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ANTI-CORRUPTION 2022

Global interview panel led by John E Davis of Miller & Chevalier

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Enforcement priorities
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Data privacy

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About the editor

John E Davis
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John E Davis is a member and coordinator of Washington DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, Southeast Asia and Latin America.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing and evaluating the effectiveness of compliance processes. Additionally, Mr Davis focuses his practice on a range of other issues relating to structuring and regulating international trade and investment transactions.

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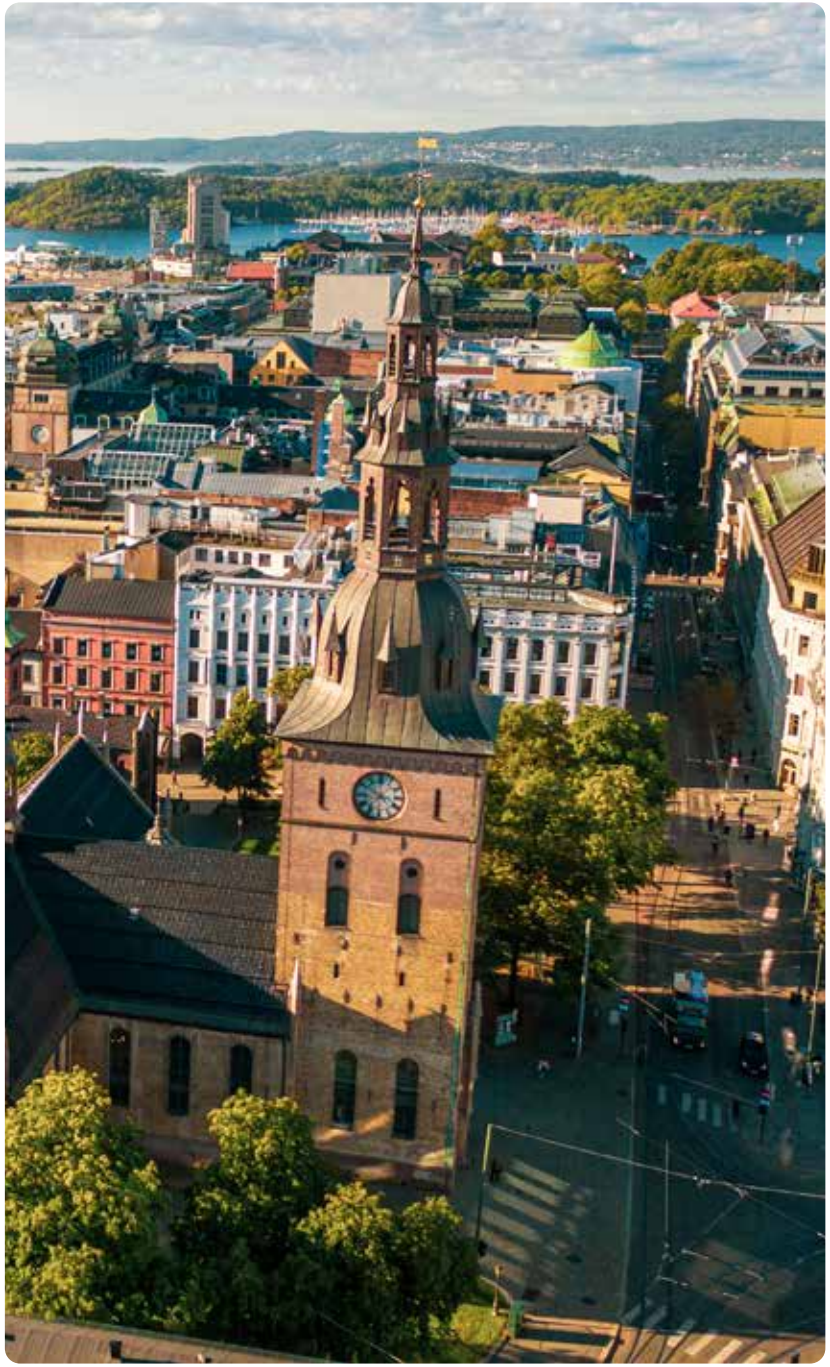

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Norway

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Tobias Kilde is an associate at Kvale in the energy and offshore department. Tobias has experience in advising national and international clients in the shipping sector with dispute and operational issues. Tobias also has experience in advising in anti-corruption matters.

