corruption. The first one mentioned is whether or not an act is perpetrated by or towards a public official or towards a private sector employee with special trust relating to his position, duties or assignment. It further states that in mentioning public officials the purpose is to underline that corruption in the public sector will more often be regarded as gross than cases revolving around the private sector.

According to Article 1, letter a, of the European Convention[183], the term "public official" comprises government ministers, mayors and judges. The definition is expanded through letter b of the Article[184], in that it also includes

[181] Stordrange (2014), "Forbrytelser mot vårt økonomiske system, 3. Edition", page 92
[182] Ot.prp.nr. 78 (2002-2003), point 7.3.3
[183] Council of Europe (1999), "The Criminal Law Convention of Corruption", Article 1, letter a
[184] Council of Europe (1999), Article 1, letter b

"prosecutors and holders of judicial offices". One should note that to incriminate a foreign public official, prerequisite that the person must also be regarded as a public official, in accordance with the convention, in the country prosecuting the case.

In the corruption case against the former head of estates at Ullevål University Hospital[185], the court highlights the aggravating condition when involving public means or people representing public companies. The verdict stipulates that when a defendant is or has been an employee of a company handling public means, many of the strict moral standards and laws governing public officials are applicable. It further emphasizes that such positions are often especially entrusted, which in turn means a waiver of the condition in § 388, that an act must yield significant economic value to constitute gross corruption.

Such considerations are also foundations for the verdicts in the Unibuss case. As employees of a communally owned business, they themselves were not public officials, but their actions could have inflicted severe damage on society through abuse of its resources and a possible diminishment of public services[186].

Public officials must in general be subject to stricter norms than employees within the private sector[187]. § 20 of the Civil Service act states that he who holds public office or serves as a public official, is not permitted to receive *"gifts, provisions, favours or other benefits that could, or which are meant by the giver to, influence his official duties, or to which there are regulations rendering them illegal to receive".* According to the preparatory, work this clause can give some guidance as to what should be considered an improper advantage in the Penal Code. Though § 20 might give some guidance, an advantage will not necessary be considered improper (undue) according to § 378 if it is in breach of § 20. The norm that constitutes the grounds for the

[185] TOSLO-2005-134006
[186] TOSLO-2013-195526
[187] Ot.prp.nr. 78 (2002-2003), page 56

impropriety principle is therefore probably not as strict as the one in the Civil Service act[188].

The Ruter case[189] illustrates how three dinners totalling a relatively modest value can become subject to incrimination. Through the defendants' acquittal, the Norwegian Supreme Court provides some guidance into what public officials or employees managing public means can accept with regards to customer relationship management. The verdict argues that even public officials must be able to accept an invitation to a dinner or similar events paid for by others than their employer, and to which representatives from other businesses or agencies are invited, without running the risk of being convicted of corruption. This includes situations where an event does not necessarily encompass factual content[190].

8.1 Why is there a distinction?

Public officials are frequently involved in corruption cases and are subject to bribes, facilitation payments, influence peddling and other forms of corruption. In many cases their decision-making sway large deals, has impacts on infrastructure and other construction projects of significant value and they are often in a position to establish or take away the foundations private businesses are built on. The impact from a decision need not be economic, but can also have severe societal impacts through for instance environmental legislation and other governing policies.

Transparency in how the public sector manages and allocates its resources is important in order to no create uncertainty around how public funds are utilized. The Ruter verdict[191] emphasizes this in stating that the limitations for acceptable social contact must be stricter when involving representatives of publically funded corporations. The reasoning is that there should be cast no doubt upon how public funds are managed, or to whether or not the decided outcomes are in the public's best interest. This is due to the importance of the general public sustaining trust in how the public sector operates. The latter

[188] NOU 2002:22, page 39
[189] HR-2014-1779-A – Rt-2014-786
[190] HR-2014-1779-A – Rt-2014-786, Ot.prp.nr. 78 (2002-2003), page 56
[191] HR-2014-1779-A – Rt-2014-786

point highlights the duties and responsibilities attached to the mandate carried by the public sector. The special trust attached to public service or through working in organizations funded by public means is consequently an element in considering the severity of corruption offences[192].

The repeal of distinguishing between corruption in the private and public sector should not be seen as a diminishment of this clarification. There was a historic reason for separating between regulation of corruption involving public officials and private sector workers; the Penal Code of 1902 included few corruption regulations for private sector workers, except for loyalty towards their employer. This meant that such considerations were safeguarded by the provision on economic infidelity[193].

According to Innst.O.nr. 105 (2002-2003), corruption acts in the private sector can be just as severe as those occurring in the public sector. The tightening of this condition is important in order to maintain trust in private business and organizations, and in ensuring fairness in competitiveness. These latter points follow from the aggravating condition when an act involves either a public official, a private sector worker managing public means – or a specially entrusted private sector worker such as in the Ullevål-case[194] or Unibuss-case[195] respectively.

9. Trading in influence vs. corruption

9.1 Introduction

Trading in influence, or influence peddling is a form of corruption punishable by § 389 which is a direct continuation of § 276 c in the 1902 PC. § 389 reads;

"By fines or imprisonment up to 3 years will be punished he who

c) for himself or any other person, receives or accepts an offer for an undue advantage to influence the exercise of someone's position, duty or assignment, or

[192] PC of 2005, § 388
[193] NOU2002:22, page 42
[194] TOSLO-2005-134006
[195] TOSLO-2013-195526 – LB-2015-9388

d) *gives or offers someone an undue advantage to influence the exercise of someone's position, duty or assignment.*

By position, duty or assignment in the first subsection refers also to position, duty or assignment abroad. "

Sordid corruption is punishable by § 387, which is a continuation of § 276 a in the 1902 PC. It reads;

"By fines or imprisonment up to 3 years will be punished he who

a) *for himself or others demands, receives or accepts an offer for an undue advantage in relation to his position, duty or assignment, or*
b) *gives or offers someone an undue advantage in relation to a someone's position, duty or assignment.*

By position, duty or assignment in the first subsection refers also to position, duty or assignment abroad."

The two paragraphs are quite similar, but the maximum penalties are very different. A person convicted for trading in influence can get a maximum sentence of 3 years imprisonment, while a person convicted for gross corruption can get up to 10 years imprisonment[196].

In the following we will try to draw a line between trading in influence and corruption, using jurisprudence and preparatory work. The person who seeks to influence another in occasion of someone's position, duty or assignment will be referred to as an "influencer" in this section.

9.2 Position, duty or assignment

One of the criterions for § 387 to apply is that the bribe has to be in relation to someone's position, duty or assignment. Similarly § 389 requires that the bribe is related to someone influencing another's position, duty or assignment. The important difference is that § 389 applies to actions where the influencing does not happen in occasion to the passive briber's position, duty or assignment. If the influencer receives an undue advantage in occasion of his own position, duty or exercise of assignment, § 387 should be the starting point. If the

[196] The Penal Code of 2005 § 388

influencer works at the procurement department of a company, and he receives an undue advantage to influence the department manager to buy from a certain supplier, § 387 should also apply[197]. This is regardless of whether the company is private or public.

§ 389 apply to the cases where the person who is sought influenced has no connection to the influencer's business, department or organization. An employee in a private company who receives an undue advantage to influence a public official should therefore be prosecuted according to § 389.

To determine borderline cases the behavior of the influencer towards his employer can be of help. If the behavior appears to be disloyal to the influencer's employer, it will normally be perceived as ordinary corruption. If an employee in an information consultation business receives a payment from a client to influence a political party, there would probably not be any disloyalty towards his employer, given that there is full transparency and the company receives the payment. In this situation § 389 would most likely apply. On the other hand if the employee is politically active and is paid to influence a party colleague, there might be a breach of trust towards his party, and § 387 would probably apply[198].

If the influencer uses gifts and other advantages to influence the "target", § 387 might apply, that is if the advantages are undue according to the paragraph. Both the influencer and the principal can then be prosecuted by § 387.

In the Yara sentence[199] the defense argued that the offence committed was influence peddling, as the bribes were not paid directly to the decision makers, and hence not in relation to someone's position, duty or assignment. The court stated that influence peddling cannot be argued in all cases where the bribe is not paid directly to the decision maker. If the payment is channeled through a third party, or someone that the decision maker has pointed out as the receiver

[197] Ot.prp.nr. 78 (2002-2003), page 60
[198] Ot.prp.nr. 78 (2002-2003), page 60
[199] TOSLO-2014-22670

of the advantage, cf. *"for himself or others"*[200], it is not natural to call the offence trading in influence – it is then called an indirect advantage.

