

EXPLANATORY NOTES ADDRESSED TO THE WORKING GROUP ON BRIBERY

The authors of these Explanatory Notes worked on the draft Recommendation and the accompanying draft Annex III on Non-Trial Resolutions enacting Recommendation 6 of the High Level Advisory Group of March 16, 2017. What follows are notes recording their considerations in drafting proposed Annex III to the Council's 2009 Recommendation to Member countries. The Principles listed in the draft Annex III are included in bold text.

1. Non-trial Resolutions designed and implemented with the purpose of deterring bribery enhance law enforcement, promote compliance and are consistent with the requirement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 that sanctions should be effective, proportionate and dissuasive. Non-trial Resolutions should not however be used as a means of reducing law enforcement or diminishing any Member country's commitment to the elimination of bribery. Non-trial Resolutions are one law enforcement tool, not a substitute for the committed and vigorous prosecution of organizations and individuals that engage in bribery.

1.1. Law enforcement agencies in an increasing number of countries, and in a range of contexts, have had the experience that Non-trial Resolutions offering appropriate clarity, predictability and opportunities for leniency facilitate law enforcement. Organizations¹ with international operations have had the experience that the benefits of entering into Non-trial Resolutions support investment in compliance and audit functions and encourage mutually beneficial cooperation with law enforcement. Organizations can be complex, and within them there are often differing views on overt cooperation with law enforcement. The opportunity to disclose voluntarily and obtain leniency can support internal efforts to combat bribery.

1.2 Investigations of foreign bribery are typically complex, expensive and time consuming. Prosecutorial time and money are limited, and those resources can be more effectively deployed if Organizations that discover or suspect foreign bribery disclose underlying facts or their suspicions to law enforcement officials voluntarily and provide meaningful cooperation.

1.3 There are legitimate concerns that Non-trial Resolutions can be susceptible to abuse or misuse, thus compromising fairness, due process and effective law enforcement and leading to a lack of public confidence that wrongdoers are being held appropriately accountable. To obtain the benefit of the programmatic approach to Non-trial Resolutions embodied in Annex III, Member countries should engage in sustained public discussion and evaluation of Non-trial Resolutions.

2. Non-trial Resolutions are a privilege of government to offer, not a fundamental right of an accused, but Non-trial Resolutions that offer predictable sanctions and leniency for self-disclosure and cooperation are effective in deterring bribery and are compatible with the criminal, administrative and civil law traditions and practices of all Member countries. Member countries should publicize standards for Non-trial Resolutions and their methods of determining constituent sanctions.

2.1 Leniency for wrongdoers that voluntarily disclose their crimes and fully cooperate with law enforcement is an established practice in many criminal justice systems: offenders who confess

¹ Throughout these Notes legal persons, corporations and the like are referred to collectively as "Organizations."

often receive reduced penalties. Such practices are also employed in the related fields of competition and public procurement law enforcement, with attendant programs for future compliance, “self-cleaning” and monitoring.

2.2 Leniency can be controversial because its use can arouse the suspicion that an offender is not being held fully accountable. Law enforcement must communicate clearly about the nature of the inducement to cooperation that it is offering.

2.3 An offer of leniency is an inducement that government may elect to employ, not a consideration that an accused may demand. The accused has the fundamental right to due process of law, including the right to be heard and the right to an impartial and independent evaluation of the allegations made against it. While the accused may not have a formal right to leniency, it may have a justified expectation in receiving it when the accused follows published standards establishing voluntary disclosure and meaningful cooperation, and when making its voluntary disclosure or proffer can express its expectation for lenient treatment in return, referring to these Principles.²

2.4 The deterrent effect of incentives incorporated in a law enforcement program that offers leniency depends on their predictability and an inverse proportionality between sanctions and cooperation. The total package of sanctions should be reduced for each step an accused takes that has the effect of promoting effective law enforcement. These steps include voluntary self-reporting, cooperation that enhances the establishment of relevant evidence and facts, and the pursuit and punishment of wrongdoers.

