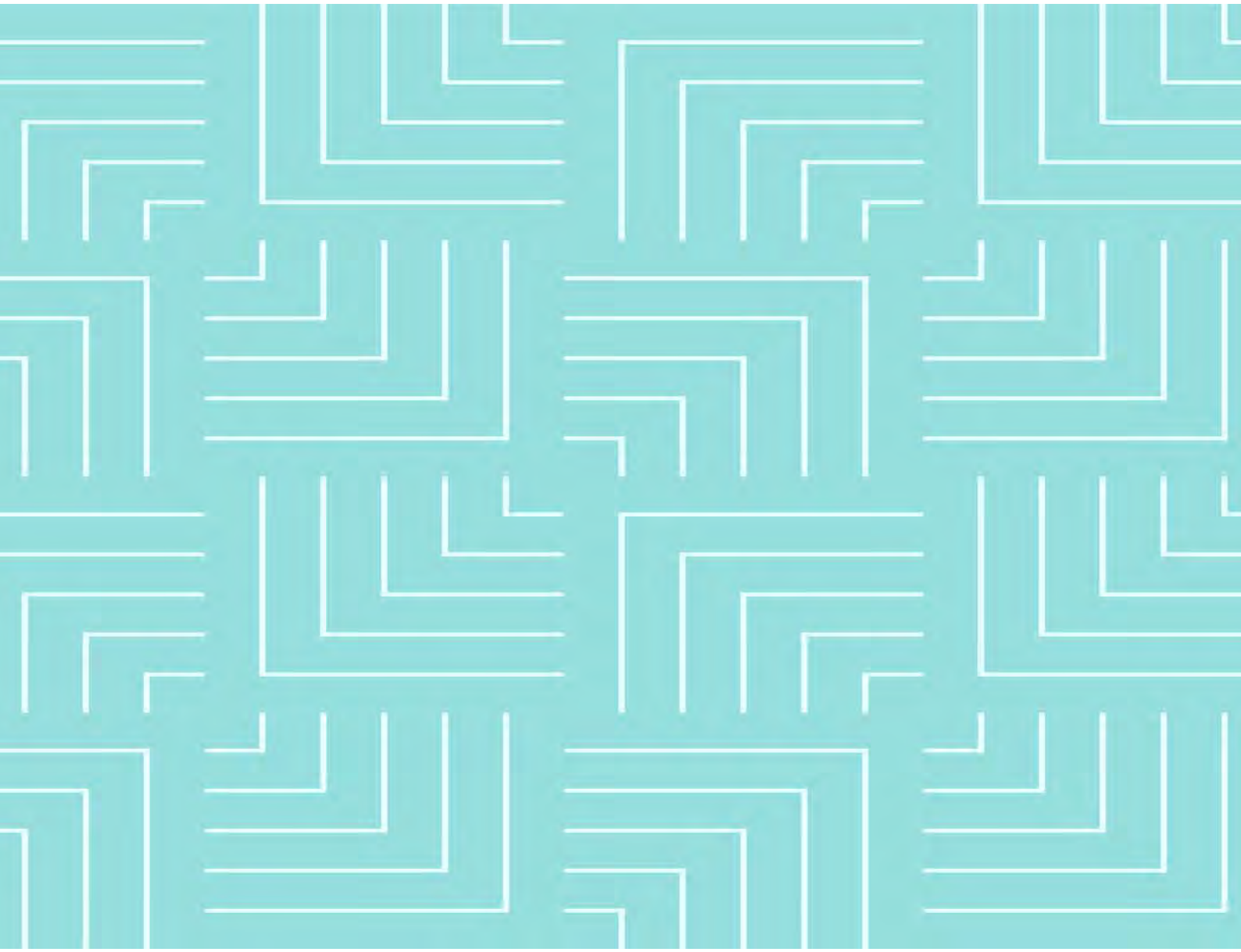
Resolving Foreign Bribery Cases with Non-Trial Resolutions

Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention



OECD

RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS

Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention



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Foreword

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention, or the Convention) states that "all countries share a responsibility to combat bribery in international business transactions." By ratifying the OECD Anti-Bribery Convention, the Parties to the Convention pledge to work together to fight foreign bribery. Twenty years after the entry into force of the OECD Anti-Bribery Convention, enforcement of the anti-bribery laws remains a challenge and a key priority to fight foreign bribery. Non-trial resolutions have become a prominent way of enforcing serious economic offences, including the bribery of foreign public officials.

The Study on Resolving Foreign Bribery Cases with Non-Trial Agreements examines non-trial resolutions that can be used to resolve foreign bribery cases with sanctions and/or confiscation. Non-trial resolutions refer to a wide range of mechanisms used to resolve criminal matters without a full court proceeding, based on an agreement between an individual or a company and a prosecuting or another authority. Where appropriate, they can also be used in administrative or civil proceedings to enforce the foreign bribery laws in the Parties to the Convention, in particular with legal persons.

This Study was undertaken by the OECD Working Group on Bribery in International Business Transactions ("Working Group on Bribery" or "Working Group") in order to take stock of the different types of non-trial resolutions available in the Parties to the Convention and analyse how these settlements are used in practice to resolve foreign bribery cases. The Study explores the reasons for, and impact of, the growing use of non-trial resolutions to resolve foreign bribery cases. It also assesses how and to what extent certain resolution rules and practices may allow for a steadier enforcement of the foreign bribery offence, both at the domestic level and in the context of multi-jurisdictional resolutions of foreign bribery investigations. The sanctions imposed and their deterrent role is also part of the focus of the Study as well as accessible guidance, procedural guarantees and, where relevant, the judicial or other review that may be exercised over these resolutions.

The Study builds on the information collected through the country monitoring reports on enforcement of the Convention as well as governmental data provided in the participating countries' responses to a detailed data collection questionnaire on their non-trial resolution systems. The Study also relies on an OECD database of concluded foreign bribery resolutions. The Study has benefited from input of business representatives, companies, civil society organisations, lawyers and academics.

The Study provides practitioners, legislators, policy makers, the private sector and civil society, with statistics on the use of resolutions in enforcement actions since the entry into force of the Convention and an analysis of the common features and discrepancies between the various resolution systems available across the Parties to the Convention that are covered under this Study. It also provides practical information on methods, which have proven effective in practice in resolving foreign bribery cases through non-trial resolutions.

It provides examples, through specific case studies, of how foreign bribery cases have been resolved in practice through non-trial resolutions with prosecutorial and other relevant authorities. Finally, the Study emphasises good practices likely to enhance enforcement through non-trial resolutions and multi-jurisdictional resolutions of cases.

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The development of this Study further benefited from the inputs of a number of consultation partners, namely: the Business and Industry Advisory Committee to the OECD (BIAC); Corruption Watch; the Natural Resource Governance Institute; Transparency International; and Transparency International UK. The authors also wish to express their appreciation to the Law Enforcement Officials of the OECD Working Group on Bribery. Finally, the authors acknowledge the inputs received in the context of the OECD's annual consultation with external stakeholders on fighting foreign bribery in December 2017 and a panel session entitled "Settling Foreign Bribery Cases with Non-Trial Resolutions" at the 2018 OECD Global Anti-Corruption and Integrity Forum (www.oecd.org/corruption/Panel-on-settling-foreign-bribery-cases-non-trial-resolutions.pdf).

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Introduction

Definition and Scope

This Study examines non-trial resolutions, commonly known as "settlements", which a number of the 44 countries Party to the OECD Anti-Bribery Convention have used to enforce their foreign bribery offences. These Parties are also Members of the OECD Working Group on Bribery and thus are also referred to as "Working Group Members" or "Working Group countries". The Study focusses on non-trial resolutions, which are defined as any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment with sanctions and/or confiscation, irrespective of whether it is a conviction (e.g. plea deals) or a non-conviction mechanism (e.g. non-prosecution or deferred prosecution agreements). Non-trial resolutions refer to a wide range of mechanisms available to resolve cases involving foreign bribery or related economic offences without a full trial on the merits. These resolutions can also be used in administrative or civil proceedings as part of the enforcement of the foreign bribery laws in the Parties to the Convention, in particular with legal persons.

Non-trial resolutions have been a prominent means for resolving economic crimes, including the bribery of foreign public officials. This Study looks at how these non-trial resolutions have been used to resolve foreign bribery cases, i.e. cases involving at least a foreign bribery offence or an alternative offence in cases pertaining to the foreign bribery sphere as defined by the Working Group on Bribery in its country monitoring work.[1] The alternative offences hence considered include, where relevant, commercial bribery and breach of trust. For legal persons, it also includes administrative offences available to sanction a company when a relevant natural person engages in foreign bribery. It does not cover ancillary offences, such as money laundering, tax, or accounting offences.

Chapter 1 takes stock of the use of non-trial resolutions to resolve foreign bribery cases across all countries Party to the OECD Anti-Bribery Convention. The rest of the Study goes into further analytical detail and covers countries Party to the Convention that (i) are known to have one or more non-trial resolutions, as defined above, potentially applicable to either legal or natural persons in foreign bribery cases as of 30 June 2018 and (ii) have submitted a completed data collection questionnaire providing information on their respective system(s) (see details on the methodology below) as part of the questionnaire on which a large part of this Study is grounded.[2] Based on these criteria, the Study covers **27 countries**:

[1] Germany Phase 4 Report, para. 27 and 28 for definition and paras. 89 et seq.to see how the WGB has used these categories.

[2] Considering the relevance of Canada's Remediation Agreement for this Study, this non-trial resolution was included in its scope, despite the fact that it became available to Canadian prosecutors in September 2018.

Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Slovenia, South Africa, Spain, Switzerland, the United Kingdom, and the United States.

All 27 countries covered in the Study have a least one non-trial resolution system to resolve a foreign bribery case.[3] A substantial majority (74%) has several applicable systems. The 27 countries have 68 resolution systems for legal persons (13), natural persons (16), or both (39). Thus, the countries in the Study have in total 52 or 55 systems available for legal or natural persons, respectively.

Data Collection and Methodology

While the Study builds on the country monitoring reports of the Parties' implementation of the Convention, it is primarily based on the answers that the countries provided to the questionnaire developed to collect data on each country's non-trial resolution systems. The answers were aggregated into data tables described below. The OECD data collection questionnaire results (comprising 58 questions, including open-ended questions on a number of issues) collects information on the resolution regimes in force, and how they have been applied to resolve foreign bribery cases, with a view to comparing the relevant features of their non-trial resolution systems.

A database has specifically been designed for this Study: it includes cross-country data tables based on the above-mentioned responses received from 27 countries Party to the OECD Anti-Bribery Convention who have at least one form of resolution, as defined under this Study, for either legal or natural persons. Country responses to the OECD data collection questionnaire results have been aggregated into tables. These have been used to generate charts or graphs that illustrate the findings documented in the Study.

The 39 tables in the OECD data collection questionnaire results include data for the 27 countries that responded to the questionnaire describing their resolution system(s) available for natural or legal persons.[4] Each table identifies as a "source" the question or questions that were used to generate the data. On most questions, the tables are split into natural and legal persons. Most tables include a column with "comments" which have been limited to main references and/or short explanations.

The Study also relies on the OECD database of concluded foreign bribery resolutions, which is constructed with publicly available information provided for this Study by individual countries. The case dataset has been updated through 30 June 2018 (hereafter "the cut-off date for this Study").

[3] While at least 31 Parties to the Convention are known to have at least one resolution system for either legal or natural persons, not all answered the questionnaire.

[4] The thematic tables are part of a separate document: Resolving Foreign Bribery Cases with Non-Trial Resolutions: OECD Data Collection Questionnaire Results (OECD, 2019), www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm.

Key Findings

Non-trial resolutions have been the predominant means of enforcing foreign bribery and other related offences.

For all 44 Parties to the Convention, non-trial resolution instruments have become the primary enforcement vehicle of anti-foreign bribery laws. According to the OECD database of concluded foreign bribery cases, 23 of the 44 Parties to the Convention have successfully concluded a foreign bribery action. Between the entry into force of the Convention, on 15 February 1999 and the cut-off date for this Study, 890 foreign bribery resolutions were successfully concluded, of which 695 through non-trial resolutions (78%). Of these non-trial resolutions, 686 (77%) were concluded using resolution systems covered in the Study because they can be used to impose imprisonment, monetary sanctions or confiscation for foreign bribery or equivalent offences. Another 9 resolutions resulted from other non-trial resolutions that fell outside the scope of the Study (1%). The remaining 195 enforcement actions were resolved by a conviction after trial (22%).

