Trading in Influence
The Criminal Law Convention on Corruption Art. 12

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Executive Summary
In January 1999, the Council of Europe proposed the Criminal Law Convention on Corruption (the CLCC Convention). The vast majority of the member states signed the convention, but several states chose to reserve their right not to establish certain forms of trading in influence as a criminal offence. There seems to be consensus that certain behavior that fall within the term trading in influence is harmful and undesired in our society. In this article I will seek to answer why some states nevertheless chose to take reservations towards establishing this as a criminal offence.

Although trading in influence, or influence peddling as it sometimes is called, was a term used also before the CLCC Convention, the content of the term has not been entirely clear. In this article, I will look at what trading in influence means under the CLCC Convention and in some of the members states’ legislation, primarily focusing on Norway. Furthermore, I will look at how trading in influence differs from “ordinary” or “traditional” corruption on the one hand, and on the other hand, how it is different from lobbyism and the political work of organisations, NGO’s and others who fight to have their voices heard by the public officials and governmental decision makers.

1. What is Trading in Influence?
Trading in influence can in simple terms be described as the using or trading of real or purported influence over persons in authority in order to obtain an undue advantage or gain. There are however certain differences in the way the term is defined, depending on which country’s legislation we look at. Below I will look at how this is defined in the CLCC Convention as well as how it is defined in the Norwegian General Civil Penal Code.

1.1 The CLCC Convention
The CLCC Convention (art. 12) describes trading in influence as:

“the intentionally, promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.”
The CLCC Convention deals with corruption in both private and public sector. In Article 12, the private sector has however been excluded.  

1.2 The Norwegian General Civil Penal Code

Norway did not make reservations to article 12 of the CLCC Convention. With an objective to strengthen the fight against corruption and as a consequence of ratifying the CLCC Convention, three new provisions were included in the Norwegian General Civil Penal Code (§§ 276a-c) in 2003.

Trading in influence was established as a criminal offence under the General Civil Penal Code § 276c, which sets out:

“All person who
a) for himself or other persons requests or receives an improper advantage or accepts an offer thereof in return for influencing the conduct of any position, office or assignment, or
b) gives or offers any person an improper advantage in return for influencing the conduct of a position, office or assignment shall be liable to a penalty for trading in influence.

Position, office or assignment in the first paragraph shall also mean a position, office or assignment in a foreign country.

Trading in influence shall be punishable by fines or imprisonment for a term not exceeding three years. Any person who aids and abets such an offence shall be liable to the same penalty.”

1.3 A brief comparison between Article 12 of the CCLC Convention and § 276c of the Norwegian General Civil Penal Code

The Norwegian Penal Code § 276 c goes further than the scope of Article 12 of the CLCC Convention on three areas; firstly the private sector is excluded in Article 12. However, Norway chose not to incorporate this exception and § 276c therefore comprises both public and private sector.

Secondly, the influence itself need not be improper (it is sufficient that the advantage is “undue”), which means that in the Norwegian provision, the (only) line between (legal) lobbyist and political work on the one hand and (illegal) trading in influence on the other, is drawn by the term “undue”. In other words, the focus is not on whether the influence is “improper” as the decisive criterion is whether the advantage obtained is considered to be undue.

This means that for example openness around the underlying facts, such as who one represents or speaks on behalf of, is not enough to pass the test. Where the person exercising his influence informs the decision maker about which interests he represents and what he is trying to achieve, one could probably not say that the influence is improper, but in principle the advantage could nevertheless be “undue”. However, based on examples given in the preparatory works, circumstances such as openness should be included in the overall assessment of whether an offence of § 276 c) has taken place. One example given in the preparatory works is if a person married to an employee of the

1 Articles 7 and 8 deal with active bribery and passive bribery in the private sector respectively. The references in Art. 12 to “any person referred to in Articles 2, 4 to 6 and 9 to 11” therefore mean that for trading in influence, the private sector is excluded.
Directorate of Immigration, requests an undue advantage for him or her to put in a good word for a person seeking asylum, this conduct could fall under § 276c, even if the influence on the spouse is not improper. It could for instance be that he or she takes on giving an account of the political situation in the asylum seeker’s home country, or promises to stress that there is a presumed real risk of being tortured upon repatriation. It is however added that the advantage would not normally be considered “undue” if the peddler is open about the circumstances. This may mean that in practice, the difference between Article 12 and §276c will not be substantial.