2.5 Member countries should establish and communicate robustly normative definitions of voluntary disclosure, cooperation and the potential leniency that may be obtained thereby. Those wishing to disclose voluntarily should be able to find easily the appropriate agency of government, and the mode (ideally on a dedicated website) and character of a voluntary disclosure qualifying for a leniency program should be clear.

3. Non-trial Resolutions may range across a spectrum from decisions not to charge a putative defendant to formal admissions of guilt by defendants or the imposition of non-criminal or civil penalties. Non-trial Resolutions and their component sanctions should be proportionate to gravity of the offenses alleged while taking into account such mitigating factors as voluntary disclosure and effective and timely cooperation. Effective deterrence does not require an admission of guilt, but does require a recognition of responsibility for wrongdoing that has occurred.

3.1 Non-trial Resolutions can take a wide range of forms; from declinations, which are exercises of prosecutorial discretion not to charge an accused with a crime, to guilty pleas or substantial non-criminal or civil penalties. Defining certain activities, such as bribery, as crimes sets priorities within societal standards. Allowing non-criminal Non-trial Resolutions or civil penalties in the conclusion of bribery cases may be perceived to reduce the importance of those enforcement activities and the gravity of the underlying conduct. But pursuing non-criminal or civil penalties can serve many of the purposes underlying criminal law, and is certainly preferable to taking no action or terminating enforcement activities without penalties.

² See J. Arlen (Reporter) American Law Institute, Principles of the Law: Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations - Preliminary Draft No. 3, Section 6 *et seq.* (September 22, 2017)

3.2 One relevant consideration is that the burden of proof for a criminal conviction is very high. Where law enforcement may not be able to prove all of the elements of a crime, such as intent, to a standard such as “beyond a reasonable doubt” it might still be able to prove negligent supervision by a preponderance of the evidence. Such an outcome would still serve the purposes of the Convention. Non-criminal Non-trial Resolutions can include large penalty payments, although in some jurisdictions penalty payments are limited to a disgorgement of profits illegally obtained. Other non-criminal Non-trial Resolutions have included voluntary withdrawal from bidding or tenders for periods of time – a form of informal debarment. Such non-criminal Non-trial Resolutions are more likely to deter bribery than a complete failure to prosecute under criminal law when evidence of all of the elements of a crime were too difficult to establish.

3.3 Among countries there is variation in the extent to which Non-trial Resolutions require the accused to make a formal admission of guilt.³ The most sophisticated regimes with respect to the use of Non-trial Resolutions in bribery cases do not require a formal guilty plea or entry of judgement in all cases: however most require an admission of responsibility. Countries that do not have such flexible regimes have nevertheless found opportunities to interpret law and procedural rules to enable effective Non-trial Resolutions. Those countries that must stretch existing substantive and procedural law to allow Non-trial Resolutions to be concluded offer less predictability and transparency than is desirable.

3.4 Non-trial Resolutions should be available only to Organizations that have demonstrated a commitment to compliance with law. Aspects to consider should include, but should not be limited to:

3.4.1 a tangible commitment to compliance as described in Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions: *Annex II - Good practice guidance on internal controls, ethics, and compliance*.

3.4.2 senior management’s demonstrated commitment to compliance, including its regular commitment of management time and meaningful communication to compliance.

3.4.3 corporate discipline of or actions against executives, employees and agents responsible for bribery.

3.4.4 compensation regimes that in their design and operation do not enable, promote or require bribery. Variable compensation schemes or aggressive sales targets have been perceived to allow or even encourage bribery, but this need not be the case. Properly managed Organizations give employees and agents tools to combat bribery, and reward attention to and discipline regarding compliance.

3.4.5 the existence of a corporate compliance system that effectively protects whistleblowers from discriminatory and retaliatory actions and informs employers and employees on a regular basis about their rights and responsibilities in this respect.⁴

³ See IBA survey results on the regulation of settlements: A. Makinwa and T. Sørreide. 2018. *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (International Bar Association, Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee, November 2018).