9.3 Undue advantage

The boundary between what is punishable and what is legal is drawn by the impropriety principle. Both trading in influence and ordinary corruption requires "clearly blameworthy behavior" and the advantage involved must be improper or undue. Undue is a legal standard, in which its content has to be assessed and decided by the court individually in each case[201]. The impropriety assessment may therefore vary from trading in influence to ordinary corruption.

One of the assessment factors is openness and transparency. As this should have some say in the assessment to § 387, it may by decisive to the assessment in § 389. To determine whether an influencer has crossed the line between lobbying and trading in influence, the fact that the influencer has been open about him performing on behalf of a principal can legalize the behavior. On the other hand if there is no reason to believe that the person sought influenced is aware of the influencer's representation, and the influencer is not open about this, the relation will in most cases be considered undue[202]. In this case even if the influencer does not succeed with his attempt to influence the decision maker, or the decision maker has already decided, the behavior can be punishable by § 389. Actual influence on the decision maker is not a criterion according to § 387 either, nor that the purpose of the advantage was to influence the receiver[203]. When it comes to trading in influence, it is sufficient that the influencer gives the briber the impression that he will seek to influence the decision maker – there is no demand for real intent (no: reell hensikt). Even though § 387 requires that the action was committed willfully, the Supreme Court found that the defendants in HR-2009-302-A[204] could be convicted with no intent proven.

---

[200] The Penal Code of 2005 § 387 (1) a
[201] Chapter 8.1 in this thesis
[202] Ot.prp.nr. 78 (2002-2003), page 61
[203] Ot.prp.nr. 78 (2002-2003), page 56
[204] HR-2009-302-A

Another difference lies in it being less likely that there exist instructions or written guidelines to what sort of gifts or other advantages a possible influence wielder may or may not receive. In comparison, companies will often have internal guidelines that aim to avoid corruption.

9.4 Official vs. Private

A central momentum in both §§ 387 and 389 is the person who is sought influenced. If this person has a specially entrusted solstice or position that should be protected against undue influence, the rules are stricter[205].

According to the preparatory work the deed description in the two clauses should be interpreted in the same way. Both passive and active corruption and trading in influence are violations of the legislation, and the part where a person *"for himself or others demands, receives or accepts an offer"* or *"gives or offers someone"* has the same meaning in the two clauses. The same applies to the terms *"advantage"* and *"position, duty or assignment"*[206].

The two corruption clauses should be seen side by side, and the impropriety assessment should be based on the same criterions by far. The difference between ordinary corruption and trading in influence will in most situations be which group of people it applies to, not where the boundary of impropriety should be set[207].

10. Comparison of the Penal Code and the Taxation Act

10.1 Introduction

The Taxation Act (TA) § 6-22 refuses deduction for bribes, or active corruption, while § 387 criminalizes the behavior. The purpose of the TA clause is similar to the purpose of the corruption clause in the Penal Code, however the wording and the approach is somewhat different. While the TA never uses the word corruption, the wording implies that pure cases of

[205] Ot.prp.nr. 78 (2002-2003), page 61
[206] Ot.prp.nr. 78 (2002-2003), page 61
[207] Ot.prp.nr. 78 (2002-2003), page 42

corruption are covered; *"compensation for wrongful consideration or that aims to ensure such wrongful reciprocity"*[208].

10.2 Legal standards

What lays the grounds for refusal of tax deduction in the TA is the so called wrongful reciprocity [no: urettmessig motytelse], where it is the *passive* party's response to the bribe that can lead to refusal. According to § 6-22 the reciprocity is wrongful when it conflicts with general business moral or business practices, see chapter 5.6. In the Uniprawn case[209] the court decided that a promise to uphold a business contract was a wrongful reciprocity, because the passive party cheated on his employer by concluding the contact. Both *wrongful reciprocity* and *undue advantage* are legal standards, and the terms will therefore have to be discussed individually in each case. The court states that the reciprocity in the Uniprawn case was not wrongful in itself, but by concluding the contract the passive party was found guilty of fraud against his employer.

In comparison the punishable relation in the PC's corruption clause is when the advantage, or the payment, from the *active* party is undue, see chapter 5.2. Whether an advantage is undue depends on several factors, such as the economical value, whether there was any degree of openness, if any accounting errors intentionally were made, the purpose of the advantage and more. This is not an exhaustive list.

The TA characterizes two types of incitement cases; the first is where there is no evident reciprocity, that is where the bribe is thought of as a way to stimulate an upcoming disloyal reciprocity, and the second is where there is a bribe, but the reciprocity from the receiver is absent. This may be an unsuccessful attempt from the bribers point of view, but it is still not legal for him to deduct the bribe from his tax report[210]. Both the expectation of a disloyal reciprocity and the actual accept from the receiver might be tacitly, and there is often an implied agreement between the briber and the receiver. These kinds of incitement cases are also considered illegal bribes according to

[208] The Taxation Act of 1999 § 6-22
[209] Chapter 6.4.1 in this thesis
[210] Ot.prp.nr. 76 (1994-1995), page 25

the TA[211]. In comparison active corruption in the PC involves giving or offering someone an undue advantage and whether the active briber follows up on his offer or not is irrelevant as long as the offer has come to the passive bribers attention[212]. The preliminary work to the TA and PC both state that it is irrelevant whether the bribe is given before, at the same time, or after the reciprocity from the receiver[213].

If there is no incitement involved the payment will be characterized as a gift. However to get a deduction for gifts, it is a requirement that the gift will have sufficient commercial effects, cf. § 6-21-5 in the regulations to the TA[214].

10.3 Accepted business culture

Culture is an aspect that should be considered according to both clauses and the accepted business moral and practices in the country where the bribe took place should be the base of the discussion. According to the TA if Norwegian standards are more rigid than the standards in the relevant country, Norwegian standards should be the base of the discussion[215]. The culture aspect of the corruption assessment in the PC should be based on the moral standards in the country where the bribe took place, but from legal practice we see that the cultural aspect is not put much weight on when judging whether an advantage is undue or not. In the Yara case the court stated that when deciding on the sentencing, the cultural aspect is more important[216].

10.4 Bribes and representation

There is no clear distinction between bribes and representation in the TA, and it is stated by the author Arthur J. Brudvik[217] that no such distinction is needed because neither is deductable according to the TA. He also mentions that a distinction in the TA would make it easier to detect corruption, as it clearly matters according to the PC. A cost that in reality should be grouped as a non-

[211] See point 5.2 in this thesis
[212] See point 5.2.3 in this thesis
[213] See points 5.2 and 5.6 in this thesis
[214] FOR-1999-11-22-1160
[215] Ot.prp.nr. 76 (1995-1996), point 1.5.2
[216] Ot.prp.nr. 78 (2002-2003) and NOU 2002:22, pt. 5.3.4
[217] Brudvik (2012), "Skatterett for økonomer", page 188

deductive bribe according to the TA can be disguised as representation costs according to the TA § 6-21 and hence not be subject for further investigation.

According to the preparatory work to the 1911 TA a bribe that is necessary to promote commercial interests might be deductable by § 6-1, as long as the conditions in § 6-22 are not satisfied. That is if the passive bribers reaction is not wrongful, a bribe might be deductable by § 6-1. However it is stated in the preparatory work to § 6-22[218] that what is a "wrongful" reciprocity should not only be assessed by the PC, but also whether it is wrongful compared to an ethical standard. This clause has its origin in an OECD recommendation from April 11th 1996, and while only a recommendation, Norway was the first member to follow up on it[219].

11. Weaknesses in the legislation

11.1 Introduction

Amongst the Nordic countries Norway has the strictest penalties for corruption, and yet we range at the bottom in the CPI-index[220]. On the ground is these facts, we have constructed a hypothesis that discretionary interpretation of the legislation, high personal gains and small chances of getting caught outweighs the risk and disutility of punishment for corruption. We wanted to look at the possibilities that lack of knowledge or wrongful interpretation of the legislation is enhancing the propensity to conduct *"grey zone business"*. While we are not able to test our hypothesis, we see that there may be weaknesses in the legislation that should be elucidated. In the following we will present these weaknesses.