Of the 23 Parties to the Convention who have successfully concluded a foreign bribery action, 15 have used a non-trial resolution mechanism, at least once, to resolve a foreign bribery case with either a legal or a natural person or both. Specifically,

- 7 countries have enforced only with non-trial resolutions (Australia, Brazil, Chile, Israel, the Netherlands, Spain, and Switzerland);
- 8 countries have enforced both through trial and non-trial resolutions (Canada, France, Germany, Italy, Norway, Sweden, the United Kingdom, and the United States); and
- 8 countries have enforced only through trials (Austria, Belgium, Bulgaria, Hungary, Japan, Korea, Luxembourg, and Poland).

Non-trial resolution systems could indirectly contribute to an overall increased enforcement of the foreign bribery offence. The 15 countries that have concluded at least one foreign bribery case with a non-trial resolution tend to frequently resort to such mechanisms to resolve foreign bribery cases. In total, 13 of the 15 countries have resolved more than 50% of their foreign bribery cases using non-trial resolutions. The three biggest enforcers of the foreign bribery offence[5] have used non-trial resolutions to resolve over 78% of their cases, namely: **Germany** (79%), the **United Kingdom** (79%) and the **United States** (96%). Together these enforcers account for 80% of all the Working Group on Bribery's enforcement actions and nearly 90% of all non-trial resolutions since the Convention's entry into force. In certain Parties, non-trial resolutions provided the means to obtain the first-ever foreign bribery resolution or have (so far) provided the only means for imposing corporate liability for foreign bribery offences. In other countries, non-trial resolutions have provided a means to enhance their foreign bribery enforcement.

Focusing on the 27 countries covered in the Study, 17 have successfully concluded a foreign bribery action (either through trial or non-trial resolutions, or sometimes both). The Study countries have concluded a slightly higher percentage (81%) of their foreign bribery

[5] The database used for this Study contains enforcement actions in which sanctions were imposed based on at least one foreign bribery charge as well as alternative offences used to prosecuted cases within the foreign bribery sphere. For a description of how these categories have been used, see the Germany Phase 4 Report, paras. 89 *et seq*.

cases through non-trial resolutions than the entire Working Group on Bribery as a whole. Irrespective of the group of countries covered, these figures show that non-trial resolutions have by far been the preferred means of resolving foreign bribery cases.

The last decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions.

Starting with the 2008 ***Siemens AG*** non-trial resolution reached with authorities in the United States and Germany, a number of coordinated multi-jurisdictional non-trial resolutions have followed through, sometimes among up to three Parties to the Convention as illustrated by some of the cases discussed in Annex B. This trend is likely to continue to increase, especially as countries continue to cooperate in the investigatory stages, strengthen their anti-corruption laws, and prioritize prosecutions of foreign bribery.

One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty. This close coordination would not have been possible in cases involving trials. Examples include the ***Odebrecht case*** (December 2016), the ***Rolls-Royce case*** (January 2017), and the ***Vimpelcom case*** (February 2016).

A key feature of all non-trial resolution systems is the potential for a reduced sanction but stark differences exist in the level of sanctions imposed in practice.

The potential for a reduced sentence is obviously a major incentive for the accused persons in their decision to enter into a non-trial resolution. Some resolution systems do not provide for the imposition of any punitive sanction, but do allow confiscation to take place. Stark differences exist in the level of sanctions imposed in practice through non-trial resolution procedures. In part, this reflects the wide variation in penalties that the Parties to the Convention can impose on legal and natural persons for foreign bribery before a possible reduction is applied as part of the non-trial resolution. In the resolution systems where a sanction is available, the ways in which the sanction is reduced also varies significantly. Some countries have a maximum sentence that can be imposed through a resolution. Other countries have law or guidance that ensures a percentage reduction from the sanction that would have applied after trial.

To illustrate the range of sanctions that can be imposed through non-trial resolutions, across the Parties to the Convention, the highest monetary penalty in a foreign bribery case (as of the cut-off date of the Study) came in the December 2016 ***Odebrecht*** and ***Braskem*** coordinated resolutions, in which the companies agreed to pay a total of at least USD 3.23 billion to **Brazil**, **Switzerland**, and the **United States** as part of a coordinated resolution. One of the lowest penalties imposed on a company in a foreign bribery case was the fine of CHF 1 in the March 2017 ***Banknotes case***, which was resolved through **Switzerland**'s *Simplified Procedure*.

Collectively, the sanctioned legal persons have paid amounts reaching in the aggregate approximately USD 14.9 billion (after converting into constant 2018 US dollars).[6] This

[6] As the OECD database of foreign bribery cases includes resolutions concluded between 1999 and 2018, the monetary amounts mentioned in this Study have – unless otherwise indicated – been converted to constant 2018 US dollars (USD) in order to enable meaningful statistical comparisons among the various forms of resolutions. According to the US Census Bureau, "Constant-dollar value

sum includes both monetary sanctions, confiscation, and, if applicable, compensation sums or prosecution costs. Non-trial resolutions were responsible for approximately 95% of this amount, with *Deferred Prosecution Agreements (DPAs)* or similar resolutions (corresponding to Form 2, as described in Chapter 2) and civil/administrative resolutions (Form 3) responsible for nearly 37% and 29% of the total, respectively. Within this sum, the fines or other monetary sanctions imposed on legal persons amounted to approximately USD 8 billion, with over 99% of the fines coming from non-trial resolutions. Of the total fines imposed on legal persons, 52% was collected through *DPA*-like (Form 2) resolutions, with "mixed" resolution forms, such as Brazil's *Leniency Agreement*, constituting just over one quarter of the fines imposed (25%) and resolutions akin to plea agreements (Form 5) constituting approximately 17%.

The OECD database of concluded foreign bribery cases contains 591 resolutions in which a natural person was sanctioned for foreign bribery in 21 countries.[7] Although the varying degrees of transparency about concluded cases in the Parties to the Convention prevents a complete analysis of the sanctions imposed on natural persons, at least 423 natural persons (72%) were sanctioned through a non-trial resolution.[8]

With respect to legal persons, many of the resolutions concluded in prominent foreign bribery cases include large amounts of monies confiscated.

As the amounts of monies confiscated are not always distinguished from the amount of the fine, it is difficult to establish exhaustive data on the respective proportion of fines and confiscation across countries and resolution systems. According to the OECD database of foreign bribery cases concluded with sanctions, at least 10 Parties have concluded 128 resolutions for which it is known that a confiscation measure was imposed. Based on those resolutions whose confiscation amounts are known, the enforcing Parties have collectively imposed at least EUR 6.8 billion in confiscation on legal persons. Confiscation from non-trial resolutions amounted to EUR 6.1 billion, nearly 90% of the total. Non-trial resolutions imposing civil or non-criminal liability on legal persons were responsible for approximately 60% that EUR 6.1 billion, while *DPA*-like resolutions (Form 2) were responsible for nearly one-fifth (18.7%) of it.

(also called real-dollar value) is a value expressed in dollars adjusted for purchasing power. Constant-dollar values represent an effort to remove the effects of price changes from statistical series reported in dollar terms. The result is a series as it would presumably exist if prices were the same throughout as they were in the base year-in other words, as if the dollar had constant purchasing power." United States Census Bureau, "Current versus Constant (or Real) Dollars" (30 August 2018), www.census.gov/topics/income-poverty/income/guidance/current-vs-constant-dollars.html.

[7] In order of enforcement, the five countries that have sanctioned the most natural persons for foreign bribery whether by trial or non-trial resolutions are **Germany** (317), the **United States** (131), **Hungary** (26), **Korea** (22), and the **United Kingdom** (16).

[8] Of the 423 resolutions sanctioning natural persons, 418 were applications of resolution systems covered in the Study, while 5 were applications of resolutions systems that were excluded from the Study either because they did not meet the criteria or because the Working Group member country did not respond to the data collection questionnaire.

Assessing whether "effective, proportionate and dissuasive" sanctions have been imposed on those who engage in foreign bribery non-trial resolutions (Article 3 of the Anti-Bribery Convention) presents a number of challenges.

While certain non-trial resolutions may enable companies to avoid the harshest consequences of a foreign bribery conviction (e.g. debarment, discussed in Chapter 4.6.1), usually in exchange for cooperation and under a number of conditions, it is also the case that the highest criminal sanctions have been imposed through non-trial resolutions. In fact, the number and size of cases resolved through non-trial resolutions, especially those involving legal persons, can make it difficult to compare with cases that proceed to trial.

The highest total sanction imposed on a legal person after a full trial in any foreign bribery case was 29 million in constant 2018 US Dollars in the 2016 ***Saipem case*** in **Italy**, in 2015, which was related to the ***TSKJ Nigeria case***. The fine was USD 681 209 and confiscation USD 28.3 million.[9] The highest fine imposed on a legal person after a full trial came in the 2016 ***Smith and Ouzman*** case in the **United Kingdom**, which resulted in a fine of GBP 1.3 million (EUR 1.43 million) plus confiscation for a total financial penalty of GBP 2.2 million (EUR 2.42 million).[10]

It is only occasionally possible to say whether the sanction imposed through a given non-trial resolution would have been substantially greater if imposed after trial. In some countries, the discount that can be imposed when resolving a case without trial is calculated from the sanction that could have been imposed at trial. In the **United Kingdom**, the Court judgment approving a *DPA* must set out in detail the steps that have been taken to calculate the reduction in fine. In the ***Standard Bank case***, the applicable sanction was reduced by a third to reflect the resolution. Thus, the Court found that the applicable sanction after trial would have been USD 25.2 million, but this was reduced to USD 16.8 million, reflecting the resolution through a *DPA*.[11] It should be noted, however, that trial may unveil factual elements that could influence the level of sanction imposed. It is hence impossible to assess with certainty what sanction would have been imposed after trial.

A certainty is that large multi-jurisdictional resolutions have to date permitted the highest global amount of combined financial penalties. As shown in the Study, eight of the top ten largest foreign bribery enforcement actions involved coordinated or sequential non-trial resolutions with at least two Parties to the Convention. Furthermore, as indicated above, the multi-jurisdictional resolution in the ***Odebrecht case*** resulted in the highest amount of financial penalty imposed to a company.

[9] Database of concluded foreign bribery cases maintained by the OECD. See also: "Italy court upholds Saipem fine and seizure order in Nigeria case", Reuters, 19 February 2015, www.reuters.com/article/saipem-nigeria-probe-idUSL5N0VT47M20150219.

[10] The OECD database of concluded foreign bribery cases. See also, UK SFO, Case Information, Smith and Ouzman Ltd, www.sfo.gov.uk/cases/smith-ouzman-ltd/.

[11] See paragraphs 43-58 of the preliminary judgment.

Chapter 1. The increasing use of non-trial resolutions to resolve foreign bribery cases

1.1. The term "resolution" describes a diverse and growing number of enforcement tools for resolving foreign bribery cases

Non-trial resolutions, commonly known as "settlements", refer to a wide array of mechanisms developed and used to resolve criminal matters without a full court proceeding, including foreign bribery cases, based on an agreement with an individual or a company and a prosecuting or another authority. Where appropriate, non-trial resolutions can also be available and used in administrative or civil proceedings. This Study looks at non-trial resolutions available to enforce the foreign bribery laws in the Parties to the OECD Anti-Bribery Convention. It also looks at non-trial resolutions used to resolve cases in the foreign bribery sphere including based on offences alternative to the foreign bribery offence as illustrated by a selection of cases throughout this Study.[12] As shown in Figure 1, the vast majority of the resolution systems applicable for foreign bribery in the Parties to the Convention are available in criminal proceedings: 39 resolutions for legal persons (75%) and 50 resolutions for natural persons (91%).[13]

For the purpose of this Study, non-trial resolutions (hereafter also "resolutions") encompass those instruments, which can be used to resolve foreign bribery offences or other offences in the foreign bribery sphere (hereafter "other related offences") with sanctions and/or confiscation without a full trial on the merits. These resolutions can, however, also impose other sanctions and conditions, such as the design and implementation of an effective compliance program.

While resolutions do not involve a full trial, the courts can still be part of the process to varying degrees. In the **United Kingdom**, for instance, in order to conclude a *Deferred Prosecution Agreement* (*DPA*), the UK Serious Fraud Office (SFO) makes a preliminary application to the court at the end of negotiations. The preliminary application is usually shortly followed by the final application. A judge must make a declaration that resolving the matter by way of a *DPA* is in the interests of justice and that the terms are fair, reasonable and proportionate.[14] Conversely, in **Norway**, court validation is not required to either issue or conclude an *Optional Penalty Writ* (also known as a *Penalty Notice*), even though the resolution has the effect of a judgement. Between these two extremes, several

[12] The database used to support data and, in places, provide examples for this study contains enforcement actions in which sanctions and/or confiscation were imposed based on at least one foreign bribery charge as well as alternative offences used to prosecute cases within the foreign bribery sphere. For a description of how these categories have been used, see Germany Phase 4 Report, paras. 89 *et seq*.

