

Mr. Angel Gurría
Secretary General
Organisation for Economic Cooperation and Development
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6 December 2018

Principles for the use of non-trial resolutions in foreign bribery cases

Dear Secretary General Gurría,

In March 2016, we wrote to you calling for principles on the use of settlements for resolving foreign bribery cases to be developed in light of the growing number of countries using settlements.¹ We understand that principles or guidelines for non-trial resolutions are now planned, and we welcome the idea that they should be included either in a revised set of Recommendations from the OECD Working Group on Bribery or in a stand-alone Recommendation. However, we urge the OECD to open a public consultation on any draft document and, in anticipation of such consultation, we supplement here our March 2016 proposals.² We note that our proposals differ substantially from those submitted to the Working Group by the Recommendation 6 Network.

We consider it of great importance that high standards of accountability and transparency should be set as benchmarks in developing principles for non-trial resolutions and the lowest common denominator must be avoided. We also urge the WGB to ensure that in developing a potential Recommendation on settlements or non-trial resolutions, such a Recommendation is grounded in, and reviewed regularly against, a solid evidence base about what is effective in achieving genuine deterrence.

We recognise the frustrations for prosecutors and the public where corporations and their senior executives face no penalty whatsoever due to the difficulties of taking international bribery cases through often under-resourced and ill-equipped courts against well-resourced defendants. We also recognise that non-trial resolutions used in appropriate circumstances

¹ <https://uncaccoalition.org/files/OECD-Ministerial-letter.pdf> This letter included a reference to Transparency International's 2015 Policy Paper on Settlements:

https://www.transparency.org/whatwedo/publication/can_justice_be_achieved_through_settlements

² The United Nations, Council of Europe, European Union and further international organisations, as a good practice, often conduct public consultations to garner input of civil society and other stakeholders for their law-making, including soft laws. The OECD also frequently follows this practice and in 2017 the Council of the OECD adopted Recommendation on Open Government that among others “promote the principles of transparency, integrity, accountability and stakeholder participation in designing and delivering public policies and services, in an open and inclusive manner”

in a transparent manner and in such a way that wrongdoing is effectively sanctioned, individuals at a senior level face prosecution, and the harm caused by the wrong-doing is remedied, may be one of a number of useful tools to achieve compliance with the Convention.

We remain concerned, however, that non-trial resolutions too easily give the public the impression and in some cases may actually mean that large corporations can pay their way out of facing justice, while their senior executives face no consequences for their role in overseeing or allowing corporate wrongdoing. Additionally, we are concerned that affected countries and their people are often excluded from the process and see little compensation for the harm caused. We strongly believe that the use of such resolutions will only ever achieve effective deterrence where there is a genuine commitment to using criminal sanctions and prosecutions in the face of egregious wrongdoing, wrongdoing that has not been self-reported, or where there has been little or no cooperation.

We believe that any Recommendation with regard to non-trial resolutions must reflect the following principles in order to be effective:

1. Circumstances in which non-trial resolutions should not be used

Experience shows that a number of companies have been granted non-trial resolutions on multiple occasions.

Non-trial resolutions should not typically be used where a company has had previous corruption-related enforcement or regulatory action taken against it, especially where the current or previous case involves grand corruption. The size of a company should not be a factor in determining whether it should be offered a non-trial resolution – companies should not be too big to prosecute. Rather, the gravity of current and previous offences should be a determining factor, and there should be a presumption that in case of recidivism the “tone from the top” and compliance systems are lacking.

Further, non-trial resolutions should not be used unless companies self-report or show effective cooperation with law enforcement and have properly addressed the wrongdoing internally, including with a credible compliance programme. Non-trial resolutions must not be influenced by factors that fall outside the case such as Article 5 considerations, or be used to protect companies from debarment.

2. Transparency

In some countries, prosecutors and other public authorities provide no information or very little public information about non-trial resolutions. In such cases, the resolutions do not adequately deter future wrongdoing and set up a barrier to accountability that undermines public confidence. This is particularly detrimental in grand corruption cases.

The risk of being named publically has strong deterrent value and provides a significant incentive for corporations to implement effective procedures. Non-trial resolutions should

require companies to report publically on how they have met the terms of the resolution. Additionally, transparency as to the recipients and intermediaries involved in the bribery helps ensure that those who seek and take bribes or facilitate corrupt transactions are exposed, and pressure is brought for action against them in their own jurisdictions.

All non-trial resolutions should be made public, including the names of the offenders, the legal basis for the resolution, the terms of the agreement, detailed justification for why a non-trial resolution is suitable for the case, the sanctions and an agreed statement of facts which reflects a recognition of responsibility for wrongdoing and provides a significant level of detail. An admission of guilt is often appropriate. In addition, details of performance of the non-trial resolution should also be published.

We believe that transparency should be a stand-alone principle in its own right in any Recommendation and that exceptions to transparency should be eschewed. Transparency is a key component of due process that cannot be abandoned in non-trial resolutions.