11.2 The impropriety principle

"Undue advantage" is a legal standard that should be defined objectively by the court in each case, in light of the common perception and ethical standards at all times. Though the preparatory work provides some guidelines as to what factors should be included in the assessment, there is no clear boundary – as is common for legal standards.

[218] Ot.prp.nr. 76 (1995-1996)
[219] Ot.prp.nr. 53 (2005-2006), page 17
[220] Transparency International (2015), "Corruption Perception Index 2015"

When including § 276 to the PC in 2003, there were some objections to the proposal. Hordaland Public Prosecutors [no: statsadvokatembeter] stated that *"in our opinion the legislative text is too vague, and appears problematic in relation to the legal requirement* [by the European convention]. *The Penal Code Commission's review and discussion* […] *clearly shows that the proposal raises difficult problems of delimitation.*[221]*"* NHO enhanced that the impropriety assessment should be practiced in a way that can create predictability and that does not change the current practice in the business sector. They stated that *"*[…] *it is unfortunate that the boundary between legal actions for information, relationship building, customer contact, sales efforts etc. and corruption is not distinct. In that way it will be more difficult to relate to the provision.*[222]*"*

In an answer to this the Department stated that the proposed formulation was the most expedient, and that it should be underlined that under Norwegian circumstances neither the briber nor the receiver has any reasonable grounds to balance on the edge of a provision against corruption[223]. They also believe that it is not given that any other formulation would create more predictability and clarity, and that simple straightforward clauses such as § 276 a will capture those relations that one wishes to frame with this proposal[224].

Whether any other formulation would create more predictability and clarity is unknown, however reasonable ground for balancing on the edge of the provision might exist. The users of the legislation of course have a great interest in establishing and maintaining good customer relationships, and while the boundary is so unclear, they might not know when they are closing up on it. The grounds for this argument is the Ruter case[225], where an unanimous District Court found that dinners amounting to between 1370 and 1700 Norwegian kroner per person constituted an undue advantage based on the assessment in § 276 a. Almost all elements of the discussion pulled towards an undue advantage. The Court of Appeal's unanimous conclusion on the other

[221] Ot.prp.nr. 78 (2002-2003), page 30
[222] Ot.prp.nr. 78 (2002-2003), page 32
[223] Ot.prp.nr. 78 (2002-2003), page 36
[224] Ot.prp.nr. 78 (2002-2003), page 36
[225] HR-2014-1779-A – Rt-2014-786

hand was that the dinners were not abnormal for the business practice in any way, and the operation manager was acquitted. Their discussion on the same elements was contrary to the District Court's discussion.

When using a legal standard to define a crime, it can be questioned according to the clarity requirements in the Norwegian Constitution § 96, however we will not be including this discussion in our paper due to its refinement.

On the positive side the legislators will capture all the intended relations. The fact that the legal standard should be seen in the light of the prevailing perception in the society at any time is also very positive in a way that the provision will not be out dated.

11.3 Representation and bribes

In our experience the lack of a clear boundary between representation and bribes constitutes a problem especially to the private sector. As previously mentioned the need to build customer relationships is crucial to many businesses, and when not given clear guide lines as to how expensive a wine bottle can be, or when it is appropriate to treat a dinner on business connections and whether wine can be served or not can be a problem. Our view is also supported by NHO, who in 2013 sent a letter to the Justice and Public Security Department [no: Justis- og beredskapsdepartementet] asking for an evaluation of the legislation[226]. They believe that the guide lines for how businesses should perform are too vague, and that the boundary between corruption and customer relationship management has to be clarified. According to the department director for business law at NHO, they get inquiries on the matter often, where the members ask questions such as *"how expensive does a gift have to be before I may not receive it?"* and *"Can one of our suppliers sponsor a dinner where our customers will be attending?"*. She states that *"What can be perceived as ordinary relationship building, we are often asked to confirm the legality of"*[227].

[226] NHO "Krever klarhet om korrupsjon (2014) cited in DN article, "Hvor dyr kan vinen være for det blir korrupsjon", 13.08.2014

[227] NHO "Krever klarhet om korrupsjon (2014) cited in DN article, "Hvor dyr kan vinen være for det blir korrupsjon", 13.08.2014

Also the lack of knowledge due to the discretionary interpretation of the legal standard "undue advantage" may result in people crossing the line for what is considered proper conduct.

11.4 Facilitation payments

NHO commented on the proposal to the addition of § 276 in the PC that *"In many societies where Norwegian companies operate, these kinds of payments are systematically necessary to conduct business, the payment systems of foreign public officials are based on those relations. According to the conventions those relations are not to be considered as corruption. By NHO's opinion it is important that this falls within the boundaries for what is considered legal also according to the impropriety principle, and that this is clearly stated in the preparatory work.* […] *Anything else would cause a competitive disadvantage for Norwegian businesses, which in itself would be very unfortunate.*[228]*"* This proves that prior to the corruption legislation an unfortunate culture of facilitation payments has been developed over time.

TI commented that the Penal Code Commission should have expressed their thoughts on facilitation payments specifically, or at least what grounds the court should use when assessing the impropriety principle in cases of facilitation payments. Further they stated that *"whether extorted or not, facilitation payments are bribes, albeit small in business terms and at the lower end of the spectrum of bribery. The extortion argument should not allow the true nature of facilitation payments as bribes to be obscured.*[229]*"*

The OECD convention does not include any obligations to have penal sanctions against facilitation payments[230], and neither does the European convention[231]. In Norwegian legislation facilitation payments are not mentioned specifically, however it is a form of corruption[232], and hence if the payment is undue (cf. PC 2005 § 387), it is illegal. In the preparatory work to

[228] Ot.prp.nr. 78, point 5.2
[229] Ot.prp.nr. 78, point 5.2
[230] OECD (2011), "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", cf. preparatory work (1999), point 9
[231] Council of Europe (1999), "Criminal Law Convention on Corruption", article 5
[232] The Norwegian Government (2011), "Næringslivets ansvar for å bekjempe korrupsjon", Regjeringen.no

the PC, the Department states that when assessing the impropriety principle regarding a facilitation payment, it should have some weight whether the advantage is paid for a wrongful reciprocity, or if it aims to achieve such a wrongful reciprocity. Further the bar should be set high when it comes to penalizing payments that are made to achieve something that the payer is lawfully entitled to[233]. These statements and the lack of specific comments on facilitation payments makes the legislation unpredictable and opens for misunderstandings. In the preparatory work the Department has commented on facilitation payments alongside the TA § 6-22 and the assessment of a *"wrongful reciprocity"*[234]. This assessment is not the same as for an "undue advantage", cf. chapter 11 in this paper, and it seems confusing that the two are compared. We also see that of the 5 largest Norwegian companies on Oslo Stock Exchange, only one has a zero tolerance against facilitation payments, yet all of them have a zero tolerance on corruption[235]. This shows that the legislation can be interpreted in different ways.

12. A presentation of the boundary

Between a box of chocolate given in the occasion of a business partners 60th birthday and a money transfer of 100 000 kroner to the person in charge of a business' acquisition at the time of a big negotiation, there is a grey area that cannot be determined by one single factor. The assessment criterions presented in this paper's chapter 7 should make the grounds for the discussion, where finally the court objectively decides what is legal customer relations, representation and marketing, and what is perceived as illegal corruption. Based on preparatory work, jurisprudence and other legal theory presented in this paper, we have attempted to make a representation for guidance on the matter.