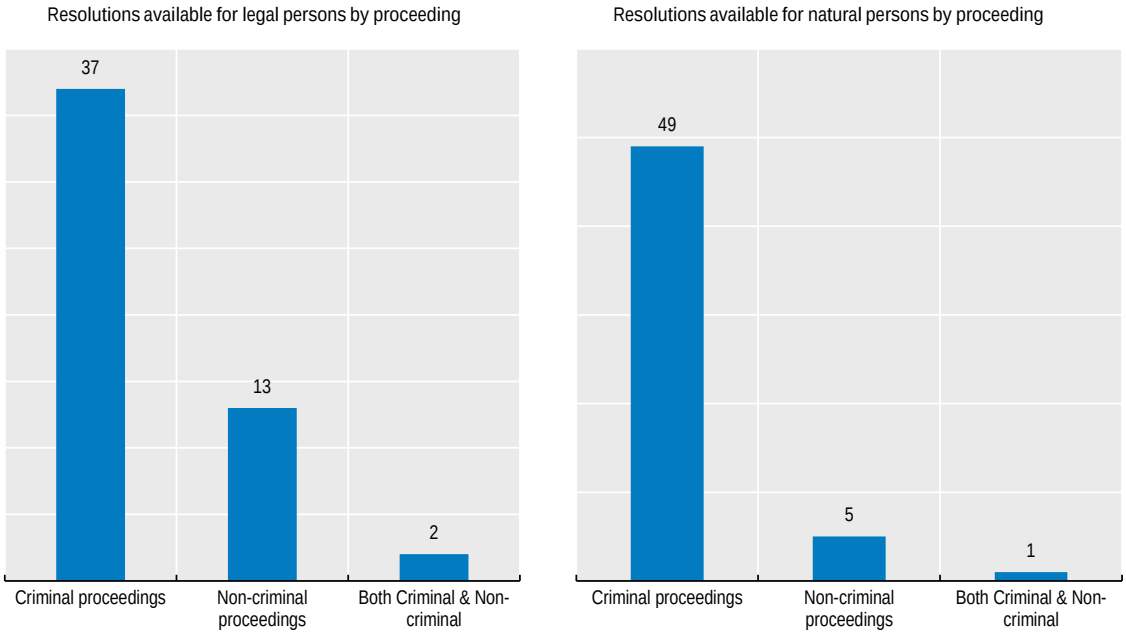
[13] See Tables 3 and 4 for the answers to question 7a.

[14] UK Crime and Courts Act 2013 Schedule 17c paras. 7(1) and 8(1) (a) & (b).

systems provide for various forms of judicial review of the proposed resolution mainly to ensure that all the substantive or procedural requirements are satisfied. Judicial review over resolutions is discussed in greater detail in Chapter 5.1.

The non-trial resolutions in this Study may result in a range of different outcomes. In particular, only some successfully concluded resolutions result in a conviction. For instance, **Italy**'s *Patteggiamento*, which is akin to a plea deal, allows for an immediate resolution of charges that leads to the alleged offender being sanctioned (but without an admission of guilt). In contrast, under the **United States** *DPA* in criminal matters and **Chile**'s *Conditional Suspension of Proceedings*, prosecution is deferred and eventually dropped if the alleged offender successfully abides by the terms of the agreement. The legal effect of non-trial resolutions is further discussed in Chapters 2 and 4. Similarly, while several resolutions have both a punitive and a confiscatory component, certain only have the latter. This is the case for the *Declination with disgorgement* in the **United States** under the US Department of Justice's (DOJ) Corporate Enforcement Policy[15] for the Foreign Corrupt Practices Act (FCPA).[16]

Figure 1. Total number of resolutions available in the countries covered by the Study



Source: OECD data collection questionnaire results, Tables 3 and 4.

Non-trial resolutions hence cover a wide variety of enforcement mechanisms. From **Argentina**'s *Effective Cooperation Agreement* to **France**'s *Convention Judiciaire d'Intérêt Public* (*CJIP*) and **Brazil**'s *Leniency Agreement*, the diversity of names given to these procedures is a testament to the variety of systems designed by the Parties to the

[15] Corporate Enforcement Policy (USAM 9-47.120), www.justice.gov/criminal-fraud/corporate-enforcement-policy.

[16] The Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.)

Convention.[17] These may either be grounded in the law, as with **Chile**'s *Conditional Suspension of Proceedings* in the Code of Criminal Procedure,[18] or in policy guidance, as in the **United States** where the use of *DPA*s for legal persons has evolved under guidance that the DOJ and the US Securities and Exchange Commission (SEC) developed for criminal and non-criminal enforcement actions, respectively.[19]

The diversity in forms and conditions of non-trial resolutions can, in part, be explained by the fact that each system is grounded in the legal tradition of the country where it is applied. Although these instruments respond to similar concerns of a practical nature, they follow the fundamental principles of each country's legal framework. In **Norway**, for instance, a prosecutor cannot resort to an *Optional Penalty Writ* where imprisonment is sought for the offence. As aggravated corruption is punishable by a term of imprisonment for natural persons, this system is mainly used for legal persons in foreign bribery cases.[20]

1.2. A large percentage of foreign bribery cases are resolved through resolutions, instead of trial

1.2.1. An increasing use of non-trial resolutions among Parties to the Convention

Non-trial resolutions have become a prominent means for resolving economic crimes, including corruption and bribery of foreign public officials or other related offences. According to the OECD database of concluded foreign bribery cases, the 44 Parties to the Convention have successfully concluded 890 foreign bribery resolutions since the Convention entered into force on 15 February 1999. Of these, 695 were concluded through non-trial resolutions. As shown in Figure 2, this represents 78% of concluded resolutions imposing sanctions or confiscation for foreign bribery.[21]

As seen in Figure 3, over half of the Parties to the Convention (23 out of 44) have successfully concluded a foreign bribery action. Of these 23 enforcing countries, 15 have used a non-trial resolution mechanism, at least once, to resolve a foreign bribery case with either a legal or a natural person (3 countries in each case), or both (9 countries). In 8 countries, the authorities have enforced their foreign bribery laws exclusively through trials, even though some of these countries, resolutions are now available to resolve foreign bribery cases. In 5 of these 8 countries (**Austria, Bulgaria**, **Hungary**, **Luxembourg**, and **Poland**) these trials only involved natural persons, while **Belgium, Japan,** and **Korea** have secured convictions of both legal and natural persons at trial. Some countries have convicted legal persons both through trial and non-trial resolutions (e.g. **France**, **Germany**, **Italy**, and the **United Kingdom**). Some countries

[17] Argentina: Corporate Liability Law – 27401 Art 9; France: Article 41-1-2. of the French Code of Criminal Procedure (CCP); Brazil: Article 16 I of the Corporate Liability Law.

[18] Article 249 of the Chilean Code of Criminal Procedure.

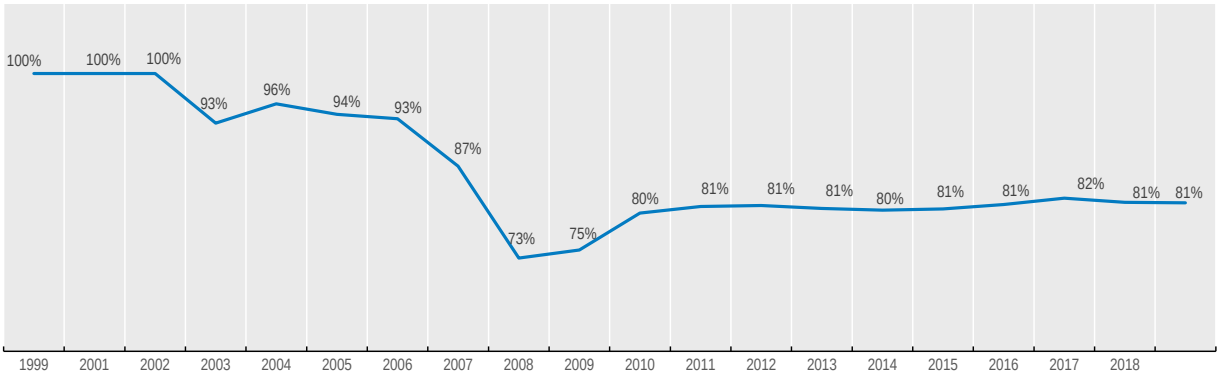
[19] See Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, www.eifr.eu/uploads/eventdocs/596f2377ec5fa.pdf.

[20] Norway Phase 4 Report, para. 81.

[21] For the 17 Parties covered by this Study, non-trial resolutions constituted approximately 82% of all of their foreign bribery enforcement actions.

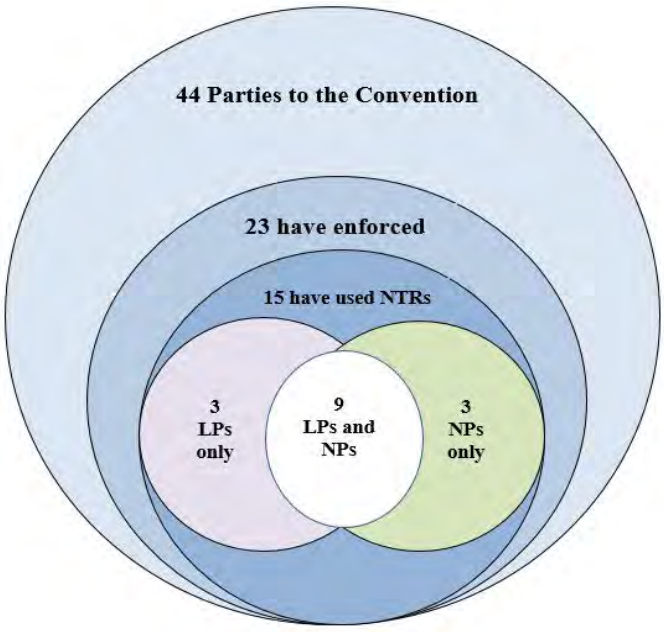
have convicted natural persons both through trial and non-trial resolutions (e.g. **France**, **Germany**, **Norway**, the **United Kingdom**, and the **United States**).

Figure 2. Cumulative percentage of non-trial resolutions in Working Group countries' foreign bribery enforcement actions since the Anti-Bribery Convention's entry into force



Source: This graph reflects non-trial resolutions concluded between 15 February 1999 and 30 June 2018. OECD database of concluded foreign bribery cases.

Figure 3. How many Parties to the Convention have used non-trial resolution mechanisms to resolve a foreign bribery case?



Note: NTR stands for Non-Trial Resolutions.

The 15 countries that have concluded at least one foreign bribery case with a non-trial resolution tend to use such mechanisms very frequently. Based on publicly available information, seven countries have exclusively used these instruments to enforce their foreign bribery laws (**Australia**, **Brazil**, **Chile**, **Israel**, the **Netherlands**, **Spain**, and **Switzerland**). In addition, 14 countries have resolved more than 50% of their foreign

bribery cases using non-trial resolutions. France and Sweden have only used non-trial resolutions to resolve respectively 11% and 17% of their foreign bribery cases. With respect to **France**, one reason is that the *CJIP,* designed to resolve economic crimes by legal persons, is a relatively recent instrument, introduced in December 2016.[22] The *CJIP*, was used for the first time in June 2018 to resolve, a prominent foreign bribery case with Société Génerale, in parallel with the **United States.** Previously, France only had the *Comparution Immediate sur Reconnaissance Préalable de Culpabilité* (*CRPC*), which amounts to a plea deal and had only been used in one foreign bribery case[23] since its adoption in 2004.[24]

The factors explaining the increasing use of non-trial resolutions to resolve foreign bribery matters are mainly of a practical nature.[25] In general, governments have limited resources available to devote to corporate criminal enforcement. Investigating and prosecuting foreign bribery requires tremendous time and financial resources. Collecting evidence is complex and resource-intensive. As the offences typically involve several jurisdictions, investigation often requires mutual legal assistance (MLA) from foreign jurisdictions. Obtaining MLA can sometimes take months, if not years before assistance is provided, thus creating a risk that the evidence may become less valuable over time or even, in certain jurisdictions, the case may become time-barred or otherwise less viable. Bribery schemes are increasingly complex and their investigation requires the support of highly specialised professionals, including forensic accounting experts. The investigation is all the more challenging that both the bribe giver and the bribe taker have a shared interest in concealing the crime from law enforcement authorities and these crimes often lack a direct victim eager to bring evidence to the authorities.