QUESTIONS

1 What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction, and what lessons can compliance professionals learn from them?

The Norwegian anti-corruption regulation has been subject to few changes in recent years, which is probably because the anti-corruption regulations in the Norwegian Penal Code (NPC) have been given a general application. The laws apply to 'corruption' (section 387), 'gross corruption' (section 388) and 'trading in influence' (section 389). Penalties for enterprises (sections 27 and 28) may, in principle, be incurred for all offences contained within the NPC, including corruption or trading in influence.

The core of the Norwegian corruption regulations is their application to 'improper advantage' given or received in connection with the conduct of a position, an office or performance of an assignment. Giving an 'improper advantage' to a person who in turn will influence someone in their position, office or assignment is also considered a criminal act to the extent it constitutes trading in influence.

Some guidance as to what is meant by 'improper advantage' can be found in the preparatory works of the NPC. The term is intended to reflect the prevailing moral view in society at all times to give the corruption regulation broader applicability. This was considered preferable to extensive and detailed regulations, allowing the laws to maintain relevance without needing constant revision. This seems to be the preferred anti-corruption regulation approach in all the Northern European countries.

One should, however, note that there are ongoing hearings regarding changes in the anti-corruption law. According to the Ministry of Justice and Public Security, the main focus of the hearings is to


Gry Bratvold


Tobias Kilde

assess the possibilities for making the regulation clearer and more effective to enforce. We have outlined here some of the suggestions.

Currently, there are no regulations or official guidelines to supplement the anti-corruption sections referenced above. Accordingly, the introduction of requirements of anti-corruption compliance for larger corporations through legislation have been proposed. Among others, the Confederation of Norwegian Enterprise (NHO), which is Norway's largest employers' organisation, has stressed the need for authoritative guidelines for the corruption regulation's applicability to everyday working life in different business sectors in Norway.

Pursuant to the NPC, an enterprise may be liable to punishment even if no individual has met the culpability requirement (ie, even if no individual is found to have acted with intent). Another suggestion from the hearing, in this context, is to apply as a requirement for enterprise

penalty that the person who has committed the corrupt act also must meet the NPC's culpability requirement. In this regard, the suggestion is to criminalise gross negligent contribution to corruption. This could increase an enterprise's possible risks of liability for its employees' breach of the anti-corruption regulation. Many of these suggestions come as a consequence of a string of European Court of Human Rights (ECHR) decisions. This has led to two new Norwegian Supreme Court judgments suggesting that the current applicability of the Norwegian enterprise penalty regulations insufficiently reflects the requirements for culpability. This legal development is further elaborated on in question 5.

There have also been proposals to establish a public anti-corruption surveillance body, which currently does not exist in Norway. However, there has been some scepticism towards this suggestion, including by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim). Its main argument being that a more effective approach is to give institutions already responsible for anti-corruption surveillance better and more effective means of enforcement.

These legislative developments are currently at an early stage and it is difficult to estimate the changes that will be applied and how they will impact the approach of compliance professionals in anti-corruption matters. Nonetheless, there is every reason to believe that Norway will look to other states' regulations and larger non-governmental organisations' (NGO) guidelines when developing future Norwegian anti-corruption regulations. Knowledge of these instruments and effective implementation of compliance programmes guided by organisations such as Transparency International (TI) and the Organisation for Economic Co-operation and Development (OECD) should therefore be at the core of any anti-corruption compliance regime. Some non-authoritative guidelines for anti-corruption compliance exist, and are addressed in question 2.

"There is every reason to believe that Norway will look to other states' regulations and larger non-governmental organisations' (NGO) guidelines when developing future Norwegian anti-corruption regulations."