Small gifts on special occasions	Proper.
Smaller courtesies	Normally proper, but it depends on the relationship between the parties

[233] Ot.prp.nr. 78 (2002-2003), page 37
[234] Ot.prp.nr. 78 (2002-2003), page 37
[235] Chapter 5.9.3 in this thesis

Contributions to a political party	Normally proper for citizens to support their political party
Business dinners	Grey zone. Dinners with full transparency that are not meant to unduly influence someone and that are not "overly lavish" according to customs or business standards are okay
Tickets to concerts or sports- or other entertainment	Grey zone. Most likely not proper, cf. the Ruter case and the Unibuss case, when compared to the dinners. In some industries such as the sales industry, it might be proper. In that case it depends on the purpose of the advantage, whether there is full transparency and whether internal guidelines say otherwise.
Items with commercial effect	Grey zone. If the items have the businesses logo or name on it, it will in most cases be considered proper in the private sector. In the public sector it is more dependent on internal guide lines and the purpose of the advantage. More expensive items might not be justified by a firm's logo in either sector.
Facilitation payments due to extortion	Facilitation payments are illegal if the advantage is undue, however if the situation can be characterized as extortion, it will in most cases be excused. For example through paying a small amount of money to get your passport back to be able to leave the country.
Study trips and conferences	Depends on the degree of openness, and the content of the trips in the private sector. A fully academic trip with full transparency is most likely okay in the private sector. In the public sector it may be okay, but dependent on the purpose, cf. the Siemens case.
Expensive dinners	Depends on the business culture in the industry; however an unfortunate "buttering culture" is not an argument for improper conduct, cf. the Onninen case.
Expensive gifts	Undue in most cases. In some sectors more expensive gifts can be accepted, if the internal guidelines do not say

	otherwise.
Expensive trips with little or no academic content	Undue. Somewhat dependent on the purpose of the trip (cf. TOSLO-2008-32091), but pure "buttering trips" are always undue. Trips with commercial effect or with an academic content may be okay in the private sector, especially in the sales sector, but most likely undue in the public sector. Cf. Unibuss case.
Cash	Undue. Whether small or big amounts, offering, giving, promising, receiving or demanding cash can in most cases not be justified as customer relationship management or representation.

This representation is not binding, as the only true definition can be given by the court individually in each case.

13. For further research

As this is a qualitative paper based on legislation, preparatory work, verdicts and other jurisprudence, we would find it very interesting to read a quantitative paper on the matter. We talked about doing a survey to map the society's perception on corruption in practice and how wide spread it is in Norway today, but found it too demanding and time consuming to do both. It would be interesting to see what ordinary employees in different sectors perceive as a corrupt act when it comes to gifts and representation, as we believe there is *"grey zone business"* going on every day. The giving or receiving of an expensive wine bottle, or trips with customers just for *"relationship building purposes"* might be perceived by many as normal day to day business when it in fact could be sordid corruption or *"buttering"* according to the PC.

We know that the unreported cases of corruption are many and that detection and investigation is both difficult and time consuming[236]. Starting at the bottom with the smaller cases and trying to change the general attitude towards the *"buttering culture"* could be proven as a good way to approach the problem.

[236] Transparency International (2016), "Corruption Perception Index 2015"

14. References

Legislation

Almindelig borgerlig Straffelov 22. mai 1902 nr. 10 (Opphevet) (Straffeloven 1902) (The Norwegian Penal Code of 1902)

Lov om skatt av formue og inntekt 18. august 1911 nr. 8 (Opphevet) (Skatteloven 1911) (The Taxation Act of 1911)

Lov om statens tjenestemenn m.m. 4. mars 1983 nr. 3 (Tjenestemannsloven) (The Civil Service Act)

Lov om skatt av formue og inntekt 26. mars 1999 nr. 14 (Skatteloven) (The Taxation Act)

Lov om straff 20. mai 2005 nr. 28 (Straffeloven) (The Penal Code)

FOR-1999-11-22-1160 Forskrift fastsatt av Skattedirektoratet til utfylling og gjennomføring mv. av skatteloven av 26. mars 1999 nr. 14 (FSSD)

FOR-2015-11-06-1283 Forskrift om taksering av formues-, inntekts- og fradragsposter til brud ved likningen for inntekståret 2015 (Takseringsreglene)

Conventions and explanatory reports

The European Convention's Criminal Law Convention on Corruption, January 27th 1999

United Nations Convention against Corruption, October 31st 2003

OECD convention November 21st 1997 on Combating Bribery of Foreign

Public Officials in International Business Transactions

Preparatory work

Innst. O. nr. 105 (2002-2003)

NOU 2002:22 En alminnelig straffebestemmelse mot korrupsjon

Ot.prp.nr.76 (1995-1996) Endringar i skattelovgjevninga 20. september 1996

Ot.prp.nr.86 (1997-1998) Ny skattelov 21. august1998

Ot.prp.nr.78 (2002-2003) Om lov om endringer i straffeloven mv. (straffebud mot korrupsjon) 25. april 2003

Ot.prp.nr.67 (2004-2005) Om lov om statens embets- og tjenestemenn 18. mars 2005

Ot.prp.nr.53 (2005-2006) Om lov om endringer i straffeloven 1902 og utleveringsloven (gjennomføring av FN-konvensjonen mot korrupsjon) 7. april 2006

Ot.prp.nr.22 (2008-2009) Om lov om endringer i straffeloven 20. mai 2005 nr. 28 (siste delproposisjon – sluttføring av spesiell del og tilpasning av annen lovgivning) 19. desember 2008

Jurisprudence

The Norwegian Supreme Court

Rt-1999-1299

Rt-2006-449 – HR-2006-657-A *Uniprawn-saken*

Rt-2008-1473

Rt-2009-130 - HR-2009-302-A

Rt-2010-1624

Rt-2012-243

Rt-2014-786 *Ruter-dommen*

HR-2009-302-A

The Court of Appeal

LB-2009-35191 – TOSLO-2005-134006 *Ullevål-saken*

LB-2015-69201 – LB-2015-9388 – TOSLO-2013-195526

The District Court

TTOTE-2006-33035 *Onninen-saken*

TOSLO-2008-32091

TOSLO-2008-171401 *Siemens-saken*

TOSLO-2009-187431

TSOST-2012-107692

TOSLO-2013-195526 *Unibuss-saken*

TOSLO-2014-22670 *Yara-saken*

Books

Andenæs, Johs., Magnus Matningsdal (Editor), Georg Fredrik Rieber-Mohn (Editor). 2004. *Alminnelig strafferett*. 5th ed. Oslo. Universitetsforlaget.

Brudvik, Arthur J. 2012. *Skatterett for økonomer*. Oslo. Cappellen Damm akademisk.

Kjerschow, Peder. 1935. *Almindelig borgerlig straffelov av 22. mai 1902 og Lov om den almindelige borgerlige straffelovs ikrafttreden av 22. mai 1902.* Oslo. Aschehough.

Langfeldt, Sverre Faafeng. Tore Bråthen. 2014. *Lov og rett for næringslivet*. 21th ed. Oslo. Gyldendal Juridisk.

Matningsdal, Magnus. 2010. *Lærebok i spesiell strafferett*. Bergen. Fagbokforlaget

Stordrange, Bjørn. 2014. *Forbrytelser mot vårt økonomiske system*. 3d ed. Bergen. Fagbokforlaget.

Newspaper Articles

Bjerknes, Christian. Kari Vartdal Riise. Ingerid Salvesen. Olav Slettebø. 2014. "Hvor dyr kan vinen være før det blir korrupsjon?". Dagens Næringsliv, August 13. http://www.dn.no/nyheter/naringsliv/2014/08/13/2158/Jus/hvor-dyr-kan-vinen-vre-fr-det-blir-korrupsjon

Electronic sources – internal guidelines for ethics and conduct

Statoil. 2016. "Code of Conduct". Accessed May 8, 2016 https://secure.ethicspoint.eu/domain/media/en/gui/102166/code.pdf

DNB. 2016. "Think twice! An anti-corruption guide". Accessed May 10. 2016 https://www.dnb.lt/sites/default/files/dokumentai/bendri/think_twice_guide.pdf

Yara International ASA. 2015. "Code of Conduct". Accessed May 8, 2016. http://www.yara.no/images/Code%20of%20Conduct%20Norwegian%20online%20version_tcm420-230598.pdf

Norsk Hydro ASA. 2013. "Vårt etiske ansvar – Hydros regler for arbeidsetikk". Accessed May 8, 2016. http://www.hydro.com/upload/Subsites/Norge/Nedlastingssenter/Om%20Hydro/Code%20of%20conduct%20NO.pdf

Telenor Group ASA. 2015. "Anti-corruption handbook". Accessed May 8, 2016. https://www.telenor.com/wp-content/uploads/2013/05/Telenor-Anti-Corruption-handbook_june2015.pdf

Oslo Kommune. 2007. ”Etisk Regler for Ansatte i Oslo Kommune”. Accessed May 8, 2016. http://www.regelverksdatabasen.oslo.kommune.no/docmap/page/doc/dmDocIndex.html