As a matter of example, during the Working Group on Bribery's Phase 3 evaluation of **Norway**, representatives of the Norwegian prosecuting agency (ØKOKRIM) explained that they preferred using *Optional Penalty Writs*, over taking a foreign bribery case to trial, because such trials are "usually long and place a large burden on law enforcement resources".[26] Referring to **Switzerland**'s non-trial resolutions, the Working Group on Bribery emphasised that: "such procedures have undeniable advantages for law enforcement authorities, in that they streamline procedures and reduce costs."[27]

Non-trial resolutions are an efficient tool for resolving complex foreign bribery cases. With these instruments, prosecutors have the option to resolve foreign bribery matters without

[22] France: Article 41-1-2. of the French Code of Criminal Procedure, enacted by Law n°2016-1691 of 9 December 2016, article 22.

[23] The CRPC was concluded against a natural person on 13 September 2016.

[24] The CRPC was created by a law of 9 March 2004 on the adaptation of the justice system to the new forms of criminality (Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité).

[25] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page.1

[26] Norway Phase 3 Report, para. 64.

[27] Switzerland Phase 3 Report, para. 41.

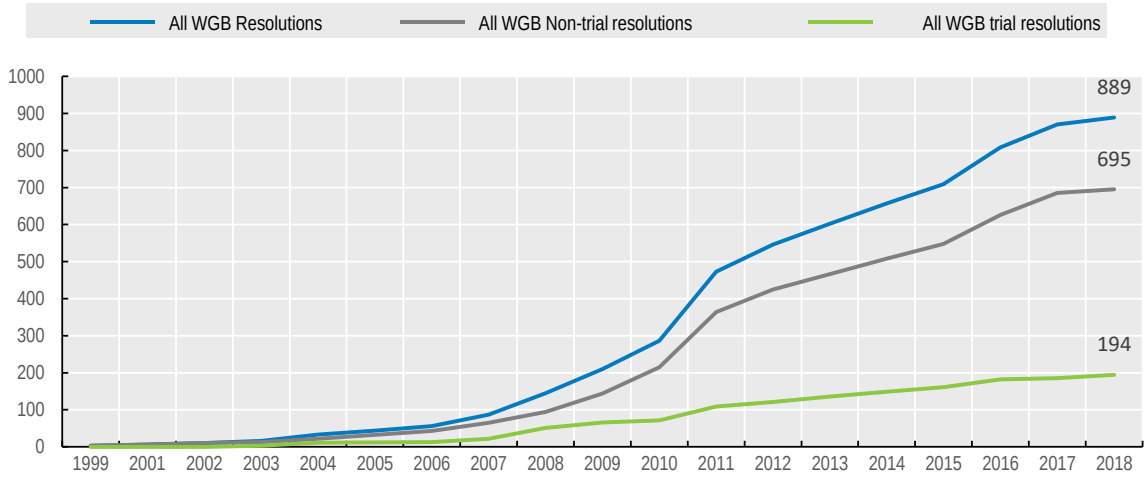
engaging the full range of resources necessary to prosecute a case through a trial on the merits and any potential appeal proceedings.

1.2.2. Non-trial resolution mechanisms have become a driver of enforcement.

Non-trial resolution systems could also indirectly contribute to an overall increased enforcement of the foreign bribery offence. Academics note that "trials are time-consuming and expensive and divert the time and attention of the judge and the prosecutorial team for an extended period, reducing their ability to pursue other cases."[28] To the extent that non-trial resolutions save time and free up resources, law enforcement authorities can use fewer resources to resolve more cases. This may potentially increase the pace of enforcement investigations and ultimately the number of enforcement actions. Shorter proceedings also maximise prosecutors' chances of completing an enforcement action before cases become time barred in countries where the prosecution itself, including appeals, must be finally concluded within the limitations period.[29] The Working Group has indeed regularly emphasised in its country evaluations how statute of limitations in some jurisdictions can present a substantial impediment to prosecutors' ability to successfully enforce foreign bribery laws.

Figure 4 shows both that the substantial majority of foreign bribery resolutions were reached through non-trial resolution mechanisms.

Figure 4. Cumulative number of Working Group on Bribery resolutions (1999 to mid-2018)



Source: OECD database of concluded foreign bribery cases.

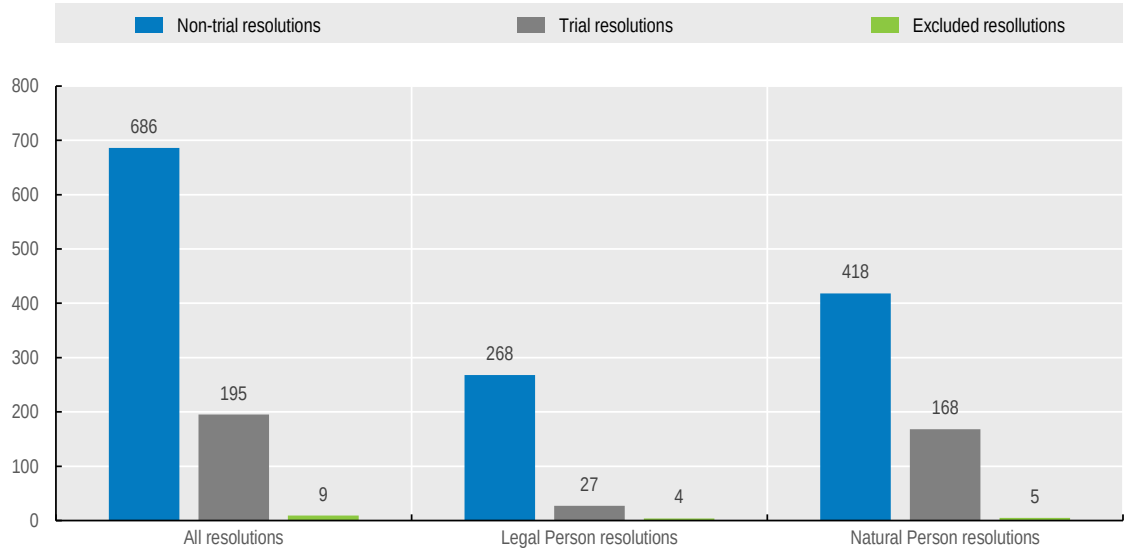
As shown in Figure 5, this pattern in usage is true both for legal and natural persons. At the same time, the proportion of non-trial resolutions is higher for legal persons than for natural persons. Whereas 91% of the resolutions with legal persons (268 out of

[28] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page.1.

[29] Italy Phase 3 Report, para. 13.

295 resolutions) did not involve a trial, this was only true for 72% of the resolutions with natural persons (418 out of 586 resolutions).

Figure 5. Working Group on Bribery's use of non-trial resolutions to resolve foreign bribery matters since the Anti-Bribery Convention entered into force



Source: OECD database of concluded foreign bribery cases.

At the country level, case data indicates that the three biggest enforcers of the foreign bribery offence[30] have used non-trial resolutions to resolve over three-fourths of their cases, namely: **Germany** (80%), the **United Kingdom** (79%) and the **United States** (96%). Together these enforcers account for 80% of all the Working Group on Bribery's enforcement actions and nearly 90% of all the non-trial resolutions since the entry into force of the Convention.

Brazil provides an example of how non-trial resolutions can contribute to boosting enforcement, including of a recent regime of liability of legal persons (which otherwise may have taken years before being enforced). At the time of its 2014 Phase 3 evaluation, Brazil had yet to successfully conclude one foreign bribery case. In 2013, however, it had enacted the Organized Crime Law (Law 12,850), which created the possibility for natural persons to enter into a *Cooperation Agreement*.[31] Brazil later added the possibility of entering into a *Leniency Agreement* with legal persons to complement its new regime of liability for legal persons. In 2017, the Working Group noted that "in January 2016, Brazil concluded its first foreign bribery case by way of a leniency agreement with a Brazilian company, and cooperation agreements with 10 natural persons. Significant sanctions were

[30] The database used for this Study contains enforcement actions in which sanctions were imposed based on at least one foreign bribery charge as well as alternative offences used to prosecuted cases within the foreign bribery sphere. For a description of how the Working Group has used these categories, see Germany Phase 4 Report (paras. 89 et seq.).

[31] Brazil Phase 3 Report, para. 100.

imposed for a range of offences, including foreign bribery. In addition, Brazil now has eight ongoing cases, five of which were initiated after Phase 3 (from a total of 21 allegations)."[32]

Conscious that "detecting the crime is the first step, and a challenge, to any effective enforcement of the Convention,"[33] a number of Parties to the Convention have also endeavoured to use non-trial resolutions to enhance self-reporting and cooperation, thus increasing detection and enabling the successful investigation and prosecution of foreign bribery cases. This point is further examined in Chapter 3.2 and 3.3.

1.3. Developments in resolving foreign bribery cases

1.3.1. Current snapshot of non-trial resolutions in countries Party to the Convention

As discussed in the previous section, non-trial resolutions have historically played a prominent role in how the Parties to the Convention enforce their foreign bribery offence. The prevalence of non-trial resolutions has only grown over time, as the Parties have adopted an increasingly wide range of non-trial resolution systems.[34] While non-trial resolutions may have once been perceived as incompatible with the inquisitorial approach traditionally found in civil law jurisdictions,[35] most of the Parties have some form of non-trial resolution for both natural and legal persons, including a sizeable number of civil law countries. As shown in Figure 6, 23 of the 44 countries Party to the Convention (48%) are known to have at least one non-trial resolution for legal persons: Argentina, Australia, Austria, Brazil, Canada, Chile, the Czech Republic, Estonia, France, Germany, Israel, Italy, Japan, Latvia, Mexico, Netherlands, Norway, Slovenia, South Africa, Spain, Switzerland, the United Kingdom, and the United States. Additionally, 28 Parties to the Convention (57%) have at least one non-trial resolution for natural persons: Argentina, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

In the aggregate, the 27 Parties to the Convention covered in this Study are known to have one or more non-trial resolution potentially applicable to either legal or natural persons. Altogether they have 68 different non-trial resolution systems potentially available for foreign bribery cases. At least 30 of these resolutions (44%) have been used to impose

[32] Brazil Phase 3 Follow-up Report, page.4.

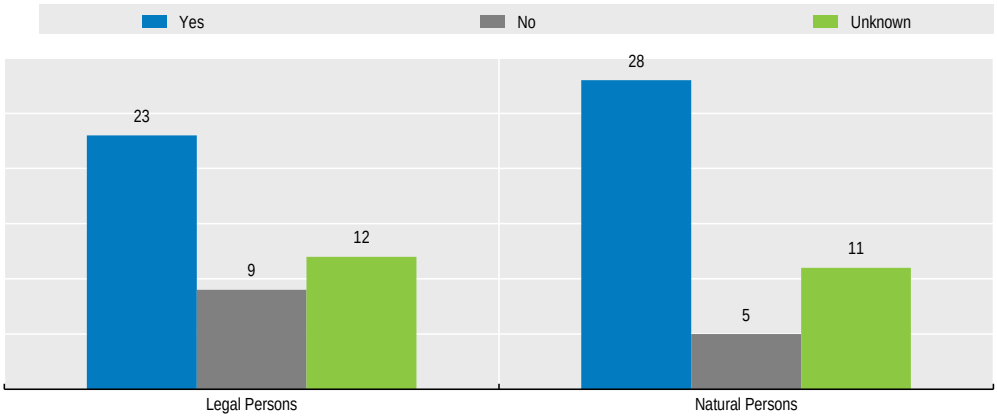
[33] OECD (2017), The Detection of Foreign Bribery, www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf, page 9.

[34] The trend among the Parties to the Convention mirrors the larger global context in which countries around the world are adopting mechanisms to resolve criminal proceedings without a full trial. According to a 2017 study of 90 jurisdictions, the number with a "trial waiver system" increased from 19 before 1990 to 66 by the end of 2015. See Fair Trials International, The Disappearing Trial Report: A global study into the spread and growth of trial waiver systems (27 Apr. 2017).

[35] Since at least the start of the 21st century, scholars have observed that civil jurisdictions have increasingly adopted non-trial resolution systems equivalent to common-law plea bargaining. *See, e.g.* Françoise Tulkens, *Negotiated Justice*, *in* EUROPEAN CRIMINAL PROCEDURES 641, 662 (M. Delmas-Marty & J.R. Spencer eds., 2002); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1, 37 (2004).

sanctions in at least one foreign bribery case. While the features of the Parties' various resolution systems are further described in Chapter 2, an idea of the diversity of resolutions available can be seen by considering three key dimensions.