⁴ See <http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf>

3.4.6 the willingness of an Organization to accept ongoing independent monitorship when appropriate.

3.5 No Organization is immune from repeated violations of law by employees. Repetition may demonstrate a failure of management to enforce a commitment to compliance and should weigh against any leniency that may be offered as part of a Non-trial Resolution. By contrast, such repetition can also be simply a function of large numbers of employees, broad geographic reach and the lapse of time. There is no reason to believe that a large Organization will have a significantly lower percentage of criminals in its employ than are found in the general population, and in most Organizations there is a continuous flow of employees leaving and joining. The incidence, cause, context and management responses to offenses are all factors to be considered and are very dependent on the facts of each case. The genuineness of management's commitment to compliance can be tested by taking evidence about such commitment from employees, agents, customers and vendors. A key factor to consider is management's attention to the prevention of bribery, as well as the detection and punishment of it.

4. Wherever reasonably appropriate the investigation, negotiation, penalties and remediation constituting Non-trial Resolutions should be coordinated among countries with jurisdiction over claims against suspected offenders. This coordination should promote efficient investigations and prompt Non-trial Resolutions and should ensure that aggregate sanctions across all countries are both appropriate given the nature of the offenses charged and fairly allocated among the countries participating in the enforcement actions, taking into account the primacy of jurisdiction.

4.1 Member countries should adopt similar definitions of what it means for an Organization to disclose voluntarily or to cooperate meaningfully in a law enforcement process.

4.1.1 While voluntary disclosure should weigh most heavily as a mitigating factor, effective and meaningful cooperation should qualify for some leniency even if the accused did not voluntarily disclose. Enforcement agencies often seek the cooperation of the accused in the cases when the offences were uncovered in ways other than voluntary self-disclosure. Nevertheless, a failure to self-disclose should reduce the extent of benefits obtained through leniency.

4.1.2. Cooperation can include commissioning investigations by independent private investigators, lawyers or accountants and giving law enforcement authorities the product of those investigations. The scope, nature and supervision by law enforcement of investigations conducted or paid for by cooperating Organizations should be transparent. Common standards and coordination in the scope, breadth, timing and focus of such investigations serve the interests of both law enforcement and the Organizations being investigated. Some Organizations have in the past received conflicting instructions from law enforcement agencies, leading to confusion and delay in achieving Non-trial Resolutions.

4.2 Cooperation among Member countries may include fashioning Non-trial Resolutions in multiple countries that are consistent and that allocate remedies among participating countries that reflect an Organization's conduct in or impact on those countries, the relative investigative and prosecutorial effort made by law enforcement in that country, and other factors – all with the aim of reducing duplicative and disproportionate punishment. Consistency, avoidance of duplication and avoidance of double jeopardy – *non bis in idem* – will promote self-reporting and cooperation

in the investigation of bribery. A common policy of disclosure by Member countries about the nature of a common Non-trial Resolution, its negotiation and conclusion would also promote cooperation by Organizations, which have legal and reputational disclosure issues to address.

4.3 Sanctions may trigger indirect consequences, mandatory or presumptive collective sanctions, civil liability for damages or debarment from public procurement. The indirect consequences of an enforcement action will depend on institutions others than the enforcement agencies responsible for foreign bribery enforcement. In many jurisdictions, a Non-trial Resolution will have the same legal consequences as a judicial verdict. The full taxation effects – exclusion, deductibility, recognition and public disclosure – should be evaluated and taken into account. There is no reason why a Non-trial Resolution should not be designed in such a way as to avoid collateral effects, if the overall Non-trial Resolution meets the standard of being effective, proportionate and dissuasive. On the other hand, the full weight of collateral sanctions may be appropriate.