Helse Sør-Øst. 2012. ”Etiske retningslinjer for innkjøp og leverandørkontakt i Helse Sør-Øst”. Accessed May 8, 2016. http://www.helse-sorost.no/fagfolk_/temasider_/etikk_/Documents/Verktøykasse%20Antikorrupsjon/etiske_innkjopsretningsinjer_2015.pdf

Kongsberg gruppen ASA. 2014. ”Code of Ethics – English”. Accessed May 19, 2016. http://www.kongsberg.com/en/kog/aboutus/corporatesocialresponsibility/ethicsarticle/codeofethics/

Electronic sources – other

Transparency International. 2014. “Bedriftsundersøkelsen 2014 Sakte, men sikkert fremover – korrupsjon og holdninger til korrupsjon i næringslivet”. Accessed March 25, 2016. http://www.transparency.no/wp-content/uploads/sites/10/sakte-men-sikkert...-bedriftsundersokelsen-2014.pdf

Transparency International. 2016. “Korrupsjonsdommmer i Norge 2003-2015”. Accessed March 22, 2016. http://transparency.no/wp-content/uploads/sites/10/domssamling2016.pdf

Transparency International. 2016. “Corruption Perceptions Index 2015”. Accessed March 22, 2016. http://www.transparency.org/cpi2015

Næringslivet Hovedorganisasjon (NHO). 2005. “… over streken?”. Accessed April 3, 2016 https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/seriost-arbeisliv-og-samfunnsansvar/over_streken_web.pdf

Transparency International. 2014. “Protect your municipality – An anti-corruption handbook”. Accessed March 18, 2016. http://www.transparency.no/wp-content/uploads/sites/10/TI_kommunehandboka_eng_digital.pdf

Transparency International. 2014. “Protect your business!, Anti-corruption handbook for the business sector”. Accessed March 18, 2016. http://transparency.no/wp-content/uploads/sites/10/TI_beskyttdinvirksomhet_eng_web.pdf

Stoltenberg, Lars. Trond Eirik Schea. 2007. “Straffebudene mot korrupsjon – utilbørlighetsvilkåret”. Accessed February 20, 2016. http://www.okokrim.no/www/okokrim/resource.nsf/files/wwww949hf6-okokrim_stoltenberg-schea_1_07/$FILE/okokrim_stoltenberg-schea_1_07.pdf

Skatteetaten. 2016. “Lignings-ABC”. Accessed June 25, 2016. http://www.skatteetaten.no/no/Radgiver/Rettskilder/Handboker/Lignings-ABC/

Økokrim. April 25, 2016. “Korrupsjon”. Accessed June 10, 2016. http://www.okokrim.no/korrupsjon

NHO. August 15, 2014. “Krever klarhet om korrupsjon”. Accessed February 17, 2016 https://www.nho.no/Politikk-og-analyse/Seriost-arbeidsliv-og-samfunnsansvar/krever-klarhet-om-korrupsjon/

OECD. 2007. “Corruption, a glossary of international criminal standards”. Accessed March 16, 2016. http://www.oecd.org/corruption/anti-bribery/39532693.pdf

Council of Europe. 2014. “What is GRECO?”. Accessed Februar 8, 2016. http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp

Council of Europe. 1999. “Criminal Law Convention on Corruption”. Accessed June 12, 2016. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173

FCPA Compliance and Ethics. 2011. “When does a grease payment become a bribe under the FCPA?. Accessed Februar 11, 2016. http://fcpacompliancereport.com/2011/02/when-does-a-grease-payment-become-a-bribe-under-the-fcpa/)

Serious Fraud Office. 2012. “Bribery Act Guidance”. Accessed February 11, 2016. https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/

United Nations. 2004. “United Nations Convention against Corruption”. Accessed March 2, 2016. http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

OECD. 2011. “Convention on combating bribery of foreign public officials in international business transactions”. Accessed March 2, 2016. http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

Regjeringen Stoltenberg II. 2011. “Næringslivets ansvar for å bekjempe korrupsjon”. Accessed March 13, 2016. https://www.regjeringen.no/no/dokumentarkiv/stoltenberg-ii/ud/tema-og-redaksjonelt-innhold/redaksjonelle-artikler/2011/ansvar_korrupsjon/id635078/

Wikipedia. 2016. “Bribery Act 2010”. Accessed April 19, 2016 https://en.wikipedia.org/wiki/Bribery_Act_2010#cite_ref-anw128_26-0

Microsoft.com. 2016. “What is CRM?”. Accessed July 10, 2016. https://www.microsoft.com/en-us/dynamics/what-is-crm.aspx

Wikipedia. 2016. “Ruter”. Accessed July 8, 2016
https://wikipedia.org/wiki/Ruter

Master theses

Aune, Marianne. 2009. ”Korrupsjon etter straffeloven § 276 A. Utilbørlighetsvilkåret – grensen mellom korrupsjon og relasjon”. UiO: Juridisk fakultet. Accessed June 15,2016
https://www.duo.uio.no/bitstream/handle/10852/22330/97204.pdf?sequence=3&isAllowed

Solvin, Kristiane Bjørkøy Fimland. 2015. ”Nedre grense for straffbar korrupsjon, jfr. Straffeloven 2005 § 387.” UiO: Juridisk fakultet. Accessed June 15, 2016
https://www.duo.uio.no/bitstream/handle/10852/49473/679.pdf?sequence=1

Tandberg, Karoline. 2015. “Utilbørlighetskriteriet I straffeloven § 387. Herunder forholdet til Grunnloven § 96 og Den europeiske menneskerettighetskonvensjonen art. 7”. UiO: Juridisk fakultet. Accessed June 15,2016
https://www.duo.uio.no/bitstream/handle/10852/49630/699_masteroppgave.pdf?sequence=1&isAllowed=y

Siri Sofie Tveiten - 0928985

Per Knut Asphaug Bernhardt - 0894856

Preliminary Master Thesis

BI Norwegian Business School

- Corruption -

-The boundary between customer relationship management and illegal corruption, bribery and influence peddling -

Supervisor:
Roy Kristen Kristensen

Campus:

BI Oslo

Examination code and name:

GRA 19003 – Preliminary Thesis

Hand-in date:

15.01.2016

Program:

Master of Science in Business

Table of Contents

I. Abbreviations / Translations

Penal Code	PC (Straffeloven)
Taxation Act	TA (Skatteloven)
Civil Service Act	Tjml (Tjenestemannsloven)
Påvirkningshandel	Influence peddling
Utilbørlig fordel	Improper benefit
Utilbørlighetsprinsippet	Impropriety principle
Transparency International	TI
Statistisk Sentralbyrå	SSB

1. Corruption – Introduction

In our society there is a growing awareness towards corruption, which shifts economical, environmental and political decisions away from ethical, moral and legal standards. The act of committing and aiding in corruption can be characterized as theft of political, social and economic welfare from society. The issue of political corruption has become increasingly publicized in the last decade as a negative influence on economic development but also as the source of a host of other problems ranging from loss of democratic legitimacy to terrorism (Bukovansky, Mlada 2006)

Corruption is a serious and socioeconomic problem that occurs in both the private and public sector. It is a crime that is often hard to detect and investigate and believed to give rise to a vast number of unrecorded incidents. According to Økokrim, the Norwegian National authority for Investigation of Economic and Environmental Crime, corruption is a threat against the welfare state, democracy and human rights (Økokrim, 2015). They uphold that in a global perspective corruption is the most significant obstacle towards social and economic development in the third world. Worldwide, it enlarges inequality, subjugates fair competition and can lead to direct financial and reputational losses.

Transparency International, a global non-profit anti-corruption organisation, believes that many companies have increased their focus on these issues and have implemented tools to avoid and detect corruption (Transparency International, 2014). Still, new cases are revealed every year and have come to play a significant role in both broadcast and written media here in Norway. According to a survey done by the accounting firm EY in 2015, 21% of the Norwegian respondents agreed that bribery/corruption practices happen widely in their country (EY, 2015). Norway ranks at 5th place on the CPI-index published yearly by Transparency International, meaning we are the worst in Scandinavia when it comes to the number of cases detected.

2003 saw the introduction of a new law against corruption incorporated into the Norwegian Penalty Code of 1902. It states that corruption is to " demand, receive or accept, give or offer someone an improper benefit in accordance to their position, duties of assignment". Before 2003, the term corruption was largely not present in the Norwegian Penal code. Instead terms such as compensation, threats or advantages were used.