2 What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

If corruption occurs in some form in relation to an enterprise, it is up to the court to determine whether it is appropriate to hold the enterprise liable. In this assessment, the court is allowed a wide margin of discretion. A number of elements listed in section 28 of the NPC may be applied in this assessment. One key element is whether the enterprise could have prevented the offence by use of guidelines, instruction, training, monitoring or other measures. Accordingly, preventive measures are key for enterprises to avoid criminal liability for corruption.

In this regard, it is worth noting that in 2013 the former head of Økokrim, Trond Eirik Schea, expressed a list of nine anti-corruption features every company should implement:

- organisation, training, follow-up and control adapted to the company's corruption risk;
- good general instructions and guidelines;
- corruption explicitly addressed in ethical guidelines, etc;
- appropriate routines for handling corruption issues;
- compliance with instructions, guidelines, etc;
- mapping and identification of special risk elements;
- regular follow-up of specific questions about how operations that involve risk are performed;
- having a leader who is instilled with his or her responsibility both to follow the rules and to report deviations; and
- regular tightening and refreshing of routines, etc.

Schea stated that he finds it very unlikely, based on his experience, that a court will hold any enterprise responsible for corruption if these measures are implemented and practised sufficiently.

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Implementing these measures requires a clear overview of the typical risk situations in relation to corruption that may appear in the daily work environment. Although authoritative guidelines for anti-corruption compliance are missing, guidance can be sought from international NGOs. The largest and most influential is probably Transparency International, which regularly publishes compliance standard documents and handbooks for different national business and public sectors. These guidelines present a hands-on approach to anti-corruption compliance and give, among other things, reference to specific exemplary situations applicable to the everyday working life in different business sectors to draw inspiration from and be aware of.

In addition to its Anti-Bribery Convention, OECD has also published recommendations and case studies that can provide a deeper understanding of the typical compliance risk in different sectors. Other contributions from NGOs worth noting are The European Council Anti-corruption body, The Group of States against Corruption (GRECO), guidelines developed by The International Organization for Standardization (ISO) and the UN Convention on Corruption (UNCAC).

Additionally, with an increasing internationality in different business sectors, it is crucial to have insight into other national acts that may apply to your business. Examples of acts with broad applications are the United Kingdom Bribery Act 2010 (UK) and the United States Foreign Corrupt Practices Act of 1977.

3 Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

As stated in the Norwegian Attorney General's yearly circular, prosecution of severe economic criminal activity, including corruption, has long been a priority of the Norwegian Attorney General. This is reflected in the steady increase in corruption convictions since the corruption regulations were implemented in the NPC in 2003.

During the hearing for changes in the regulations on corruption and enterprise penalty, there has been widespread support to implement detailed requirements for enterprises' anti-corruption measures which will lead to penalties if not met and there are reasons to believe that this will be implemented. Developing and maintaining sufficient anti-corruption measures, such as an effective compliance programme is, and will continue to be, very important for enterprises in reducing the risk of corruption for the enterprise and avoiding penalties.

The use of professional third parties to evade the detection of criminal economic activity such as corruption is becoming more common. Along with the increasing internationality of business, the possible ways to conduct and hide corruption are becoming more complex and likewise increasingly difficult to discover and unravel. Therefore, preventive measures and monitoring are key. One of many examples of the implementations of preventive measures can be found in

"The use of professional third parties to evade the detection of criminal economic activity such as corruption is becoming more common."

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investment business sectors where anti-corruption now is a common part of a due-diligence routine. TI has, among others, published different standard forms that can be used to question the seller and the target company as preventive measures against corruption.

4 Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

Norway has obligations to combat corruption nationally and internationally through the OECD, UNCAC and The European Council Anti-Corruption Body. As a result, Norway is making a continuing effort to align its anti-corruption measures and to be of mutual international assistance according to these ever-evolving NGOs' regulations. Even though Norway has one of the lowest occurrences of corruption in the world, the latter years have seen a general increase in the number of convictions in Norwegian courts for corruption. TI Norway regularly publishes an overview of rulings from Norwegian courts regarding corruption.