4.4 Cooperation among law enforcement bodies, and the effectiveness of Non-trial Resolutions in promoting deterrence is enhanced by communication, coordination and mutual recognition. Coordination can take the form of selecting a lead enforcement agency, mutual recognition of disclosures made by Organizations and individuals, allocation of fines and penalties, accommodation of the timing and scheduling of national law enforcement investigations, shared information about the quality and reliability of cooperation and the like. Law and practice in the realm of attorney-client privilege, for example, vary among jurisdictions, but accommodations can be made to promote the value of encouraging individuals to seek and receive effective legal counsel in confidence, while at the same time not impeding work on appropriate investigative goals.

4.5 The OECD Working Group on Bribery in International Business Transactions should continue and should expand its informal communication among participants about relevant issues and facts.

4.6 Member countries should under the appropriate conditions allow non-Member countries to join in the process of entering into multi-jurisdictional Non-trial Resolutions.

5. While in many jurisdictions Organizations can be prosecuted or held liable for foreign bribery, bribery is effected by individuals working for those Organizations. Those individuals should be held accountable. Their civil and procedural rights must be observed, and not compromised for the sake of achieving a prompt Non-trial Resolution.

5.1 Non-trial Resolutions should fairly hold both corporate and individual wrongdoers accountable.

5.2 Where national laws provide for liability or culpability of Organizations, individual wrongdoers should not escape accountability. Indemnities by Organizations of their managers and employees for the penalties of enforcement should be disfavored, but providing individuals legal assistance, advanced legal fees (subject to recoupment) or separate legal counsel to promote cooperation with law enforcement while protecting individual rights is appropriate.

5.3 There is frequently pressure on Organizations to undertake to defend their managers and employees. Managers, employees and agents have in the past argued that they were only acting in the Organization's interests, even that they were not personally enriched. This line of argument must be refuted and individual accountability not diluted. In many cases, the individuals engaged in bribery were rewarded by the Organization, directly or indirectly, for their actions. By contrast, Organizations have in the past offered the defense that just a few rogue employees were responsible

for bribery, when in fact the root cause was systemic management weakness, poor controls or even senior management participation in bribery. In seeking to mitigate its own exposure, an Organization should not directly represent the personal interests of its employees.

5.4 Organizations have a legitimate interest in the actions brought against, managers, employees and agents – at least because they can be held derivatively liable for the managers’, employees’ or agents’ actions - and may appropriately participate in those actions to defend their own interests. An Organization’s own ability to cooperate with law enforcement may be hampered by a divergent strategy of an individual actor, which in some cases may be exercising its own fundamental rights.

6. Non-trial Resolutions should be subject to checks and balances to ensure fairness and conformity with the rule of law. Such control can be exercised by an independent judiciary, another branch of government independent of the state actor that is a party to the Non-trial Resolution, or through a robust internal review process.

- 6.1. Member countries should provide for review of Non-trial Resolutions through a process that assures public confidence.
- 6.2. Judicial review is the preferable mode of review, but other independent, competent reviewing arms of government could be employed, or where reliable, an internal robust and disciplined review process. Where Non-trial Resolutions must be presented and defended in open court, in colloquy with an independent examiner, there is a strong check on the discretion of prosecutors. There is, however, a danger that judicial review can offer another opportunity for corruption or undue influence, and that sufficiently specific legislative guidance or internal review and testing as to acceptable parameters for Non-trial Resolutions could be applied by other agencies of government or within the same agency. It is possible that criteria for Non-trial Resolutions could be sufficiently specific and normative that a separate review would not be necessary; that legislative definitions would provide sufficient checks on prosecutorial or judicial abuse.
- 6.3. Review should be substantive and effective, but should not subvert the benefits of Non-trial Resolutions. Non-trial Resolutions are by definition the outcome of negotiations or compromises. Established rules and procedures implementing checks and balances on Non-trial Resolutions should discourage the reopening of appropriate compromises and should not allow for *de novo* considerations of all of the underlying facts and applicable laws (unless, of course, new facts appear during the course of the review).
- 6.4. Member countries should publish the standards and procedures applied in checks and balances that constitute the review of Non-trial Resolutions.
- 6.5. Transparency in the disclosure of material facts, applicable law, and the rationale for specific outcomes will promote public confidence in the use of Non-trial Resolutions and provide guidance for Organizations and individuals considering voluntary disclosure, as the standards for rewarding voluntary disclosure and cooperation will be readily evident in the case histories and publications of Non-trial Resolutions. Non-trial Resolutions should provide for the publication of the material facts adduced in the investigation, such as the nature of voluntary disclosure if any, the gravity and pervasiveness of the bribery, the nature and extent of the defendant’s cooperation and any other facts that illustrate the appropriateness of the Non-trial Resolution, including the rationale for specific penalties, and the laws violated. Any such publication may omit facts where such omission serves a compelling interest. Such interests could include the safety of individuals, the