Figure 6. Number of countries Party to the OECD Anti-Bribery Convention that have a non-trial resolution system for foreign bribery

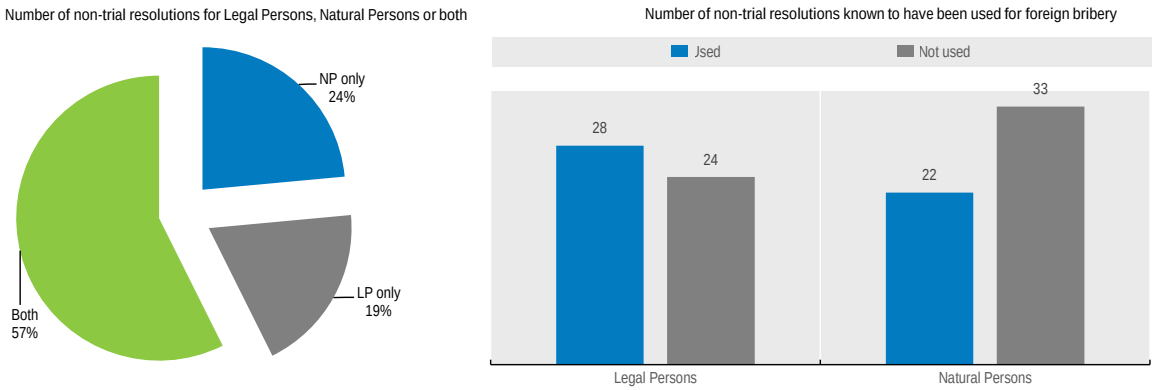


Source: OECD data collection questionnaire results, Table 7.

The first dimension is whether a resolution system has been designed for natural persons, legal persons, or both natural and legal persons. As shown in Figure 7, 39 resolution systems (57%) covered in this Study are available for both natural and legal persons. A further 13 systems (19%) are only available for legal persons, while 16 systems (24%) are designed exclusively for natural persons. Thus, in total, there are 52 different non-trial resolution systems for legal persons and 55 systems for natural persons. In terms of practice, 28 of the 52 resolutions (54%) potentially available for legal persons have in fact been used to impose sanctions in at least one foreign bribery case. For natural persons, only 22 of the 55 potentially available resolutions (40%) have actually been used to sanction foreign bribery. In part, this difference reflects the fact that a larger percentage of resolutions for natural persons is found in Parties that have yet to enforce their foreign bribery offence. Nonetheless, resolutions with natural persons have been used less frequently than those for legal persons.[36]

[36] Of all the non-trial resolutions covered in the Study, roughly one-half (48%) of those available for legal persons and one-quarter (25%) of those available for natural persons have been used. The difference in usage is even starker for the resolution systems intended for only legal or natural persons: while 54% of the former have been used, the same is true for only 13% of the latter.

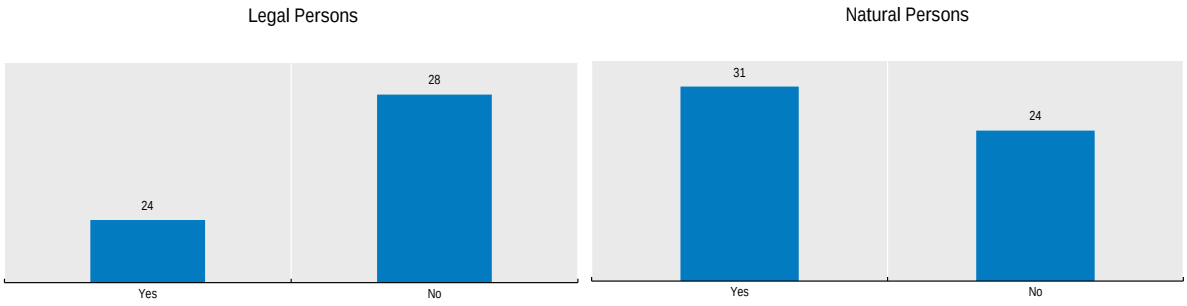
Figure 7. Number of non-trial resolutions for legal and natural persons



Source: OECD data collection questionnaire results supplemented by Secretariat research; the OECD database of concluded foreign bribery cases.

A second key dimension is whether the non-trial resolution system results in a conviction. Among the 68 resolution systems covered in the Study, 32 (47%) can result in a conviction and 36 (53%) do not. The parties to the Convention have notably differed in their approach towards legal and natural persons in this respect. Thus, while only 2 of the 13 resolution systems (15%) designed exclusively for legal persons result in a conviction, 9 of the 16 resolution systems (56%) intended exclusively for natural persons result in a conviction. Of the 39 resolution systems that apply to both natural and legal persons, slightly more than half (54%) result in conviction. Thus, as shown in Figure 8, only 24 of the 52 resolution systems available for legal persons result in a conviction. For natural persons, 31 of the 55 systems available result in a conviction. It is not clear whether this pattern stems from policy considerations (for example, to encourage corporate entities to report misconduct by eliminating potential collateral consequences such as debarment) or if it reflects the legacy of traditional notions of justice tying convictions to personal guilt, which may seem anomalous when dealing with abstract corporate entities.

Figure 8. Number of non-trial resolutions resulting in conviction



Source: OECD data collection questionnaire results, Tables 12 and 13.

In practice, the non-trial resolution systems without conviction appear to have been used more frequently to sanction foreign bribery cases. Of the 30 resolution systems that have actually been used to impose sanctions on either natural or legal persons, 18 systems (60%) do not impose a conviction. The preference for non-conviction based resolutions can also be seen in the fact that 18 of the 36 resolution systems (50%) available to natural and/or legal persons without conviction have been used at least once in such cases. In contrast,

only 12 of the 32 non-trial resolution systems (38%) available to natural and/or legal persons with conviction have been applied in foreign bribery cases.

When a non-trial resolution results in a conviction, this may reduce the likelihood that they will be used by either legal or natural persons. The effect, however, appears to be stronger for legal persons. Of the 29 non-trial resolution systems available for legal persons without conviction, 15 systems (52%) have actually been used to resolve a foreign bribery matter. On the other hand, legal persons have only used 7 of the 23 systems with conviction (30%) available to them. This pattern was reversed for natural persons. While 10 of 30 of the available resolutions (33%) for natural persons with conviction had been used in foreign bribery case, this was only true for 4 of the 25 non-trial resolutions without a conviction (16%).

The vast majority of the 32 non-trial resolutions resulting in a conviction will involve the court in some fashion. Four of these non-trial resolutions (13%), however, result in the equivalent of a conviction without any judicial involvement: the *Prosecutor's Penal Order* (**Latvia**), *Punitive Order* (**Netherlands**), *Optional Penalty Writs* (**Norway**), and the *Summary Punishment Order* (**Switzerland**). This in effect gives the prosecution service a quasi-judicial role, albeit with the consent of the accused. In addition, these sorts of resolutions typically can only be used to impose a fine or some other sanction not involving imprisonment, although the Swiss *Summary Punishment Order* can be used to impose a prison term of up to six months. Furthermore, it may also be possible for the accused to appeal the imposed resolution. In the **Netherlands**, the accused has 14 days to appeal the imposed *Punitive Order* before it becomes final. In **Switzerland**, a written rejection of the *Summary Punishment Order* may be filed with the public prosecutor within 10 days by the accused, other affected persons, and the Office of the Attorney General of Switzerland or of the canton in federal or cantonal proceedings respectively. Unless a valid rejection is filed, the summary penalty order becomes a final judgment.[37] Finally, as discussed in Chapter 5, the Parties to the Convention also may rely on non-judicial forms of oversight to ensure that non-trial resolutions are used appropriately.

A third major dimension to the various approaches taken across countries Party to the Convention that have adopted various non-trial resolutions is the range of offences to which each resolution can apply. As a preliminary point, the Parties to the Convention report that none of the non-trial resolutions covered in this Study are exclusively limited to foreign bribery. Some resolution systems are broadly applicable to all offences. This is the case, for example, for the *Plea Agreement* in **Australia** and *Plea Agreement* in **Latvia** as well as *Diversion* in **Austria**.

Other resolution systems are limited to certain offences. Countries Party to the Convention have taken a wide range of approaches for determining which offences may be resolved through a particular non-trial resolution. Some non-trial resolutions are available only for certain expressly specified offences. For example, **Argentina** has restricted its non-trial resolution systems for legal persons to offences such as domestic or international bribery, extortion, unjust enrichment, and aggravated false accounting. Likewise, **France**'s *CJIP,* which was promulgated in 2016, is intended for companies in relation to active (supply-side) bribery, including the bribery of foreign public officials, as well as other related

[37] Swiss Criminal Procedure Code, Article 354 1 and 3. Article 354 provides that the "Office of the Attorney General of Switzerland or of the canton in federal or cantonal proceedings respectively" can file a written rejection of the Summary Punishment Order "if so provided".

offences.[38] **Brazil** has similarly made its *Leniency Agreement* available for bribery cases, public procurement fraud, and other acts that violate public administration rules and principles or international commitments undertaken by Brazil. The United Kingdom also has a specified list of offences for which DPAs are available.[39] Some countries that are considering adopting new non-trial resolution systems are also contemplating this approach. **Australia**, for instance, reports that the *DPA* system that it is currently considering would apply to a specific list of offences, including money laundering, terrorist financing and other specified offences. Interestingly, however, Australia's draft legislation would allow companies to resolve certain other offences (known as "secondary" offences), if the company is already using a *DPA* to resolve one of the permitted offences.

Other systems are intended to resolve any offences contained within a given class of offences. For example, **Norway**'s *Optional Penalty Writ* can be imposed for any offence that permits the imposition of a fine without imprisonment. Other resolutions are limited to offences that are not especially serious (e.g. the **Czech Republic**'s *Agreement on Guilt and Punishment*). Still others are limited based on the length of the prison sentence that the offence could incur. **Spain**'s *Conformidad* is available for offences punishable by no more than six years' imprisonment. Since 1983, the same is true for the *Transaction*, a non-trial resolution in the **Netherlands**, whereby the right to prosecute will be extinguished if the accused fulfils certain conditions. Previously, the *Transaction* was only available for offences punishable by a fine.[40]

Finally, some countries make resolutions available for most offences, while excluding only a list of certain crimes. For example, **France**'s version of a guilty plea, the *Comparution sur Reconnaissance Préalable de Culpabilité (CRPC)*, which is available to natural or legal persons, is generally applicable for any offence unless expressly excluded. The offences excluded from the *CRPC*'s field of application include manslaughter, political offences, and aggravated sexual offences.

1.3.2. Historical development

The potential use of non-trial resolution systems for foreign bribery has attracted increased attention in recent years as more countries Party to the Convention have adopted them. A few non-trial resolution mechanisms were developed by Parties with either common law or civil law legal systems long before foreign bribery was criminalised.[41] As shown in

[38] Pursuant to Article 41-1-2 of the French CCP, as amended by Law n°2018-898 of 23 October 2018, the *CJIP* can be used to resolve allegations of the following offences: active and passive domestic, foreign and private-to-private bribery, active and passive trading in influence, tax fraud and related money laundering.

39 Crime and Courts Act 2013 Schedule 17 Part 2.

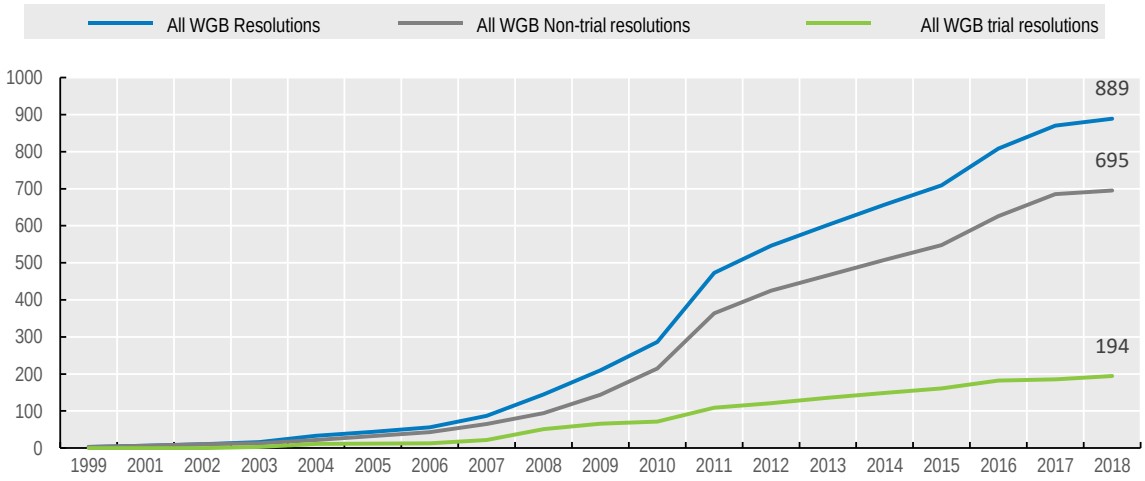
40 Peter J.P. Tak, The Dutch Criminal Justice System: Organization and operation (Wetenschappelijk Onderzoek – en Documentatiecentrum, Den Haag, 1999).