In July 2020, the Norwegian Parliament passed an act for amendments in the NPC, extending the NPC's reach on corruption and trading committed abroad to a broader extent than the former legislation allowed. Before the passing of the amendment to the Penal Code, it was a requirement that the criminal conduct was also punishable in the state where it was conducted. This is no longer a requirement, making corruption and trading in influence a crime if committed by Norwegians or Norwegian enterprises, also when committed in a country where such acts are not considered a crime.

International corruption is a small portion of the actual court-ruled corruption cases in Norway but is often the most severe when unravelled. International transactions involving third parties have made it increasingly difficult for the authorities to investigate and uncover corruption and calls for demanding cross-border cooperation with other state authorities. Consequently, it is expected that international cooperation by the Norwegian police authority will continue to increase in the future.

A study carried out by the OECD between 2014 and 2020 revealed that the majority of corruption transactions are carried out through the use of a professional third person, often across borders, through complex transaction routes that are difficult to trace. This type of corruption calls for increased international cooperation, as it is close to impossible to unravel through national investigation alone. In the 2020 Norway Monitoring Report to the OECD, Økokrim reported that their investigative and prosecution resources have been strengthened and that their anti-corruption teams have had sufficient resources to investigate and prosecute cases of foreign bribery.

5 Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

TI published in 2017 a review on rulings passed in Norway regarding corruption. Even though 80 per cent of the rulings concerned actors within an enterprise, enterprise penalties were rarely or never addressed in the court. From the implementation of the corruption regulations in 2003 up to late 2020, there have only been eight court rulings where an enterprise has been penalised for corruption. The statistics show that giving optional penalty writs is the preferred enforcement method for enterprise penalty in general, and also for enterprise penalties for corruption.

The preference for the optional penalty writ can mostly be explained by the effectiveness of an out-of-court settlement compared to the initiation of a penal proceeding in court. Økokrim does publish announcements of penalty writ settlements, but not consistently. Therefore, the lack of transparency is a downside to this out-of-court settlement. In the ongoing hearing process regarding the corruption regulation and enterprise penalty, it has been proposed to establish a public register where optional penalty writs are published. A public register will increase predictability, establishing a better overview of how enforcement authorities handle the potential culpability of individuals versus corporate entities' liability for punishment, and also the severity of reactions given for different violations of the anti-corruption regulation.

Due to recent development in the EHRC practice, there has been important developments on enterprise penalty in Norway. In a Supreme Court ruling from April last year (HR-2021-797-A), the question was whether NPC section 27, which states that an enterprise penalty could apply even 'if no single person meets the culpability

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or the accountability requirement', was in line with recent EHRC practice. The case concerned a question of whether a restaurant could be subject to enterprise penalty because the CEO lacked a legal residence permit in Norway. Despite the clear wording of section 27 and the preparatory works, the Supreme Court interpreted the rule restrictively and found subjective culpability is a requirement for liability. Strict liability can thus not be imposed, with few exceptions, on an enterprise.

In a Supreme Court case that was given high publicity, the Court passed another ruling in June 2022 regarding the strict liability of an enterprise (HR-2022-1271-A). The case concerned a question of enterprise liability following the death of one child, and severe injury of two other children after they were able to enter the operating station of trains in Oslo, owned by Bane Nor, which is the Norwegian state enterprise responsible for the Norwegian railway network. Inside the operating station, the children had come into contact with a high-voltage overhead line after climbing on a stationary train. The court found that Bane Nor, due to cumulative and anonymous errors,

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was responsible for not securing the operating station adequately. The Supreme Court found that the requirement for subjective culpability for liability established by EHRC and the Supreme Court in HR-2021-797-A, did not hinder strict liability for an enterprise where no single person could be held liable, as long as blame could only be placed on the enterprise as a whole.