Since 2003, Norway has amongst the most stringent corruption laws worldwide with three paragraphs covering corruption, gross corruption and influence peddling. The law incriminates corruption involving Norwegian public servants and private participants, foreign public servants and private participants as well as aiding to commit acts of

corruption. It also covers bribery that takes place through agents, consultants or other middlemen.

The 1st of October 2015, ten years after it's making, the Penalty Code of 2005 came into effect. The paragraphs on corruption are practically unaltered from the 1902 Penalty Code, and since the sentences we will be looking at has grounds in the 1902 Penalty Code, we will be referring to it throughout the paper.

For all companies, maintaining client relations is a necessary and fully legal business practice. In Norwegian tax law, deducting expenses arising from so-called representation is not allowed. However, even if they are not deductible, they may be legal according to the penal code. A pitfall lies in that it is not obvious what is legal and what is not in all cases. This is further complicated by the fact that each case is different and therefore there is no concrete answer to the question.

Although the law is put in place to clarify and guide, the expression "improper benefit" gives room for interpretation. Each new case raises the question; "When does an act become illegal?" and which considerations are important to decide? And what is the difference between corruption and influence peddling in the penal code? In the years before the introduction of the paragraphs, what is now called corruption are things companies in the past were able to expense in their accounting. For instance, in Norwegian penal code it only became law as late as in 1996 that deductions could not be made from involvement in bribery and other form of compensation in return of improper advantages.

In addition to being covered in the penal code, there are also considerations to make in relation to the Norwegian tax laws as well as the law regulating the conduct of public servants.

2. Background

2.1 The YARA-case

In 2011 the investigation of what would later turn out to be one of the largest cases of corruption in Norway to this date was initiated, revolving around the Norwegian based globally operating fertilizer – and chemical company Yara International ASA. After four years of intense scrutiny the case went to court in March 2015. The Norwegian agency for investigation of economic crime, Økokrim, took interest after an implicated representative at Yara notified the agency of possible bribes to an independent consultant in Libya, Shokri Ghanem. The payment of around 10 million (exchange adjusted to January 2015) led to the conclusion of a deal within three weeks after it had seen a stand

still for multiple years. The company also launched its own investigation. The payment was concealed through an elaborate system of accounting, funnelling it through the tax haven The British Virgin Islands, aiming to conceal it within the normal operational activities. During Økokrims investigation, information surfaced regarding payments to an Indian consultant as well as so-called "unacceptable payments" from Balderton Fertilisers SA, Yaras by then 50% owned Switzerland based subsidiary, to suppliers in Eastern Europe.

Four former Yara leaders were sentenced to prison ranging between two to three years by Oslo's District Court (Dagens Næringsliv, 2015). The penalties they got were significantly lower than Økokrim had requested, as the court pointed out that international verdicts on similar cases would have to be taken into account. However, many important perspectives are raised. Firstly, a whistleblower cannot be redeemed of a foul act by simply coming forward. It further shows the actual application of corruption laws. It also predicates that the top management cannot organise themselves away from responsibility through delegating and compliance systems. The case is expected to set an international precedent.

2.2 The Unibuss-case

Norwegian companies are also subject to influence from foreign companies such as in the case known as the Unibuss-case. The case is multi faceted and involves several counts of bribery and corruption as well as embezzlement.

Unibuss AS is a state-owned owned Transport Company that operates buses in both Oslo and other parts of Norway. The case came into light when a tip, in relation to a German investigation into the German buss maker MAN, revealed that a Norwegian company had engaged in bribery to secure contracts for the sale of new buses. Investigation revealed that a Norwegian agent for MAN, Vest Buss, had on two occasions organized and paid for two trips to the World Cup in biathlon in Rupholding, Germany, both in 2009 and 2010. Participants on the two trips involved the CEO of Unibuss and the technical director responsible for purchase of buses.

Another issue that arose was that MAN in Germany had concealed payment of cash bribes to CEO and technical director of Unibuss over several years. These payments were funnelled through Vest Buss. The representative of Vest Buss was convicted to a suspended sentence and a fine for bribery.

The CEO of Unibuss was also revealed to having made use of a rented car on three occasions paid in full by the CEO of Solaris, another maker of buses. The reason was for Solaris to maintain good relations with Unibuss, as it was an important customer. The

expenses were concealed from both Unibuss and the public. The CEO of Solaris received a suspended sentence and a fine for the bribery.

In addition, on a separate count, both the CEO and technical director of Unibuss had received bribes from an entrepreneur. The entrepreneur was engaged in construction and maintenance work for Unibuss. The bribes came in the form of the entrepreneur conducting work on the private residences and holiday retreats of the two Unibuss employees and involved paying for tiling, roofing and plumbing work. The work was estimated to be worth in excess of one million NOK per count.

The Unibuss case, although not all counts are legally enforceable yet, shows a systematic culture for being susceptible to corruption. It demonstrates how influence peddling can be institutionalized in some cases.

2.3 The Vimpelcom-case

State majority owned Norwegian global telecom giant, Telenor, acquired 25% of Russia's largest telecom provider in 1998. In 2002, Telenor became made a partnership agreement with Alfa group, owned by Russian Oligarch Mikhail Friedman, later raising its equity stake to 43% of voting rights. Vimpelcom is today registered in the Netherlands. Vimpelcom had specialized in markets in the former Soviet Union.

In 2012, a Swedish documentary revealed how the Swedish telecom company TeliaSonera had engaged in bribery to secure telecom licences in Uzbekistan. The recipient of amounts totalling billions of Swedish kroner was a shell company called Takilant registered in the tax haven of Gibraltar. Investigation revealed that Gulnara Karimova, the daughter of long-term Uzbek president Islam Karimov, in fact controlled Takilant. The documentary spurred an inquiry into the deal Vimpelcom had made to also secure such licences.

By late 2012, Økokrim is made aware by Swedish police that Vimpelcom could also be involved in corruption in Uzbekistan. A few months later, CEO of TeliaSonera resigns after the company's dealings in Uzbekistan had come under intense scrutiny, and launched a review of all investments made in former soviet countries. The case gains traction in Norway by 2014 as Telenor, being a significant shareholder, had three representatives on the board of Vimpelcom during the period when the payments to Takilant took place. Norwegian media writes that Takilant supposedly received an amount equalling more than 600 million NOK from Vimpelcom (Dagens Næringsliv, 2015).

The case is still under Norwegian investigation involving amongst other former CEOs of Vimpelcom and Telenor as well as the former Telenor chairman. As Vimpelcom has a

secondary listing on the Nasdaq it has also been under investigation in the US. By late November 2015, American business media service Bloomberg reports that Vimpelcom is in talks to accept fines of 775 million USD to settle allegations of paying bribes in Uzbekistan to win business (Bloomberg, 2015). This would mean the second largest settlement for violations of the US Foreign Corrupt Practices Act, banning bribes worldwide.

A high profile whistle blower with information about Telenor's involvement has made contact with Norwegian authorities. Telenor has come under pressure to reveal if officials were aware of the supposed actions, and if they could have been able to prevent it. It is also of significant interest to review the transactions Vimpelcom made to enter the markets of countries neighbouring Uzbekistan, as more allegations of bribery and corruption have come to light. Who knew what is of essential interest as Telenor prides itself in maintaining a leading ethical standard for conducting business.

2.4 The Ruter-case

An employee in the publicly owned bus transportation company, Ruter, had over a three-year period participated in three dinners paid for by the bus maker Volvo. (NHO, 2014). The collective sum of all three dinners amounted to kr. 4739. The Ruter employee worked as head of operations within the company. This meant that he was responsible for arranging tender offerings as well as purchasing equipment. Volvo had, during the time period in which the three dinners took place, tendered or was in the process of tendering an offer towards Ruter. Prosecutors in the District Court argued that this was corruption according to paragraph 276 a, and fined Ruter AS.

The case was appealed all the way to the Norwegian Supreme Court and came to a verdict on 5. September 2014, acquitting Ruter AS of wrongdoing. The Supreme Court decided that representatives of Volvo did not seek to influence Ruter towards some specific end. None of the dinners were seen to be strategically timed to influence any tender offer process. By these grounds, the court saw no reason to find the employee of Ruter AS guilty of misconduct. The decision set a certain precedent in the definition of what is regarded as improper. It means that such an act is not punishable unless it is clearly wrongful.