Finally, also acts and omissions that are not necessarily “decision making” may under certain circumstances also lead to the conduct being considered a criminal offence under § 276 c. The example given in the preparatory works of an act of this kind is if the influence peddler is married to a journalist and receives payment to influence what his spouse writes about a business, a political party, a movie or a theater production.

Below, under item 3, we shall have a closer look at which types of conduct fall within the terms “improper” as well as how “undue advantage” is to be understood.

2. What is the difference between “traditional” Corruption and Trading in Influence?

There are certain important differences between the other “traditional corruption” offences set out in the CLCC Convention and trading in influence as described in Article 12. As stated in the Explanatory Report on the CCLC Convention, the protected legal interests are nevertheless the same for these two types of offences; the objective is to ensure that the decision making process of public administrations is transparent and impartial. Art. 12 seeks to:

“reach the close circle of the official and the political party to which or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption. It permits Contracting Parties to tackle the so-called "background corruption", which undermines the trust placed by citizens on the fairness of public administration.”

Criminalizing trading in influence in other words, goes beyond just the briber and the decision maker and seeks to reach the environment these operate in.

Although the CCLC Convention aims at developing common standards concerning certain corruption offences, it does not provide a uniform definition of corruption. Even if no common definition has yet been found by the international community to describe corruption, everyone seems at least to agree that certain political, social or commercial practices are corrupt. In this article, I will for simplicity use the general definition used by Transparency International, which is that corruption is “the abuse of entrusted power for private gain”.

The briber in “traditional” corruption and the briber in trading in influence both seek to influence or control the decision making of someone. Trading in influence differs from the more traditional sense of corruption in that an intermediary (the influence peddler) is introduced between the briber and the decision maker. We therefore have a triangular relationship. Whereas in corruption, the private gain (an “undue advantage”) is directly linked to the receiver’s entrusted power, the influence peddler obtains the advantage in

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3 See the Explanatory Report on the Criminal Law Convention on Corruption item 64.
return for improper use of actual or supposed influence on the decision making of a third authority ("the decision making of any person"). The person accepting or requesting the advantage has i.e. not been entrusted the power themselves, but rather has (or claims to have) influence over someone with such entrusted power.

In addition to the factors listed above, the decision maker (who is the object of the actual or promised influence) need not even know that he is part of this trilateral relationship – he may not know what is going on – there is no requirement of any advantage being transferred to the decision maker. The structure of such relationships can be quite complex and difficult to uncover from the outside. To complicate the matter even more, the actual or promised influence does not need to actually be exercised. It is sufficient that claiming to have such influence has given an undue advantage. Furthermore, the influence does not have to lead to the desired result. All these factors mean that the conduct one is fighting to combat here is very challenging both to discover and to investigate.

3. Where does trading in influence differ from lobbyism and the political work of organisations, NGO’s and others who fight to have their voices heard by the public officials and governmental decision makers?

3.1 Introduction – what is lobbyism?

‘Lobbyism’ is a term often used to describe the work of private companies engaged by organisations or businesses to represent their interests and views to decision makers, often in the public sector, but also decision makers in the private sector could be included here.

Lobbyists have various methods to ensure the opinion they are voicing is heard; it could be by arranging meetings, organising protests or providing briefing material. It could be formal methods as well as informal meetings or discussions.

Although many agree that lobbyism is an important function in most democracies, a concern often raised is that unregulated or secret lobbying may be a danger and can undermine democratic principles and good governance. The Council of Europe therefore recommends regulating lobbying activities to ensure transparency and openness, but few member states have done so to date. Among 14 countries have regulated lobbying or considered the issue within their parliaments, but only four European countries have adopted a law on lobbying activities.4

3.2 Criteria – the Legal Standards “undue” and “improper”

As seen above, the Norwegian Penal Code is stricter than the CCLC Convention, but for both provisions, the line between legal lobbyism and (illegal) trading in influence is drawn by legal standards only. When judging from the face of the situation, legal lobbying and illegal trading in influence can be identical. It is therefore of central importance how these legal standards are to be interpreted.