Accordingly, there is an important distinction between cases where one or more individuals are to blame for the unlawful act and where no one in particular but the enterprise is to blame. In the latter, strict liability can be applied. In the former, the Supreme Court makes a distinct deviation from the wording and preparatory works of the NPC section 27, by establishing a requirement of subjective culpability. These rulings highlight the importance of continuous preventive measures by the implementation and monitoring of general instructions and guidelines for anti-corruption compliance, applicable to all employees and employers, in order to avoid anonymous and cumulative errors.

6 Has there been any new guidance from enforcement authorities in your jurisdiction regarding how they assess the effectiveness of corporate anti-corruption compliance programmes?

While there are no official authoritative guidelines for anti-corruption compliance programmes, some recommended guidelines have been published by Norwegian authorities by, among others, Økokrim (see question 2) and the Ministry of Foreign Affairs. There are also present guidelines from NHO called 'Crossing the line?'. There have not, however, been any new additions to these in the later years. Therefore, we recommend to supplement these guidelines with those published and continuously updated by renowned NGOs such as TI or OECD in the development and implementation of anti-corruption compliance programmes.

Of the very few rulings passed regarding enterprise penalty for corruption, the following can be noted relating to the court's assessment of the compliance programmes of the enterprise in question:

- The higher risk the enterprise's area of operation represents for corruption, the higher the demand for the quality of their compliance programme will be.
- Even though an enterprise's area of operation does not represent any particular risk for corruption, the court will still hold it against the enterprise if no anti-corruption compliance programme relative to the risks present is established.
- Even though corruption has been carried out by an employee below the management of the enterprise, the enterprise may still be held liable if the employee is trusted to represent the enterprise.

Accordingly, an anti-corruption compliance programme should apply to every enterprise involved in a business where corruption

can occur, pay particular attention to high-risk areas of the enterprise's business and target all its employees. Økokrim has recently published a guideline for indicators and typical examples of corruption in different sectors, which can be used to gain knowledge of high-risk elements of different business sectors.

7 How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

There are a number of laws and regulations concerning privacy, restricting companies from being able to freely investigate their employees' whereabouts during work hours and as a result restrict companies' ability to investigate suspected corrupt activities. The most central is the Norwegian Working Environment Act (WEA) and its related regulations and the Personal Data Act.

The 2018 regulation concerning employers' access to email and other electronically is implemented in the WEA.

Email communication is a natural place to start an investigation on corruption-related matters. However, as a requirement for access, the employer will need to meet the test that it necessary for the safeguarding of the day-to-day operations or other legitimate interests of the business or that it is reasonable to suspect that the target employee has committed a serious breach of his or her obligations as employee or committed activity that gives grounds for dismissal.

The European Union's General Data Protection Regulation is implemented in Norway through the Personal Data Act. The regulation requires the data controller to have a legal basis for the processing of personal data. The regulation also gives extensive rights to the data's relevant person and applies requirements on how data should be handled and stored. These requirements will also apply before, during and after an enterprise's investigation of their employees in corruption-related matters.

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QUESTIONS

The Inside Track

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

In general, a good adviser in the anti-corruption area needs to have a thorough understanding of the unique risks of corruption that can occur in different types of business sectors. From the start to the end of an advising relationship, it is important to apply knowledge of the different legislative risks. It is also key to be able to advise on the establishment of sufficient internal control routines tailored to the relevant entity.

Given the ever-increasing internationalisation of the Norwegian market, an adviser should have in-depth and up-to-speed knowledge of other jurisdictions' anti-corruption regulations applicability and requirements, as well as the extensive network of NGO guidelines.

The nature of corruption also requires that the adviser can apply extensive knowledge of both civil and criminal procedure as well as experience with the different challenges that can occur and what measures to apply in the event of potential corruption.

What issues in your jurisdiction make advising on anti-corruption compliance challenging or unique?

The general design of the Norwegian anti-corruption regulation, the absence of official guidelines and the few court rulings passed on corruption concerning enterprise penalties create a challenging void of authoritative guidance. A successful compliance programme tailored to the specific enterprise demands a solid knowledge of the challenges the different business sectors face daily and what measures should be applied accordingly.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

One of our more recent matters involved a challenging scheme that was hiding facilitation payments in a rather sophisticated manner.