3. Dissuasive sanctions

In some countries, there are no sanctions or only weak sanctions are imposed in non-trial resolutions, or else sanctions vary in an arbitrary way from case to case. In some resolutions, the defence of “effective regret” is accepted, something consistently criticised by the OECD WGB as undermining the purpose of the Convention. In others, “ability to pay” considerations are taken into account. All of these approaches are of great concern. We also have strong concerns about a trend in some countries to lower sanctions in order to incentivise self-reporting by corporations.

Non-trial resolutions must impose significant penalties and sanctions if they are to provide genuine deterrence and dissuasive value and be consistent with the Convention. These should take into account the gravity of the offence and should include disgorgement of profits. Further, we believe that non-criminal or civil sanctions cannot serve as a substitute for the criminal law.

Non-trial resolutions must not preclude further legal actions in other jurisdictions that are not parties to the settlement, subject to the applicability of the *non bis in idem* principle (double jeopardy). Authorities should make all relevant evidence available to their counterparts in other relevant jurisdictions.

4. Admission of guilt

Countries vary in their practice regarding an admission of guilt. In some countries, it is always required; in others, it is never required; and in a third group, it is sometimes required. In most cases, at least an admission of responsibility is required.

We believe that enforcement authorities should adopt a flexible approach with regard to admissions of guilt, with decisions made on a case-by-case basis. However, this should not mean that in practice admissions of guilt are never required. In particular, country authorities should aim to obtain admissions of guilt in cases of grand corruption. Moreover,

in the absence of an admission of guilt, there should always be an admission of responsibility.

5. Judicial review

In some countries, judicial review of non-trial resolutions is inadequate or completely lacking. For example, in some countries, the only state body involved in the procedure is a prosecutor, with no oversight whatsoever.

Judicial review of non-trial resolutions is the gold standard and must be required to safeguard the integrity of their use. This should include a public hearing that gives an opportunity for affected stakeholders to express their views, especially in cases of alleged grand corruption. This is the only real means to ensure application of clear standards and parameters that have been established for the use of non-trial resolutions and to prevent unfettered discretion by – or possible corporate capture of – prosecutors, or other forms of undue influence.

6. Senior-level individual accountability

The lack of senior-level individuals facing prosecution where serious corporate wrongdoing has occurred is one of the major sources of public concern about the use of non-trial resolutions. Individual accountability that involves lower level employees being prosecuted while those at a senior level who managed or allowed wrongdoing by these employees escape any accountability undermines confidence – not just in the justice system but in the economic and political system as a whole. Any Recommendation, in our view, must state clearly that senior-level individuals must face a serious prospect of prosecution or disqualification, where appropriate.

7. Reparation and inclusion of affected country authorities and victims

Joint investigations and joint non-trial resolutions involving multiple countries are on the rise. However, non-trial resolutions still seldom involve notification of enforcement authorities or victims from affected countries to enable them to testify to the harm done and submit compensation claims within the non-trial resolution negotiations. State coffers in supply-side countries are in many cases filled with fines and disgorgement of profits, while the state and people affected by the corruption are “left out of the bargain”.

Reparation or compensation for harm and the inclusion of authorities from affected countries at an early stage in the development of non-trial resolutions are essential to the fight against corruption. Reparation of harm is crucial in the interests of justice and in recognition of the fact that corruption is not a victimless crime. The inclusion of authorities from affected countries at an early stage, meanwhile, is essential to ensure that those who seek and take bribes can be pursued within their own jurisdictions, as well as facilitators of bribery.

Further, where appropriate, such as in cases of grand corruption and state capture, classes of victims should be given the opportunity to have representation other than from the authorities in affected countries.

Countries and, as far as possible, all persons who would be affected by the settlement should be notified of the intention to enter into a settlement, given a right to representation at settlement hearings and be informed of how to make representations about compensation.

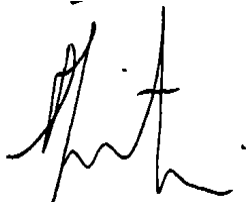
At the same time, arrangements for reparation or compensation should exclude the possibility of those subject to non-trial resolutions, implicated in wrongdoing, having a say in how that reparation and compensation is used and administered, and of gaining reputational advantage from reparation and compensation. The process should include giving voice and representation to the victims and aim to benefit the public good.

We urge you to help ensure that our views are given full consideration within the OECD Working Group on Bribery when its members discuss the development of a Recommendation on the use of non-trial resolutions and look forward to your response.

Yours sincerely,



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The signatories to the letter have invited other organisations to indicate their support and thus far the following organisations have endorsed the letter:

Africa Freedom of Information Centre (AFIC)

Anti-Corruption Trust of Southern Africa (ACT-SA)

C4 Center (Malaysia)

Corruption Watch South Africa

Global Financial Integrity

Jordan Transparency Center

Ligue congolaise de lutte contre la Corruption (LICOCO, Democratic Republic of the Congo)

Transparency International Bangladesh

Transparency International Brazil

Transparency International Netherlands

Transparency International Pakistan

Transparency International UK

Socio-Economic Rights and Accountability Project (SERAP, Nigeria)

UMTAPO Centre (South Africa)