In the CCLC Convention Art. 12, two criteria must be met to form a criminal offence; the advantage must be “undue” and the influence must be “improper”.

“Improper influence” must according to the Explanatory Report contain a corrupt intent by the influence peddler. This means we need to know the intent of the influence peddler. It is also stated that “acknowledged forms of lobbying do not fall under this notion”5. The

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4 See Lobbying in a democratic society (European Code of conduct on lobbying), Doc. 11937/5 June 2009
5 See Explanatory Report item 65.
challenge then is that we need to have an insight into a mental element, i.e. what the intent of the influence peddler is.

The Explanatory Report sets out that the *undue advantage* usually will be of an economic nature but may also be of a non-material nature. The Report emphasises that the advantage must put the receiver in a better position than he was before the offence, and that he is not entitled to the benefit. The advantages given as examples in the report are money, holidays, loans, food and drink, a more expedient case handling and better career prospects.

The term “undue” for the purposes of the CLCC Convention is to be interpreted as “something that the recipient is not lawfully entitled to accept or receive” and that it 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”6.

Under the Norwegian Penal Code, the further content of the legal standard “undue” is laid down by the courts in accordance with the “current prevailing moral in the society”. In the preparatory works it is stressed that it is only the “clearly blameworthy” conduct that falls under the provision, it is not sufficient that the conduct is to be blamed or criticized.7

As mentioned above, the preparatory works state that openness around the underlying facts, such as whose interests one represents, be relevant. Other factors in the assessment of whether the advantage is “undue” will be the type of the advantage as well as its value. It is also of importance who the peddler seeks to influence, as the assessment may be stricter where the decision maker is in the public rather than the private sector.

3.3 Remarks

Considered from a rule of law perspective, it is a problematic that the line between criminal and legal conduct is drawn only by criteria as vague and elastic as “improper” and “undue” (for Art. 12) and “undue” (for § 276 c), thus providing the authorities with power to investigate and prosecute on grounds of their own perceptions of what constitutes such “improper” and “undue” behavior8.

The challenges of establishing an objective and clear difference between trading in influence and lobbyism are concerns raised by many of the states that have ratified the CLCC Convention. See further below in item 6.

4. Practical Examples

4.1 United Kingdom

A real life example (although staged by journalists) of someone offering an advantage to another who confirms to be able to exert influence over the decision making of a person, was given by the Duchess of York, Sarah Ferguson, who in 2010 was caught on tape in offering access to her ex-husband Prince Andrew9 to ‘rich businessmen’ for a substantial

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6 See item 37 and 38 of the Explanatory Report.
7 For criminal law provisions, this may seem an unnecessary precision, as the punishing of conduct that is not blameworthy should only be exceptions to the rule.
9 Prince Andrew/the Duke of York is the Special Representative for International Trade and Investment, involving i.a. promoting the UK as an investment destination and helping British businesses overseas. (http://www.thedukeofyork.org/Home/TheDukesRole/role.aspx)
amount\textsuperscript{10} in the “cash for access” scandal. Although the Duchess received heavy criticism for her behavior both in national and international press, she did not face any formal charges.

When ratifying the CoC Convention, the United Kingdom reserved the right not to establish as a criminal offence all of the conduct referred to in the CoC Convention on the basis that part of the conduct was:

\textit{“covered by United Kingdom law in so far as an agency relationship exists between the person who trades his influence and the person he influences. However not all of the conduct referred to in Article 12 is criminal under United Kingdom law. Accordingly, in accordance with Article 37, paragraph 1, the United Kingdom reserves the right not to establish as a criminal offence all of the conduct referred to in Article 12.”}\textsuperscript{11} (my underlining).