[41] For common-law examples, the **United Kingdom** and the **United States** have made extensive use of *Plea Agreements* since at least the mid-1880s. See Albert Alschuler, "Plea bargaining and its history," 79 Columb. L. Rev. 1, 5-6 (1979). For civil-law examples, Germany appears to have adopted its Penal Order procedure in 1879, while Spain adopted its Conformidad procedure in 1882. See Günter Plath, Expert Report on the "Permissibility of the Penal Order procedure under Federal Code of Criminal Procedure § 407" (1 Sept. 2011); Spain's Ley de Enjuiciamiento Criminal de 14 de septiembre de 1882 (3rd edition, 1899), article 655.

Figure 9, the Parties have also adopted a considerable number of additional non-trial resolutions since the Convention entered into force on 15 February 1999. In many cases, these newer non-trial resolutions were expressly designed to be used for complex economic crimes, such as foreign bribery (e.g. **France**'s *CJIP*) or **Argentina**'s *Effective Cooperation Agreement*).

In large part, this trend has been traced to a desire to improve judicial economy in an effort to address increasing caseloads both to combat crime and to reduce backlogs undermining the right to a speedy trial.[42]

Figure 9. Cumulative total of non-trial resolution systems adopted after Convention's entry into force



Note: This graph reflects the date when each resolution mechanism entered into force, if known; otherwise, it reflects the date when the legislation or policy creating the resolution was enacted or adopted.

One of the most striking trends over time is the growth in the number of resolutions available exclusively for legal persons. Before 2000, it appears no Party had adopted a non-trial resolution system exclusively designed for legal persons. In 2000, the **United Kingdom** created the *Administrative Order* under the Financial Services and Markets Act.[43] Since 2010, however, at least six Parties to the Convention have all adopted at least one non-trial resolution system for legal persons: **Argentina** (*Effective Cooperation Agreement* and *Penalty Exemption*), **Brazil** (*Leniency Agreements*), **Canada** (Remediation

42 See Françoise Tulkens, "Negotiated Justice," in European Criminal Procedures 641, 662 (eds., M. Delmas-Marty & J.R. Spencer, 2002) (observing that the 1987 Council of Europe Recommendation R(87)18 "expressly recommend[ed] the guilty plea procedure with a view to accelerating justice"); see also Maximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure," 45 Harv. Int'l L.J. 1 (2004).

43 While it is not clear that such orders have been used to penalise foreign bribery *per se*, the UK Financial Conduct Authority has used this resolution to sanction companies for failing to establish or implement procedures for preventing foreign bribery. See United Kingdom Phase 4 Report, para. 68 (citing FCA sanctions imposed on Besso Ltd. And JLT Speciality in cases related to foreign bribery).

Agreement) **France** (*CJIP*), the **United Kingdom** (*DPA*), and the **United States** (*Declination with Disgorgement* instituted by the DOJ under its FCPA Corporate Enforcement Policy).

Significantly, 9 of the 11 non-trial resolution systems (approximately 82%) expressly designed for legal persons do not result in a conviction. These include **France**'s *CJIP*, **Brazil**'s *Leniency Agreement*, the **United Kingdom**'s *DPA*, and the **United States**' policy favouring *declinations with disgorgement* when companies self-report and meet other criteria in criminal matters. Only **Argentina** has adopted non-trial resolution systems exclusively for legal persons that result in a conviction, namely: the *Effective Cooperation Agreement* and the *Penalty Exemption*.

Such choices may affect the frequency in which the non-trial resolutions are used. Table 1 compares the average length of time that elapsed between the time when non-trial resolution systems became available and when they were first applied in a foreign bribery case. Whereas resolutions available to legal persons were used on average just under six years after the date they became available for foreign bribery, it took just over eight years on average before resolutions for natural persons were used for foreign bribery. This suggests that legal persons may be more likely to use non-trial resolutions than natural persons. Legal persons, however, appear to be more reluctant than natural persons to use non-trial resolutions resulting in a conviction. For legal persons, resolutions without convictions were used on average roughly two earlier than those imposing a conviction. For natural persons, however, there was virtually no difference in the use of the two types of resolution. This may reflect the need for legal persons to avoid the collateral consequences of a conviction, most notably debarment from public procurement or ineligibility for certain public advantages. Incentives for alleged offenders to enter non-trial resolutions are further discussed in Chapter 3.3.

The pattern for legal persons held true even when limiting the sample to the 17 enforcing countries that have at least one non-trial resolutions system that imposes a conviction and at least one that does not impose a conviction. In that sample, the average time it took for a non-conviction system was 4.6 years, while it took 8.7 years on average before a foreign bribery resolution was concluded with a non-trial resolution imposing a conviction.[44] This finding also correlates with the fact discussed above that a smaller proportion of non-trial resolutions that impose sanctions with a conviction have actually been used than their non-conviction counterparts.

Table 1. Speed in which accused offenders resorted to available non-trial resolution systems once Convention entered into force

Average time from resolution systems' creation to first use in a foreign bribery case

Eligible offender	All non-trial resolutions*	Conviction	No conviction
Legal Persons	5.7 years	7.4 years	5.3 years
Natural Persons	8.395 years	8.409 years	8.362 years

Note: This table only reflects the 25 resolution systems available to legal persons and the 14 systems available to natural persons that are known to have been used to resolve a foreign bribery case.
Source: OECD database of concluded foreign bribery cases, plus supplemental research by the OECD Secretariat.

[44] There were not enough enforcing countries with both conviction and non-conviction resolution options for natural persons to run a similar test.

Some possible explanations from the perspective of natural persons might be that resolutions without conviction may still impose a stigma that is perceived as being less tolerable than that associated with legal persons. It may also be the case that the sanctions imposed on natural persons are perceived as being more burdensome than for legal persons again without regard to whether the resolution results in a conviction. Finally, the risk of imprisonment, which for natural persons would be the main consequential difference between resolutions with or without conviction, may have less of an impact in legal systems that have the option of suspending custodial sentences for economic crimes.

1.3.3. Recent developments in the use of non-trial resolutions

The availability of non-trial resolutions has had a clear influence on how the Parties to the Convention have enforced their laws criminalising foreign bribery. The vast majority of the Working Group on Bribery enforcing countries (15 of 23) have relied on non-trial resolutions in some fashion to enforce their foreign bribery laws. This includes 7 enforcing countries (30%) that have exclusively used non-trial resolutions to handle their concluded foreign bribery cases: **Australia**, **Brazil**, **Chile**, **Israel**, the **Netherlands**, **Spain, and Switzerland.** Collectively, these countries have concluded 40 separate resolutions (4% of the 890 resolutions in the OECD database of concluded foreign bribery cases). Eight enforcing countries (35%) have used a combination of trial and non-trial resolutions to conclude 769 resolutions, representing 86% of total resolutions: **Canada**, **France**, **Germany**, **Italy**, **Norway**, **Sweden**, the **United Kingdom**, and the **United States**.

Among the countries that have relied on both trial and non-trial resolutions, the vast majority of their resolutions were, on average, concluded through non-trial resolutions. **France** was the jurisdiction least likely to conclude a foreign bribery matter without trial, concluding only 2 of 18 resolutions (11%) through some type of non-trial resolution, including its 2018 *CJIP* with ***Société Générale***. At the other end, **Italy** was the most likely to resort to a non-trial resolution, having reportedly concluded 20 of 21 foreign bribery resolutions (approx. 95%) through its *Patteggiamento* procedure. The **United States** also concluded over 96% of its foreign bribery matters through some form of non-trial resolution, including *Plea Agreement*, *Non-Prosecution Agreement (NPA)*, *Deferred Prosecution Agreement (DPA)*, and *Declinations with Disgorgement*. With this background in mind, this section of the Study will examine some of the ways in which non-trial resolutions have shaped the countries Party to the Convention' foreign bribery enforcement efforts.

Finally, certain countries have enforced their foreign bribery laws exclusively by trial. According to the OECD database of concluded foreign bribery cases, 8 of the 23 enforcing countries (35%) have only sanctioned foreign bribery following a conviction at trial: **Austria**, **Belgium**, **Bulgaria**, **Hungary**, **Japan**, **Korea**, **Luxembourg**, and **Poland**. Collectively, these countries have imposed sanctions in 81 of the 890 resolutions (9%) across all countries Party to the Convention. Three of these countries (**Austria**, **Belgium**, and **Hungary**) have forms of non-trial resolutions that could be applied in foreign bribery cases for natural and, at least in the case of Austria, legal persons.

Countries whose first foreign bribery resolution was a non-trial resolution

In certain Parties to the Convention, non-trial resolutions provided the means to obtain the first-ever foreign bribery resolution. The **Netherlands** did not enforce its foreign bribery offence against natural or legal persons for more than 11 years after the Convention entered

into force for the country.[45] In late December 2012, Dutch prosecutors concluded an out-of-court *Transaction* in the ***Ballast Nedam case***. As part of the resolution, the corporate group agreed to pay EUR 5 million and to abandon a tax claim worth EUR 12.5 million. Within a year, the Netherlands had also reached a resolution with Ballast Nedam's auditors, KPMG. The Dutch Public Prosecution Service found that the audit by KPMG had been carried out deliberately in a way that made it possible for Ballast Nedam to conceal the payments to foreign agents and the corresponding shadow administration. KPMG agreed to pay EUR 7 million in fines and confiscation. Furthermore, KPMG committed to strengthen its anti-corruption compliance programme, subject to the supervision of the Netherlands' Authority for the Financial Markets (AFM). In November 2014, the **Netherlands** concluded a third resolution with SBM Offshore N.V. (***SBM Offshore case***). As a result, SBM agreed to pay USD 240 million, including a USD 40 million fine plus USD 200 million in confiscation. [46]

In October 2016, **Brazil** first imposed sanctions in connection with the bribery of foreign public officials when it concluded a *Leniency Agreement* with Embraer, a Brazilian aerospace and defence company (***Embraer case***). The company also simultaneously concluded resolutions with US authorities concerning the same matter. This resulted in a combined sanction of USD 205 million for alleged bribery of foreign public officials in several countries. The Brazilian portion was BRL 64 million (USD 20.5 million). This primarily reflected BRL 58 million in disgorgement, plus a fine of BRL 6 million. This resolution constituted a major accomplishment given that Brazil only adopted its Corporate Liability Law in 2013 in order to create administrative liability for foreign bribery and other corruption offences.

Likewise, **Israel**'s first foreign bribery conviction came through a *Plea Agreement* in the ***Nikuv case***. In December 2016, Nikuv International Projects Ltd pleaded guilty to the bribery of a foreign public official in order to obtain contracts to produce identification cards in an African country not party to the OECD Anti-Bribery Convention.[47] As part of the plea deal, the company agreed to pay NIS 4.5 million (USD 1.15 million) in fines and forfeiture. It also agreed to establish an anti-bribery compliance programme. Perhaps most significantly, the company agreed that it and its relevant officers and employees would cooperate in the investigation and prosecution of any officials in Lesotho. In exchange, Israel agreed to not pursue charges against the Israeli natural persons concerned.

Chile's first foreign bribery resolution was also concluded through a non-trial resolution. In the ***Asfaltos case***, the prosecution resorted to the *Conditional Suspension of Proceedings* mechanism. After originally closing the case, Chilean authorities reopened the matter at the conclusion of the Phase 3 evaluation of Chile. Ultimately, both the company and its manager resolved the allegations with a *Conditional Suspension of Proceedings*. The company agreed to donate CLP 10 million (USD 13 500) to an educational centre. The commercial manager agreed in turn to make a donation of CLP 1 million (USD 1 300) and to keep the prosecution service informed of his place of residence.[48]

[45] Netherlands Phase 3 Report , para. 44 ("As of the time of this report, there have been no finalised foreign bribery cases in the Netherlands.").

[46] Netherlands Phase 3 Written Follow-up Report.

[47] "In first, Israeli company convicted of bribing foreign official," Times of Israel (15 Dec. 2016).

[48] Chile Phase 3 Follow-up Report, page 49.