The Supreme Court also noted the following: As a state-owned company, the employees of Ruter are subject to even higher standards of conduct. However, even employees of the state must be able to accept an invitation to gatherings paid for by companies other than their employer, and where representatives of other companies or government agencies are present, without running the risk of being convicted of corruption.

2.5 The Jotun-case

The case came to public light in January 2016 (DN, 2016). It involves six former employees in the international supplier of painting products Jotun. All are charged with gross corruption. The most severe charges are against the former Head of Maintenance who supposedly received goods and services amounting to 2,1 million NOK. These bribes involved work on two private residences and a holiday retreat in the form of paving, gardening and electrical work. It also involves three iPads to the defendant's wife and children, a power drill for his brother as well as catering for his wedding and birthday celebration. The investigation was initiated in 2012 after Jotun themselves pressed charges. (DN, 2016).

3. Research Question

3.1 Where do you set the boundary between customer relationship management and illegal corruption, bribery and influence peddling?

This question has been asked several times in prior literature, yet the answer is still a discretionary interpretation of the words "improper" and "benefit". We want to look at primary data such as verdicts, articles, master thesis, and other guidelines on the subject. We wish to enlighten where each source draws the line, and especially what is emphasized when it comes to penalties.

The impropriety principle poses our main research question, but we will also be examining some other aspects of the corruption area. In the following we will present these issues.

3.1.1 Comparing the Taxation Act and the Penalty Code

§6-22 in the Taxation Act covers the taxation aspect of bribery, and states that you do not get a deduction on bribes, but it also describes what should be considered a bribe. Is the description of bribery in the Taxation Act in accordance to how bribery is interpreted from the Penalty Code? And if not, can the description help interpret corruption according to the PC?

Since both laws cover one or more aspects of corruption, we want to compare them and see whether they complement each other.

3.1.2 Private vs. Public

We also want to compare corruption in the private sector with the public sector, using the Civil Service Act, as there are stricter regulations for officials. We want to explore how such regulations influences the business conduct of employees within the public sector.

The Ruter-case is one example that gives precedent as to what level of customer relations management employees in state-owned companies can engage in. We aim to review more relevant verdicts and issued guidelines to further highlight this issue.

3.1.3 Lack of knowledge

In addition to this, we want to research what the common perception among ordinary people is and get an impression of their knowledge in relation to corruption and its boundaries. Could it be that the lack of knowledge or wrongful interpretation of the legislation is enhancing the propensity to conduct "grey zone business"?

3.1.4 Corruption and Influence peddling

An important aspect of our research on corruption is the boundary between corruption and influence peddling. Gross corruption could lead to a maximum of 10 years of prison, cf. PC §276 b, whereas influence peddling has a maximum penalty of 3 years, cf. PC §276 c. Whether §276 b or §276 c should be used in a corruption case does not always have a straightforward answer, and since the sentencing in each case is very different, we want to see what is discussed and emphasized in verdicts on the two.

4. Hypothesis

Lack of knowledge, discretionary interpretation of the legislation, high personal gains and small chances of getting caught outweighs the risk and disutility of punishment for corruption.

A business survey from 2014 performed by Transparency International Norway shows that the awareness and level of knowledge regarding corruption in Norway has increased since 2009, but that over 50% of the participants in the survey had taken no actions to prevent corruption in their business and that they believed that no such actions were necessary. Regardless of this increased focus, TI believes that lack of knowledge, ethical frameworks and anti-corruption measures constitutes a problem in Norwegian businesses (Transparency International, 2014).

The relevant paragraph in the Penalty Code of 1902 is §276 a, b and c. According to these paragraphs corruption is when you give or receive an "improper benefit" to/from a person in a particular position, duty or mission, and influence peddling is when you receive or give an "improper benefit" to influence a person as mentioned above. The key question in the three paragraphs is what constitutes an improper benefit, and as mentioned earlier, this is a highly discretionary interpretation that has to be evaluated individually in each case. The fact that an improper benefit is against the law does not necessarily mean that a "proper advantage" is within the boundaries of what is legal. The lack of a

straightforward boundary might make a people more prone to activities that are in the grey area of what is legal.

Communications between the involved parties are usually discrete and hidden, and the payments go through third parties or anonymous offshore-accounts. The "improper benefit" could also be disguised or perceived as normal day-to-day business, such as gifts, company trips and bonus payments. Evidence is often hard to find, and explains why corruption is often hard to detect. Many Norwegian corruption scandals, such as the Yara-case, have been uncovered because of the involvement of a whistleblower, or through findings of distressing evidence by the compliance department within the company.

The parties involved in corrupt activities often gain a personal benefit, outweighing both the ethical and moral considerations, as well as the risk of being caught. Being caught could mean suffering a fatal loss of reputation, fines and up to 10 years of prison, but still we hear about new corruption cases more often now than 10 years ago (Transparency, 2014). Our main focus will be on the interpretation of the legislation and, if possible, reveal whether there is a lack of knowledge into both legality and proper conduct.

5. Objective

The main objective of this thesis is to illuminate the weaknesses of the framework.

When comparing verdicts, we aim to provide insight into whether there are contradictions or if the judges have dissenting opinions. Further, we want to see how they relate to EU-legislation, human rights and the Norwegian Constitution. It is also of interest to look at whether the boundaries set are clear enough to provide meaningful guidance.

The fact that Norway is the most corrupt country in the Nordic region according to the CPI index, (Transparency International, 2014) despite our penalties being the strictest, gives grounds to a suspicion that there may be weaknesses in the framework.

6. Pre-existing theory

There is a variety of pre-existing theories on the subject, the main proportion of it being jurisprudence, preparatory work and conventions and directives from the EU. Our main focus will be on cases and verdicts from the Norwegian Supreme Court, the court of Appeal and the district court. As the Penalty Code of 2005 was implemented in 2015, these verdicts will be based on the corruption clause in the Penalty Code of 1902, but the wording in the two paragraphs is practically the same.

Both Transparency International (Norway) and NHO (the Norwegian Trade Organization) have published guidelines towards this discussion, and what you, as a business owner, should be aware of regarding the pitfalls. These guidelines are mainly based on the theory mentioned above.

There has been written master theses on the subject as well, with themes such as "corruption and acquisitions", "corruption and corporate penalties", but also as to where the boundary between corruption and relation is drawn (Marianne Aune, 2009). The latter thesis focuses solely on an interpretation of §276 a in the Penalty Code of 1902. The paper is from 2009 and the writer has therefore based her paper mainly on preparation work and directives and conventions from the EU, as the corruption paragraph was only included in the Penalty Code in 2003. Her conclusion is that the rate of corruption probably has not increased, but the stricter legislation and heightened media coverage have increased awareness within the general public. Due to the lack of verdicts and corruption cases based on the "new" legislation in 2009, we are not assured that her conclusion is as probable.

7. Proposed methodology

7.1. Research Method

Our paper will be a qualitative research paper, where we will be using second hand data for most of the time. As we will be looking at prior data while attempting to make a theory, the paper will be both descriptive and exploratory. It would also be exciting to make a questionnaire to map ordinary working people's knowledge and thoughts about corruption in the workspace, but this would require a representative sample and relevant questions, so it might be outside the boundaries we set for this paper.

7.2 Legislation

We will be using a lot of second hand data for the research in our paper, the main part being legislation. The most relevant legislation is the Norwegian Penalty Code, the Taxation Act and the Civil Service Act.

7.2.1 The Penal Code

The Norwegian Penal Code of 2005 was implemented in October 2015, and hence there are no verdicts with grounds in it. However the wording in regards to corruption and influence peddling in the code of 2005 is the similar as in the 1902 penalty code and we will therefore be looking at both.

The one difference between the wordings in the two penalty codes is in the paragraph about gross corruption. In the 1902 PC one of the assessment factors is whether the act has lead to a significant economical advantage, whereas in the 2005 PC it is enough that the act *could* have lead to a significant economical advantage. This is a change that we want to investigate further in our thesis, as it could make a big difference when assessing whether the act is covered by the general corruption clause or the gross corruption clause.

7.2.2 The Taxation Act

In the Taxation act of 1999, there is a highly relevant paragraph to our research; §6-22 about bribes. Taxing and representation and gifts are also covered in the TA, and we will be taking these paragraphs into consideration when comparing the PC and the TA.

7.2.3 The Civil Service Act

The act applies to employees within the Norwegian Civil Service. In some ways it aims to prevent corruption, through regulation of employment and strict rules regarding appearance and conduct.