In the cash for access scandal, there was no formalized relationship that could be characterized as an “agency relationship” between the “businessman” and the Duchess.

4.2 Norway

As described above, the line between lobbyism and trading in influence will have to be decided by the Norwegian courts. To date there has been no case law on trading in influence.

However, § 276 c has been used once by Økokrim (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) to issue fines. In June 2004 Økokrim issued a fine of 20 million NOK (about 2.6 million Euros) to the Norwegian oil company Statoil for contravention of section 276c on trading in influence. In addition, ØKOKRIM issued a fine of 200,000 NOK to the head of Statoil’s international division personally. Both fines were accepted.

The conduct that was seen as an offence of § 276c was that Statoil had signed an agreement that involved paying about 15 million dollars to a consultant for him to influence persons involved in the decision making process concerning the award of oil and gas contracts in Iran. The payment was to be made to a company, which in turn was to send the money on to a consultant who was the son of an influential politician. The advantage that was to be gained was deemed undue for various reasons, including the size of the payment and the fact that the true nature of the agreement had been concealed.

5. How is this dealt with in other countries? - Some examples

The CLCC Convention was ratified by 43 countries, but over one fourth of these states reserved themselves against Art. 12. Amongst these are Denmark, the Netherlands and France in addition to already the United Kingdom as already mentioned.

The reservation made by France was however limited to not to establish as a criminal offence:

\textit{“the conduct of trading in influence defined in Article 12 of the Convention, in order to exert an influence, as defined by the said Article, over the decision-making of a foreign public official or a member of a foreign public assembly, referred to in Articles 5 and 6 of the Convention.”}

\textsuperscript{10} The amount mentioned on the tape is GBP 500,000.

\textsuperscript{11} A full list of reservations is found on the Council of Europe’s home page. (www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=173&CM=&DF=&CL=ENG&VL=1), consulted on 10 May 2012
France is a country where the focus on trading in influence has been high for centuries, and an early example is found in what is referred to as the “decorations scandal” from the late 19th century. Several members of parliament and the French president’s son-in-law used their influence to have other persons decorated and rather openly made money on trading their influence. The involved persons were brought to court and first convicted. They were however acquitted by the Paris Court of Appeal, which found the texts on corruption incomplete. The acquittal then led to inter alia an expansion of the corruption laws in the Act of 4 July 1889.

Today, France has established trading in influence as a criminal offence both in the passive and active form in its Act of 13 November 2007 (La loi du 13 novembre 2007 relative à la lutte contre la corruption). Unlike the offence of public corruption, trading in influence is an offence also when the person does not have the status of a public official.

6. Challenges with criminalizing Trading in Influence – Evaluation by GRECO

There seems to be a widespread consensus that trading in influence is harmful to the society and that the interests that the one seek to protect by establishing trading in influence are the same as for corruption. It is therefore at first puzzling to see that so many countries, in spite of their high focus on fighting corruption, have reserved themselves against establishing trading in influence as a criminal offence. Below we will therefore look at some of the arguments and concerns raised by the member states.

In 1999, the Council of Europe established the Group of States against Corruption (GRECO) to monitor States’ compliance with the organisation’s anti-corruption standards. Membership in GRECO, which is an enlarged agreement, is not limited to the member States of the Council of Europe. Today GRECO comprises 49 member States - 48 European States and the United States of America.

GRECO evaluates the States through e.g. the collection of information through questionnaires and visits to the countries as well as drafting of evaluation reports. These reports contain recommendations to the evaluated countries on how they can improve their level of compliance with the provisions under consideration.

So far GRECO has launched three evaluation rounds. The Evaluation Round III, Theme I (“Evaluation III) in particular deals with the States’ compliance with provisions of the CLCC Convention. This evaluation gives us some answers as to why so many states have concerns with criminalizing trading in influence.

A concern raised by several States is that the conduct described in Article 12 is so broad that an implementation risks the infringement of free speech or criminalising legitimate activity. For Finland this is noted along with a concern that it may also be in conflict with the “rule of law as guaranteed under the Constitution”.