Countries whose foreign bribery resolutions are exclusively non-trial resolutions

In some countries, non-trial resolutions have (so far) provided the only means for imposing liability for foreign bribery offences. **Israel**'s only other concluded case connected with a foreign bribery scheme was resolved in January 2018 through a *Conditional Agreement* reached with Teva, Israel's biggest company and one of the world's largest generic pharmaceutical companies ***(Teva case)***. As a result of this agreement, the prosecution agreed not to prosecute the company for false accounting in violation of Israel's Securities Law in exchange for a payment of NIS 75 million (then USD 22 million). The prosecutors concluded that it would be in the public interest to conclude this non-trial resolution given that, *inter alia*, the company had already paid USD 519 million to authorities in the United States to resolve related FCPA charges. [49]

For its part, **Spain** recently recorded its first convictions for foreign bribery when two natural persons plead guilty in a 2017 case involving a publishing company's efforts to obtain contracts by bribing the Minister of Education in Equatorial Guinea. The company was not charged because the offence took place before Spain had adopted its new criminal corporate liability regime.[50]

In certain other countries, non-trial resolutions constitute the exclusive means by which companies have been sanctioned for foreign bribery, even though natural persons have been convicted at trial. This is the case in **Norway**, which has sanctioned four companies in cases involving foreign bribery.[51] In contrast, Norconsult, the only company to contest foreign bribery allegations at trial, was ultimately acquitted by the Supreme Court in 2013 on the grounds that certain fact-specific considerations made it inappropriate to convict and punish the entity.[52]

Countries whose non-trial resolutions enhanced their foreign bribery enforcement record

In Parties to the Convention, non-trial resolutions have prompted larger (or more frequent) resolutions than those available in the past. **France** recently employed a new form of non-trial resolution, the *CJIP*, in a foreign bribery case. The *CJIP*, which was enacted in December 2016, notably does not entail a conviction, unlike France's older non-trial resolution system, the *Comparution sur reconnaissance préalable de culpabilité* (*CPRC*). The CRPC has not yet been used in a foreign bribery case for a legal person. In June 2018, a judge validated France's first *CJIP* concerning a foreign bribery matter in the ***Société Générale case***.[53] In the **United States**, the DOJ concomitantly announced that it had reached separate non-trial resolutions with Société Générale S.A. and its subsidiary SGA Société Générale concerning foreign bribery. In total, Société Générale agreed to pay

[49] The Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.)

[50] Raquel Flórez, Client Update, "Spain's first foreign bribery convictions: a watershed moment?", Freshfields Bruckhaus Deringer (9 Mar. 2017).

[51] In the Statoil case, Norway resolved the foreign bribery allegations through an Optional Penalty Writ predicated on trading in influence. The United States also sanctioned the matter as an FCPA violation.

[52] See Norway Phase 4 report at paras. 16 & 149-151.

[53] French National Prosecutor's Office for Financial Crime, Press Release (4 June 2018).

USD 585 million criminal penalty of which USD 500°000 is to be paid as a criminal fine on behalf of its subsidiary, SGA Société Générale. In addition, half of the amount of the fine was credited to the French authorities. In France, Société Générale signed the first *CJIP* ever reached in a foreign bribery case in May 2018. As part of the resolution, Société Générale agreed to pay in total USD 292.8 million (EUR 250.15 million) to the French Treasury, equal to 50 percent of the total criminal penalty otherwise payable to the U.S. authorities. In addition, the bank was subjected to a two-year monitorship under the supervision of the French Anti-Corruption Agency (AFA).

France's use of its new non-trial resolution system made headlines for a number of reasons. First, the monetary penalties imposed on Société Générale dramatically exceeded what had been imposed under previous foreign bribery cases following conviction at trial.[54] Second, France's new *CJIP* resolution system appeared to have facilitated the first coordinated resolution between French authorities and the DOJ. Third, the *Société Générale case* marked the first time that French authorities had required a company to undergo a monitorship following a resolution of foreign bribery cases.[55] Finally, although this was the first *CJIP* for foreign bribery, it was the fifth *CJIP* that had been concluded since the resolution system became available on 1 June 2107. This suggests that the *CJIP* is seen as an attractive mechanism for resolving complex economic crimes.

1.3.4. Recent developments in adopting non-trial resolutions

The countries Party to the Convention continue to expand the number of non-trial resolutions available for foreign bribery cases. **Australia** and **Canada** have conducted in-depth public consultations on whether to adopt *DPA*-like resolutions to encourage companies to detect and report offences (the legislative initiatives undertaken by those two countries are further discussed below). Significantly, both countries expressly linked their consideration of these new resolution systems to other countries' experience with similar tools, such as **Brazil**, **France**, the **United Kingdom** and the **United States**.[56] Some countries Party to the OECD Anti-Bribery Convention report that they have provided insights about their non-trial resolution systems to other Working Group countries developing their own systems. This shows that countries Party to the Convention are continuing to harmonise their legal frameworks, in part to help enable effective cooperation in complex foreign bribery cases.[57] **Switzerland** is also considering adopting a DPA scheme. In November 2018, the Attorney General called for the government to amend the criminal code to introduce DPAs to help prosecutors hold companies accountable for economic wrongdoing. The Ministry of Justice began considering whether to introduce

[54] In 2018, the Cour de Cassation upheld the conviction of Total S.A. for unlawful payments made to Iraq in the context of the Oil-for-Food scandal. Total was ordered to pay a EUR 750 000 fine. In the same case, the Vital was also obliged to pay EUR 300 000 for its conduct in the Oil-for-Food scandal.

[55] The authority in charge of monitoring is the French Anti-Corruption Agency (AFA), which was created by the same law that introduced the CJIP (Law n°2016-1691 of 9 December 2016).

[56] See, e.g. Press release by Michael Keenan, Australian Minister for Justice, "New tools to tackle white-collar crime" (31 Mar. 2017); Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation" (Sept. 2017) at page 5.

[57] See, e.g. Australian Attorney-General's Department, Public Consultation Paper, "A proposed model for a Deferred Prosecution Agreement scheme in Australia (Mar. 2017).

DPAs in March 2018, and the matter is expected to be discussed by Switzerland's parliament in 2019.[58] Finally, in 2016, Japan adopted amendments to its Criminal Code introducing a new non-trial resolution system, available for both legal and natural persons.[59] This system, called *Agreement Procedure,* became available in June 2018 and is further discussed in Chapter 2.6.

Australia is considering a new Deferred Prosecution Agreement regime

On 6 December 2017, the Australian government introduced legislation that would, *inter alia*, amend the Director of Public Prosecutions Act 1983 in order to establish a *DPA* scheme.[60] This legislation was developed after two separate public consultations between 2016 and 2017. Since then the proposed amendments have been undergoing examination by different Senate committees. In parallel, the Attorney-General's Department prepared a draft Code of Practice to explain how the *DPA* would work, if adopted.

The explanatory memorandum accompanying the proposed amendment explains that the *DPA* was proposed in part to help make it easier to detect and investigate complex corporate crime, including foreign bribery. It observed that such investigations often involve massive amounts of documents and data, disputes over legal privilege, and the difficulties of obtaining evidence overseas through MLA.[61] Given its focus on fighting economic crime and improving corporate culture, the proposed Australian *DPA* regime is only intended to be available to corporations for specified economic offences.[62] As currently proposed, the Australian *DPA* would require the company to admit to facts detailing the misconduct, pay a financial penalty. In addition, the *DPA* may impose other terms, such as for example, requiring the company to disgorge any ill-gotten profits or other benefits obtained from the offence, to compensate victims, to adopt or strengthen a corporate compliance programme, to cooperate in the investigation of company executives or other individuals implicated in the wrongdoing, or even to pay the reasonable costs that the Commonwealth incurred in negotiating the *DPA*.[63]

In terms of oversight, the Australian legislation foresees that no *DPA* would go into effect until an appointed former judicial officer (called an "approving officer") has determined that the *DPA* is fair, reasonable, proportionate, and in the interests of justice. Furthermore,

[58] See GIR, Swiss Attorney General calls for DPAs, Waithera Junghae, 21 November 2018, and GIR Switzerland favours US-style DPAs, Emily Casswell, 25 May 2018

[59] Act no. 54 of 2016 (Act to Amend Parts of Criminal Procedure Code and Other Acts). Code of Criminal Procedure (CCP), art. 350-2 – 350-15.

[60] The draft Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 also contains proposed amendments to Australia's substantive criminal law concerning the elements of the foreign bribery offence and to create a new offence for a corporate body to fail to prevent foreign bribery by an associate.

[61] See Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 2.

[62] See Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, paras. 2 & 11.

[63] See draft Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17C(1) & (2); see also Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 12.

the Commonwealth Director of Public Prosecutions must conclude that the *DPA* is in the public interest before the *DPA* is submitted to the approving officer for consideration. If the *DPA* is concluded, no criminal proceedings would be instituted against the company in either federal court or in a court of any State or Territory concerning the offence(s) specified in the agreement unless the company materially breaches the *DPA* or obtained it on the basis of information that it knew or should have known was inaccurate, incomplete or misleading.[64]

In general, the *DPA* would be published on the website, but the Director may, if appropriate, decide to publish a redacted version without the name of the company or other material, or to not publish the *DPA* at all. This could be done, for example, in order to avoid prejudicing a pending investigation or trial or to otherwise advance the interests of justice. If the *DPA* is materially breached, then the prosecution would have the right to initiate prosecution or to seek to vary the terms of the *DPA*. Any variation would need to be approved by the approving officer applying the same standard used to approve the initial *DPA*.[65]

Documents (except for the *DPA* itself) indicating that a company is or was party to a *DPA* or sought to negotiate a *DPA* cannot be admitted as evidence against it. Any documents (again other than the *DPA* itself) prepared solely for the purpose of negotiating the *DPA* would also as a general rule not be admissible into evidence. Those evidentiary restrictions would not apply if criminal proceedings are initiated after a company materially breaches the *DPA* or if the company gave inconsistent evidence or testimony in another criminal or civil proceeding. The agreed facts contained in a *DPA* can also be used for proceedings under the Proceeds of Crime Act 2002 following any criminal proceedings that may be started after a material breach.[66]

Canada has developed its own DPA regime following a public consultation

In **Canada,** the government introduced legislative amendments in the Budget Implementation Act 2018 to create a new non-trial resolution system, referred to as a "Remediation Agreement Regime". After receiving Royal Assent in June 2018, the amendments went into force on 19 September 2018. This new system resembles the DPAs found in the **United Kingdom** and the **United States** in so far as it provides companies[67] with a way to report and resolve specified economic crimes, such as foreign bribery, without receiving a conviction. According to the government of Canada, the introduction of Remediation Agreements will provide prosecutors with more flexibility to hold companies accountable without triggering the collateral consequences of a formal conviction, which can harm innocent third parties such as employees or shareholders. It

[64] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17A(1)-(3); see also Explanatory Memorandum to Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, para. 13.

[65] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17D(8) & (9), 17F.

[66] See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, Schedule 2, Sections 17H(1), (3). & (5).

[67] Technically, the Remediation Agreement regime is applicable to all organisations as defined under Section 2 of the Criminal Code, with the exception of public bodies, trade unions and municipalities. See Budget Implementation Bill 2018, Act C-74, Section 715.3(1).

also expects that they will serve as a means of strengthening corporate compliance measures.[68]

In the fall of 2017, **Canada** had conducted a public consultation on corporate wrongdoing seeking input on the introduction of a Canadian version of the DPA. The consultation also sought views on the overall effectiveness of Canada's "Integrity Regime", which was adopted in 2015, to ensure that ethical companies obtain government contracts and public benefits awarded by Public Services and Procurement Canada.[69] During the consultation, the government met with over 370 participants and more than 70 written submissions from businesses, non-governmental organizations, individuals and the legal profession.[70] The majority of participants supported the adoption of a DPA regime, mainly to encourage self-reporting and to promote compliance and rehabilitation.[71] (The Canadian Remediation Agreement is further discussed in Chapter 2.2.)

1.4. Resolutions have enabled the coordinated resolution of large multi-jurisdictional cases

International cooperation among jurisdictions has advanced a great deal over time. The vast majority of foreign bribery cases involve some level of international cooperation among prosecuting authorities at the investigatory stage, and as this Study highlights, non-trial resolutions are also increasingly coordinated across jurisdictions. When circumstances allow for multi-jurisdictional non-trial resolutions, all stakeholders tend to benefit from the finality of the resolution with the cooperating jurisdictions. Finality of a multi-jurisdictional resolution often helps: (1) create efficiency for multiple prosecuting authorities that can allocate resources to other matters, (2) provide greater certainty for defendants based on the agreements in which they enter, (3) ensure that all criminal conduct can be addressed even if it occurred in several jurisdictions beyond the reach of any one enforcement agency, and (4) fairly distribute any compensation, fines, disgorgement, or other penalties among the participating jurisdictions.

For prosecuting authorities, assistance in the investigatory stage often leads to coordinated multi-jurisdictional resolutions. Indeed, all of the case summaries in Box 2 involved prosecuting authorities sharing information with one another. At the investigatory stage, international cooperation is often a two-way street: prosecuting authorities and law enforcement both receive and provide assistance to one another. Such assistance is often "formally" requested and executed pursuant to a bilateral treaty, such as a Mutual Legal Assistance Treaty (MLAT), or multilateral treaties, such as the United Nations Convention against Corruption. In 2017, the DOJ announced that, since 2012, there has been "an increase of 147% in the number of annual requests from foreign counterparts seeking US-

[68] Public Services and Procurement Canada, News Release, "Canada to enhance its toolkit to address corporate wrongdoing" (27 March 2018).