As we are comparing private vs. public, we will be comparing these stricter rules to the ones covering only private employees.

7.2.4 Verdicts and other jurisprudence

Verdicts from the Supreme Court, the court of Appeal and the district court are highly relevant to our paper, as they often set precedence to similar future cases. In a clause where there is a discretionary assessment factor to the act, precedence from verdicts plays a big role in the discussion. We will be focusing on some of the biggest cases in Norwegian court to this date, such as the Yara case, but also smaller cases and cases that are not yet settled.

7.2.5 Conventions and directives from the EU

We will mainly be focusing on Norwegian legislation and preparatory work, but the incorporation of conventions and EU directives are still relevant, as these are implemented in Norwegian legislation.

7.2.6 Preparatory work

Preparatory work to the legislation we will be using can help determine some boundaries by assessing what the legislator wanted to achieve with the law. The purpose of the law is a good starting point, and the court when discussing a verdict often stresses it.

7.3 Master Theses and Doctorates

We have already found some master theses covering the corruption area, and will use these for inspiration and potentially pick up the thread where they finished. We also see that these theses are not up to date, and are therefore able to find if there is a knowledge gap and whether there has been any progress in the area.

If we find any, we will do the same to doctorates on the impropriety principle.

7.4 Data collection

Most of these data, such as legislation, jurisprudence and preparatory work we will be finding at the databases Lovdata Pro and Rettsdata. Statistics and publications from Transparency International and The Norwegian Trade Organization can be found on Statisk Sentralbyrå's, Transparence International and The Norwegian Trade Organization's databases. Other sources we will be using are Google Scholar, Oria, Bibsys, Web of Science and BI Norwegian Business School's library to find articles, master's theses and doctorates. We will also be doing basic searches on Google.

7.5 Tentative Sample selection

- Researched material is to be related to Norwegian law and legal practices.
- Norwegian private and state-owned companies
- Transactions with both domestic and foreign parties are relevant.

8. Validity

8.1 External validity

The geographical boundaries of our paper will be Norway; however we are aware that some of the verdicts we will be looking at will involve corruption on an international basis. The research will be restricted to verdicts and other jurisprudence settled by Norwegian courts and Norwegian legislation and preparatory work. The incorporation of conventions and EU directives is still relevant, as these are implemented in Norwegian legislation. The external validity of our study to foreign countries is limited due to differences in both penal code, tax legislation as well as codes of conduct for employees in the public sector.

8.2 Internal validity

Legal cases are by their nature highly different, which means that verdicts will be reached based on, different grounds and weighing different facts and findings. Internal validity of

our findings could therefore in some cases be limited by not being directly applicable to other cases. A challenge will lie in interpreting some universal guidelines or precedents.

9. Tentative Plan for thesis progression

- January

  Review available literature.

  Look at relevant verdicts and make transcripts of a selection

  January 15: Hand-in, Preliminary Thesis Report
- February

  Presentation of pre-existing literature, master theses, articles, jurisprudence and preparatory work to the Penalty Codes (1902 and 2002), the Taxation Act and the Civil Service Act.

  Complete strategy for research methodology.
- March

  Comparing verdicts and legislation.

  Try to formulate a representative study for investigating knowledge about corruption and its boundaries, and find a relevant sample.
- April

  Interpret and compare findings.

  Comparison of public vs. private should be finished.
- May

  Comparison of TA and PC should be finished.
- June

  Finish research. Only writing the paper should remain.
- July

  Finishing touches. Our aim is to have the Thesis finished by early August.

Deadlines and detailed plans for our work next week will be set for each Wednesday, as this is the day during the week we are able to commit a full day. Between Wednesdays we will each work on our delegated tasks. We will seek advice and maintain a dialogue with our supervisor throughout the process.

10. References

(Bukovansky, Mlada 2006, The Hollowness of anti-corruption discourse, Review of International Political Economy 2006, Vol 13(2), p. 181-209**,** *http://www.jstor.org.ezproxy.library.bi.no/stable/25124069***.** Accessed 10.01.16

Transparency International, Hva er korrupsjon? (Internet), Available at: http://www.transparency.no/hva-er-korrupsjon/, Accessed 25.11.15

Store Norske Leksikon, Korrupsjon (Internet), Available at: https://snl.no/korrupsjon, Accessed 25.11.15

Økokrim, Korrupsjon (Internet), Available at: http://www.okokrim.no/korrupsjon, Accessed 25.11.15

Virke, Er en forretningsmiddag korrupsjon? (Internet), Available at: http://www.virke.no/virkehjelperdeg/juridiskbistand/juridiskefagartikler/Sider/Grensen-mellom-lovlig-kundepleie-og-korrupsjon.-Er-en-forretningsmiddag-korrupsjon.aspx, Accessed 02.01.16

Visma, Korrupsjon eller kundepleie? (Internet), Available at: http://www.visma.no/blogg/korrupsjon-eller-kundepleie/, Accessed 02.01.16

NHO, "Juss info nr 5", 2014, Representasjon, Korrupsjon – Tillatt Kundepleie, (Internet), Available at: https://www.nho.no/Om-NHO/Regionforeninger/NHO-Troms/Nyheter/juss-info-nr-5-2014/, Accessed 10.01.16

Paraplyen NHH, 2015 Chronicle, "Yara-saken: Hva nå?" (Internet), Available at: http://paraplyen.nhh.no/paraplyen/arkiv/2015/juli/yara-saken-hva-na/, Accessed 10.01.16

Dagens Næringsliv, 2015, "Alle fire er dømt i Norges største korrupsjonssak" (Internet), Available at: http://www.dn.no/nyheter/politikkSamfunn/2015/07/07/1458/Yarasaken/alle-fire-er-dmt-i-norges-strste-korrupsjonssak, Accessed 09.01.16

Dagens Næringsliv, 2015, "Dette er spørsmålene som utløste Yara-saken", (Internet), Available at: http://www.dn.no/nyheter/naringsliv/2015/07/09/1620/dette-er-sprsmlene-som-utlste-yarasaken, Accessed 11.01.16

Dagens Næringsliv, 2015, "Yaradommen", (Internet), Available at: http://www.dn.no/meninger/leder/2015/07/07/2150/Jus/yaradommen?_l, Accessed 11.01.16

E24, 2015, "Dette er Vimpelcom skandalen", (Internet), Available at: http://e24.no/naeringsliv/vimpelcom/dette-er-vimpelcom-skandalen/23552186 Accessed 05.01.16

E24, 2015, "Vimpelcom skal være nær korrupsjonsforlik", (Internet),Available at: http://e24.no/naeringsliv/vimpelcom/vimpelcom-skal-vaere-naer-korrupsjonsforlik/23567842, Accessed 05.01.16

Bloomberg, 2015, "Vimpelcom said to be near 775 million US bribery settlement", (Internet), Available at: http://www.bloomberg.com/news/articles/2015-11-25/vimpelcom-said-to-be-near-775-million-u-s-bribery-settlement, Accessed 05.01.16

Dagens Næringsliv, 2015, "Byttet gartnerarbeid og bryllupsregninger mot kontrakter", (Internet), Available at: http://www.dn.no/nyheter/naringsliv/2016/01/10/1110/Jus/byttet-gartnerarbeid-og-bryllupsregninger-mot-kontrakter, Accessed 10.01.16

Transparency International, 2014, "Sakte men sikkert fremover", (Internet), Available at: http://www.transparency.no/2014/05/14/sakte-men-sikkert-fremover/, Accessed 26.12.15

Transparency International, 2015, "Protect your business", (Internet), Available at: http://www.transparency.no/2015/02/04/protect-your-business-oppdatert-handbok-i-engelsk-utgave/, Accessed 27.12.15

Marianne Aune, Master Thesis, Universitetet i Oslo, 2009, "Korrupsjon etter Straffeloven 276 A", (Internet), Available at: https://www.duo.uio.no/bitstream/handle/10852/22330/97204.pdf?sequence=3&isAllowed, Accessed 04.01.16

EY, 2015, "Fraud and Corruption – the easy option for growth?" EMEIA fraud survey, (Internet), Available at: http://www.ey.com/Publication/vwLUAssets/ey-emeia-fraud-survey/$FILE/ey-emeia-fraud-survey.pdf, Accessed 25.11.15