Denmark and Germany reflect the view that the offence is too complicated and difficult to define and moreover is unnecessary as the more mainstream bribery offences, or other provisions dealing with for example, breach of trust, deal with the principle problems posed by bribery. The view expressed in these reports is that when one takes into account the law of complicity and secondary participation the most serious parts of trading in influence at least are catered for.

The Netherlands is one of the member states who take the view that other bribery offences in their legislation are broad enough to capture at least the most blameworthy.

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12 See the GRECO presentation on https://wcd.coe.int/ViewDoc.jsp?id=1622225
13 www.coe.int/t/dghl/monitoring/greco/general/about_en.asp
aspects of trading in influence. Here we also find the argument that there is a clear risk that a full implementation of Article 12 would risk criminalising the lobbying profession. It is stated that “certain forms of influence (whether financial or not) over decisions of public officials or politicians may be lawful and to regulate this matter would encroach upon legitimate lobbying and free speech”. This view is supported in the reports for both Sweden and the United Kingdom.

The report from France notes that a concern on applying the offence of trading in influence to decision making by a foreign public official or by a member of a foreign public assembly. France made a reservation towards Article 12 in this respect and restates in the Evaluation III that “trading in influence is little known in the other Council of Europe states and that, in these circumstances, making it an offence in France would have placed French businesses and nationals at a disadvantage vis-à-vis nationals of other countries where it was not an offence”.

Although Norway made no reservation towards Article 12 when ratifying the CCLC Convention, the Norwegian preparatory works for § 276c show that there were many concerns with implementing Article 12 in a separate provision. The arguments found are inter alia that the difference between lobbyism and trading in influence is difficult to frame and define exact in a legal provision; that the anti-corruption provisions in §§ 276a and b were already very broad and that instances falling outside these were considered to be few.14 The arguments supporting criminalizing trading in influence were that the existence of this phenomenon could lead to undermine the confidence both to the public sector and private businesses and organisations; that it would give an important signal and hopefully have a preventive effect and; that it could raise the awareness on the problem.15

7. Conclusive remarks

The Netherlands, Sweden and the United Kingdom have all reserved their right not to establish trading in influence as a separate criminal offence. The reports for the Netherlands, Sweden and the United Kingdom all note the concern that Article 12 will risk catching legitimate conduct such as lobbying.

As noted by GRECO, the challenge therefore seems to be “to find a formulation for the offence that gives added value beyond mainstream bribery offences without creating too broad a scope of criminality.”16

We have seen above that the very nature of trading in influence makes an offence difficult to uncover. For instance the fact that even the decision maker himself need not know that he is being influenced in an improper manner or that the influence peddler obtains an advantage, gives us an indication of the inaccessibility of such conduct. It may be therefore be that criminalization alone is not sufficient to fight this phenomenon.

In a paper presented in the meeting of the EGPA Study Group in 2010 Willeke Slingerland suggests that rather than “striving to find the perfect definition for this phenomenon and instead of seeing the criminalization of this phenomenon as the goal, it is crucial to aim for a better understanding of the phenomenon.” 17

14 See NOU 2002: 22 side 31–32
15 See Ot.prp. nr. 78 (2002 – 2003) section 6.4
16 See Evaluation III, Theme I page 22.
Slingerland proposes that the states instead attack the problem from a multidisciplinary angle, and study the system in which influencing takes place. In other words studying society and the way we have organized it. Slingerland encourages politicians to put the issue on their agenda to create awareness and proposes that employers have a ‘duty of care’: “Raising awareness and discussing situations which employees can come across and which are seen as trading in influence are important for achieving this duty of care.”

Some of the arguments found in the Evaluation III lead to think that some of the states find trading in influence too complex to be dealt with by legislation. As long as the States nevertheless agree that this is a phenomenon that threatens democratic processes, it would be a shame to see that the reservations are upheld without any further work on the matter. I therefore support Slingerland’s remarks in her conclusion on that:

“Complex phenomena have never kept scientists, policy-makers and politicians from trying to deal with them effectively.”

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