obstruction or impedance of an ongoing investigation or the protection of legitimately protected trade secrets.

- 6.6. Non-trial Resolutions such as declinations, or aspects thereof, should be made public, as public accountability is a fundamental principle of an effective judicial system. However, they may remain confidential if there is good reason therefor. The presumption should be for disclosure, but such presumption ought to be rebuttable for good cause shown. It has been the practice in some countries not to publish that a prosecution has been declined because the Organization's response was quick and effective after discovery of a possible offense and the objectives of law enforcement have been met. This can be a powerful incentive for Organizations to move quickly and effectively when they suspect criminal behavior.

7. The process of concluding Non-trial Resolutions should where appropriate provide for consideration of potential remedies for injured parties without compromising the goals of law enforcement.

7.1 Where the direct consequences of bribery can be identified and where national enforcement authorities can be confident that measures taken to address any harm caused are not susceptible to diversion or abuse, government actors effecting Non-trial Resolutions should consider victim recovery, compensation or other appropriate remediation.

7.2 There are many actors affected by bribery: competitors, countries, communities and individuals. Evaluation of the harm caused by bribery will differ depending on the facts and circumstances of each case. There are self-interested complainants, such as competitors and civil litigants, whose special perspective should be evaluated in context. Most importantly, it would undermine public confidence in the fairness of Non-trial Resolutions if money obtained by penalties further enriched those soliciting or receiving bribes.

7.3 Enforcement agencies that actively pursue international bribery generally resist allocating penalty payments obtained in Non-trial Resolutions to nations that have not actively pursued bribery, challenging those nations to enforce their own laws. Some countries, however, are not well equipped to investigate and prosecute international bribery: substantial cooperation might provide an adequate substitute for independently maintained investigations and prosecutions.

7.4 In some countries, money raised from penalties assessed against Organizations guilty of paying bribes has been used, at least in part, to address the harm caused by those bribes.

7.5 Some Non-trial Resolutions have entailed direct aid to affected communities supplied by cooperating Organizations, which aid may be considered a mitigating factor in the resolution of a case. This direct aid by cooperating Organizations can have the collateral effect of improving such Organizations' reputations. While this might seem an inappropriate benefit for a wrongdoer, it can also be an incentive for good corporate behavior that should be taken into account when devising Non-trial Resolutions.

8. Member countries should collect, share and disclose information and metrics concerning enforcement practices regarding Non-trial Resolutions, particularly through the Working Group on Bribery.

8.1 One impediment to robust international law enforcement is lack of information about which tools and practices have been most effective in combatting bribery, especially in the context of the

rapidly evolving practices employed in the implementation of rules and guidelines regarding the use of Non-trial Resolutions. A pooling of experiences will address that impediment.

8.2 Member countries should collect, share and disclose information and metrics concerning enforcement practices, particularly through the Working Group on Bribery, which has proved to be one of the most effective international bodies in the fight against corruption: its work should be expanded.

Peter Y. Solmssen and Tina Søreide

On behalf of the Recommendation 6 Working Group

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