CORRUPTION WATCH

TRANSPARENCY INTERNATIONAL
the global coalition against corruption

UNCAC Coalition
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Angel Gurría
Secretary General,
OECD
2 rue André Pascal
75775 Paris
France

10 March 2016

Global Standards for Corporate Settlements in Foreign Bribery Cases

Dear Secretary General Gurría,

We are writing to you in the run up to the OECD Anti-Bribery Ministerial meeting in Paris on 16 March 2016, with proposals on settlements for your consideration. At the outset, we would like to commend your timely decision to hold the first OECD ministerial focused on the OECD Anti-Bribery Convention. A renewed commitment to the Convention is needed in view of the ongoing lack of enforcement in many countries party to the Convention.

With this letter we would like to express our concern that the increasing use of corporate settlements in the way they are currently implemented as the primary means for resolving foreign bribery cases may not offer "*effective, proportionate and dissuasive*" sanctions as required under the Convention. Additionally, the use of settlements varies greatly from country to country providing an uneven playing field for anti-corruption enforcement. We urge the OECD Working Group on Bribery to develop as a matter of priority global standards for corporate settlements based on best practice.

The OECD Ministerial meeting is considering the use of settlements to encourage companies to voluntarily disclose wrongdoing as an innovative means of detection. The use of such settlements is not however new. The OECD Foreign Bribery Report found that 69 percent of foreign bribery cases had been resolved by some form of out of court settlement between 1999 and 2014.

The question we are asking the OECD to address urgently is whether the use of settlements has sufficient deterrent effect. This is particularly important in light of fact that several parties, including Australia, Canada and Ireland are looking closely at introducing settlements as a means to resolve foreign bribery offences. Before there is widespread

adoption of this method of enforcement, close attention needs to be paid in each country and at a global level to the lessons learned from the use of corporate settlements so far.

We urge the OECD Working Group on Bribery to adopt guidelines based on the following principles, that have emerged from the lessons learned from use of settlements over the past decade, and in line with recommendations made by Transparency International[1], Corruption Watch UK[2] and the UNCAC Coalition[3]:

1. Settlements should be one tool in a broader enforcement strategy in which prosecution also plays an important role, and should be executed on a proper legislative basis;
2. Settlements should only be used where a company has genuinely self-reported, and cooperated fully;
3. Judicial oversight which includes proper scrutiny of the evidence should be required;
4. Settlements should only be used where a company is prepared to admit wrongdoing. Settlements, including their detailed terms, should be submitted to public hearing and should be accessible to the public, as well as the relevant facts admitted, including identification of officials who received the bribes, company employees involved in the wrongdoing, and detailed justification for why a settlement is suitable for the case;
5. Settlements should require companies to strengthen and monitor compliance programmes and to report publically on how they have met the terms of the settlement;
6. Settlements should be used to leverage full disclosure of wrongdoing within a company;
7. Prosecution of individuals should be the standard practice and settlements must preclude companies from paying directly or indirectly for fines and legal fees of individuals implicated in the case;
8. Settlements must provide effective, proportionate and dissuasive penalties;
9. Settlements should require companies to provide total cooperation with authorities and agencies in other jurisdictions;
10. Compensation to victims, based on the full harm caused by the corruption, must be an inherent part of a settlement;
11. 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 informed of how to make representations about compensation;
12. Settlements must not preclude further legal actions in other jurisdictions that are not parties to the settlement, subject to applicability of the *non bis in idem* principle

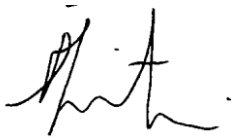
[1] https://www.transparency.org/whatwedo/publication/can_justice_be_achieved_through_settlements
[2] http://www.cw-uk.org/wp-content/uploads/2016/03/Corruption-Watch-Out-of-Court-Out-of-Mind.pdf
[3] http://uncaccoalition.org/files/UNCAC-Coalition-Statement-6th-COSP-English.pdf See paragraph 11.

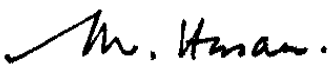
(double jeopardy). Authorities should make all relevant evidence available to their counterparts in other relevant jurisdictions;

13. Settlements must not be influenced by factors that fall outside the case such as Article 5 considerations, or be used to protect companies from debarment;
14. Settlements should not typically be used where a company has had a previous corruption-related enforcement or regulatory action taken against it.

Unless the use of settlements for foreign bribery can be seen to be delivering real deterrence and effective sanctions, public confidence across the world in the fight against corruption will be undermined. We urge the OECD and Ministers attending the meeting on the 16 March to give serious attention to this proposal.

Yours sincerely,





Andrew Feinstein
Executive Director
Corruption Watch UK
E: andrewfeinstein@me.com

Manzoor Hassan
Chair
UNCAC Coalition
E: mhasan56@gmail.com

Cobus de Swardt
Managing Director
Transparency International
E: cswardt@transparency.org

Gillian Caldwell
CEO
Global Witness
E: gcaldwell@globalwitness.org