

# Settling Foreign Bribery Cases with Non-Trial Resolutions



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This note has been prepared for the session on Settling Foreign Bribery Cases with Non-Trial Resolutions that will take place at the Global Anti-Corruption and Integrity Forum on 27 March 2018.

Non-trial resolutions have become a prominent way of resolving economic crimes, including corruption and bribery of foreign public officials. The 2014 OECD Foreign Bribery Report shows that 69% of the cases successfully concluded by countries Party to the OECD Anti-Bribery Convention since its adoption were resolved through non-trial resolutions. These resolutions, often referred to as settlements, are used with both individuals and companies, and their features vary significantly from one Party to the next. Instruments like Deferred Prosecution Agreements, Non Prosecution Agreements, civil and administrative settlements, leniency agreements and plea deals present fundamentally different features. Yet they all fit the description of a settlement, as they are non-trial enforcement vehicles meant to either conclude or defer the prosecution of foreign bribery cases.

Settlements are generally viewed as a pragmatic and efficient way to resolve cases that would otherwise require tremendous time and resources to investigate and prosecute before reaching a court. Advocates for settlements also argue that their compromising rather than adversarial nature constitute an incentive for wrongdoers to self-report to prosecutors and increase the prospects of corporate governance reforms. Yet settlements present legal, institutional and procedural challenges that have led some experts to question their ability to fairly and effectively deliver justice. Questions of transparency, the level of deterrence and victims' compensation are generally at the heart of their concerns.

As part of its mandate to oversee the implementation of the OECD Anti-Bribery Convention, the OECD Working Group on Bribery (WGB) closely monitors trends affecting enforcement of the foreign bribery offence, including the instruments and vehicles used to achieve this goal. In 2016, the WGB explored the liability of legal persons and, in 2017, the detection of foreign bribery.

“ As additional countries step up and engage in the fight against corruption, there are, to be certain, additional complexities and obstacles that arise, both for the various authorities investigating and prosecuting the cases and for the companies and individuals subject to those enforcement efforts. But those are complexities and obstacles we must and will confront and overcome in order to most effectively combat transnational corruption.

*Daniel Kahn, Chief, Foreign Corrupt Practices Act Unit, Department of Justice*

“ Negotiated settlements can enhance deterrence by increasing the certainty and lowering the cost of criminal settlements, thereby enabling prosecutors to pursue more cases expeditiously. Settlements can also deter if they are structured to incentivise firms to detect and report misconduct to authorities and to help government prosecutors obtain evidence needed to prosecute the individuals responsible for misconduct.

*Jennifer Arlen, Professor, New York University School of Law*

“ Protecting the integrity of Deferred Prosecution Agreements and other negotiated settlements as an enforcement tool is essential for ensuring that they provide effective deterrence and that public confidence in the use of these agreements is maintained. Key issues for protecting integrity include making sure that companies that do not cooperate and self-report are prosecuted; that standards for defining cooperation and self-reporting are high; and that such agreements are not available for recidivist behaviour.

*Susan Hawley, Policy Director, Corruption Watch*

Throughout 2018, the WGB will be conducting a cross-country study of the use of settlements to resolve foreign bribery cases. The results are scheduled for publication in early 2019.

This study will take stock of the different types of settlements available and analyse how these settlements are used in practice to resolve foreign bribery cases. It will explore how and to what extent certain settlement rules and practices allow for a steadier enforcement of the foreign bribery offence, both within countries and in the context of multi-jurisdictional resolution of foreign bribery investigations.

In support of this project, and with the objective of consulting stakeholders outside of the WGB to fuel the settlements discussion, a panel dedicated to this topic will be held during the 2018 OECD Global Anti-Corruption and Integrity Forum.



In reality, the court assessment of the facts matters less than a broader view of the situation. The settlement instrument is also about other people, other practices, and, in the end, about the entire corporate culture.

*Astrid Mignon Colombet, Lawyer, Partner at Soulez Larivière & Associés, on the first French Convention Judiciaire d'Intérêt Public*



There are many compelling reasons to continue to increase the use of negotiated settlements. Not only are they a pragmatic and efficient way to resolve cases that would otherwise require tremendous time and resources, but handled correctly they advance the public interest and promote compliance.

*Robert Sikellis, Chief Counsel Compliance, Siemens*

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## References

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. [www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm](http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm)

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## Issues for Discussion

The panel on “Settling Foreign Bribery Cases with Non-Trial Resolutions” will discuss the achievements and challenges associated with settlements, will explore possible solutions and share existing good practices. In particular, the panel will discuss how settlements features can help deter corporate crime by incentivising self-reporting and cooperation with law enforcement authorities. Discussions will also explore how the settlement process should be structured to satisfy the rule of law, and what may be lost in not resolving foreign bribery cases through full trial.

### Moderator

Jennifer Arlen, Professor, New York University School of Law

### Speakers

Daniel Kahn, Chief, Foreign Corrupt Practices Act Unit, Department of Justice

Astrid Mignon Colombet, Lawyer, Partner at Soulez Larivière & Associés

Susan Hawley, Policy Director, Corruption Watch

Robert Sikellis, Chief Counsel Compliance, Siemens