[69] Mark Morrison, Michael Dixon & Liam Kelley, "Another Step Forward: Canada Announces Impending DPA Legislation and Further Integrity Regime Amendments," Blakes Client Alert Bulletin (27 Feb. 2018).

[70] Department of Justice Canada, Backgrounder, "Remediation Agreements and Orders to Address Corporate Crime" (27 March 2018).

[71] Government of Canada, Summary of Public Consultation, "Expanding Canada's toolkit to address corporate wrongdoing: What we heard" (22 Feb. 2018).

based evidence to support foreign bribery and corruption investigations."[72] Law enforcement authorities and prosecutors also exchange information on an "informal" or police-to-police/prosecutor-to-prosecutor level, which may take place before, during, after, or absent a formal request. In sharing information with one another, prosecuting authorities and law enforcement better understand the facts surrounding a case, and often have the opportunity to consider the potential for a multi-jurisdictional resolution.

As discussed in Chapter 6.3, the challenges inherent in coordinated multi-jurisdictional resolutions generally arise from the fact that authorities involved in the resolution work within their own respective domestic legal and institutional framework. Also, these authorities may reach different conclusions about various aspects of a case. For example, one country may determine that a monitor/other form of independent oversight is necessary, while another does not, as was the case in the ***Rolls-Royce*** and ***Société Générale cases***. In contrast, in the ***Odebrecht case***, both the **United States** and **Brazil** required independent monitors. Indeed, multi-jurisdictional resolutions are often able to proceed even when there are differences among jurisdictions, as evidenced in the list of cases in Box 2.

As noted by many commentators in media reports and academic analysis, the last decade has seen a steady increase in the use of coordinated multi-jurisdictional non-trial resolutions. These resolutions sometimes involve up to three Parties to the Convention (as illustrated in the case summaries in Annex B). Starting with the 2008 ***Siemens AG*** non-trial resolution coordinated between the United States and Germany, a number of coordinated multi-jurisdictional non-trial resolutions has followed at a pace that has increased exponentially since 2016. This trend is likely to continue, especially as countries continue to cooperate in the investigatory stages, strengthen their anti-corruption laws, and prioritize prosecutions of foreign bribery. Coordinated multi-jurisdictional resolutions have often proven to be an advantageous way to resolve cases for both prosecuting authorities and defendants for some of the following reasons:

- Perhaps most significantly, the various jurisdictions involved in a global resolution will take into account the sanctions imposed by other jurisdictions, thus reducing the risk that a defendant will be unfairly subjected to penalties disproportionate to the conduct in question. For example, (1) in the ***Siemens*** resolution, the **US** and **German** authorities gave consideration to the amounts the company would pay in both jurisdictions in reaching a global resolution; (2) in the ***Odebrecht*** resolution, the company and the **United States**, **Brazil**, and **Switzerland** agreed on the distribution of the penalties to the various jurisdictions; (3) in the ***VimpelCom*** resolution, the **Dutch** and **US** authorities agreed to impose equal fines, based on the circumstances of the case; (4) in the ***Standard Bank*** resolution, the **UK** court that approved the *DPA* took into account the fact that the terms of the proposed UK DPA were brought to the attention of the SEC and that, as a result, the SEC had announced its intention to impose a civil fine of USD 4.2 million for separate but related conduct. In turn, the **US** SEC took into consideration the proposed disgorgement figure in the UK DPA when imposing the civil fine; and (5) in the ***Rolls-Royce*** resolution, the DOJ credited the USD 25.5 million paid to **Brazil**

[72] Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017) (Also from 2012 to 2017, there was "a 75% increase in the number of annual requests for foreign evidence made in support of U.S. prosecutors conducting FCPA and corruption investigations.").

aspart of a parallel resolution because the conduct underlying the resolutions overlapped.

- In the context of a multi-jurisdictional resolution, prosecuting authorities can work to more fairly sanction defendants for conduct that most squarely fits within their jurisdictional reach. For example, in the ***Rolls-Royce case***, the **United States**, **UK**, and **Brazil** worked together to determine which authority was best placed to investigate and prosecute the various schemes involved.
- Defendants often agree to provide continuing cooperation both in the jurisdictions involved in a global resolution, as well as to other foreign authorities. For example, ***Odebrecht***, ***Rolls-Royce***, ***Siemens***, and ***VimpelCom*** agreed to cooperate with foreign authorities as part of their respective resolutions.
- Prosecuting authorities may agree not to prosecute certain conduct, leading to a more predictable outcome for all parties. For example, in the ***Standard Bank case***, the DOJ decided not to bring a separate action against the bank when the UK DPA covered the relevant conduct and appropriately sanctioned the bank. In the ***Rolls-Royce case,*** the **United States** and **United Kingdom** agreed not to prosecute **Rolls-Royce** for additional conduct pre-dating the respective resolutions and arising from the currently opened investigations into Airbus and Unaoil.
- Depending on the breadth of the conduct at issue and the prosecuting authorities involved, a multi-jurisdictional resolution can put an end to all jurisdictions investigating the conduct. However, as explained in Chapter 6.3, this may not always be the case.

Box 1. Good Practices in Coordinated Multi-Jurisdictional Resolutions

1. Cooperate early: prosecuting authorities that learn about conduct that may be prosecuted in multiple jurisdictions should consider sharing information early in order to better understand the facts, as well as to consider whether a global resolution is possible.
2. Determine what issues must be addressed if a multi-jurisdictional resolution is possible: e.g. an efficient method for information sharing, the jurisdictions best suited to prosecute certain conduct, the necessity for a defendant's continuing cooperation in other jurisdictions, how the terms of a resolution in one country may impact other jurisdictions, whether a monitor is necessary, whether a jurisdiction may agree not to prosecute a defendant under certain circumstances, and the timing of releasing information publicly.
3. Prioritise fairness: consider the sanctions imposed by other jurisdictions when determining any penalties and fines.

Box 2. Significant coordinated resolutions in large multi-jurisdictional cases

Odebrecht – To date, ***Odebrecht*** is the largest ever foreign bribery resolution. The investigation began in **Brazil**, which shared information with the **United States** and **Switzerland** early in the investigation. Information sharing was a key component in allowing the countries to reach coordinated resolutions with the company, which ultimately agreed to pay a criminal penalty of USD 2.6 billion. The **United States** and **Switzerland** received 10% each of the total criminal penalty and **Brazil** received the remaining 80%. In addition, Braskem S.A., an Odebrecht subsidiary, agreed to pay a criminal penalty of approximately USD 632 million and disgorgement of USD 325 million. The **United States** and **Switzerland** received 15% each of the criminal penalty and **Brazil** received the remaining 70%. Each of the three jurisdictions considered the fines that would be paid to other jurisdictions. For example, in the plea agreement with the US DOJ, the **United States** agreed to credit the amount of the fines and confiscation that Odebrecht S.A. would pay to **Brazilian** and **Swiss** authorities. Furthermore, Odebrecht agreed to cooperate with other foreign authorities, although the specifics of such cooperation are detailed in the respective resolution agreements. Finally, Odebrecht agreed to be subject to an independent monitor in **Brazil** and a separate monitor in the **United States**.

Rolls-Royce – This case resulted in a coordinated global resolution with the SFO and the US DOJ, and another coordinated resolution between the US DOJ and the Brazilian Federal Prosecution Service (FPS). Generally, the **United Kingdom** and **United States** were prosecuting different conduct, and the **United States** and **Brazil** were prosecuting similar conduct. Although the three authorities learned about the company's conduct in different ways, the jurisdictions worked together at an early stage to determine which authority was best placed to investigate the conduct involved, which facilitated the multi-jurisdictional resolution. As part of its resolution with the U.S. DOJ, Rolls-Royce committed to cooperate with foreign states. Although the resolutions were coordinated, the three jurisdictions took varying approaches in their final agreements. For example, in the **United Kingdom,** the company received credit for cooperation despite its failure to self-report. The Court ultimately granted a 50% reduction based on the "extraordinary" level of cooperation provided by Rolls-Royce and the fact that the conduct Rolls-Royce ultimately reported was "far more extensive" (and of a different order) than what may have been uncovered without the cooperation. In the **United States,** the DOJ granted a 25% reduction in the context of its separate DPA, taking into account the lack of self-reporting.[73]

While Rolls-Royce agreed to corporate independent oversight and reporting in the **United Kingdom**, the US DOJ did not include a similar requirement. The DOJ credited the USD 25.5 million paid to **Brazil** as part of a parallel resolution because the conduct underlying the resolutions overlapped. With some exceptions, the **United States** and the **United Kingdom** agreed not to prosecute Rolls-Royce for additional conduct pre-dating the respective resolutions and arising from the currently opened investigations into Airbus and Unaoil.

Siemens – The ***Siemens*** case was the first coordinated resolution between two Parties to the Anti-Bribery Convention. In 2006, the **German** authorities commenced an investigation into Siemens AG and its employees for possible foreign bribery and

[73] Different rules apply to the calculation of fines in the United States and United Kingdom. Under the UK sentencing guidelines, there is no clear mechanism to penalise a lack of a full self-report.

falsification of corporate books and records. Shortly thereafter, Siemens AG disclosed potential FCPA violations to the DOJ and SEC, which closely cooperated with **German** authorities. Siemens resolved the matter with combined penalties of more than USD 1.6 billion in 2008. The **United States** and **Germany** simultaneously announced the sentences. As part of its guilty plea, Siemens AG agreed to continue fully cooperating with the DOJ, the **German** and other foreign authorities in their ongoing investigations. When determining the level of the fine, both authorities took into account the expected substantial punishment to be imposed by one another.

Société Générale – In 2018, the Société Générale reached a parallel resolution with the French Parquet National Financier and the DOJ in the first coordinated resolution by these authorities in a foreign bribery case. **France** and the **United States** began sharing information during the investigative stage and ultimately allowed for a faster resolution of the case. The authorities shared evidence from their parallel investigations and reached a coordinated resolution with Société Générale. The **United States-French** cooperation reportedly involved daily contacts between the authorities during negotiations. As part of the **French** resolution, Société Générale agreed to be subject to a two-year corporate monitor by the **French** Anti-Corruption Authority (AFA). The US authorities did not impose a monitor, but the company agreed to self-report to the DOJ for 3 years.

Standard Bank – In November 2015, a UK court approved a DPA between the SFO and Standard Bank. The company agreed to pay a fine of USD 16.8 million and USD 8.4 million to disgorge profits. Standard Bank was also required to cooperate with any other agency or authority, domestic or foreign in related investigations. Significantly, **United Kingdom** authorities consulted with their **United States** counterparts and ultimately, the DOJ agreed to take no action to the extent that the conduct would be captured in the UK DPA and that appropriate sanctions be imposed. The SEC imposed a civil penalty of USD 4.2 million with regard to conduct not covered in the UK DPA. The SEC took into consideration the proposed disgorgement figure in the UK DPA when imposing the civil fine. In turn, the UK court that approved the DPA took into account the fact that the terms of the proposed UK DPA was brought to the attention of the SEC and that, as a result, the SEC had announced its intention to impose a civil fine of USD 4.2 million for separate but related conduct when approving the final terms of the DPA. In addition, the **United Kingdom** consulted with the Tanzanian authorities who also had potential jurisdiction over domestic corruption. Tanzania agreed that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation for Tanzania.

VimpelCom – Between 2006 and 2012, VimpelCom, a **Dutch**-based telecommunications provider, together with its wholly-owned Uzbek subsidiary Unitel, conspired to pay over USD 114 million in bribes to an Uzbek government official. The VimpelCom bribery case is linked to the **Swedish** telecommunication provider Telia Company AB (formerly TeliaSonera AB), leading **Switzerland**, **Sweden**, and the **United States** to open investigations into VimpelCom, Telia, and a third telecom company. In February 2016, VimpelCom agreed to the terms of a global resolution with both the **Dutch** and the **US** authorities, whereby both jurisdictions agreed to impose equal fines. As part of the DPA, VimpelCom agreed to cooperate with foreign authorities and multilateral development banks (MDBs) in any investigation of the company, its subsidiaries or affiliates as well as its executives, employees and agents.

Source: Annex B.

Chapter 2. Taking stock of the various forms of non-trial resolutions

The Study analyses 52 non-trial resolution systems for resolving foreign bribery cases against legal persons and 55 non-trial resolution systems for resolving foreign bribery cases against natural persons in 27 countries Party to the Anti-Bribery Convention. Non-trial resolution systems often differ in their legal and procedural approach, but also share certain features.

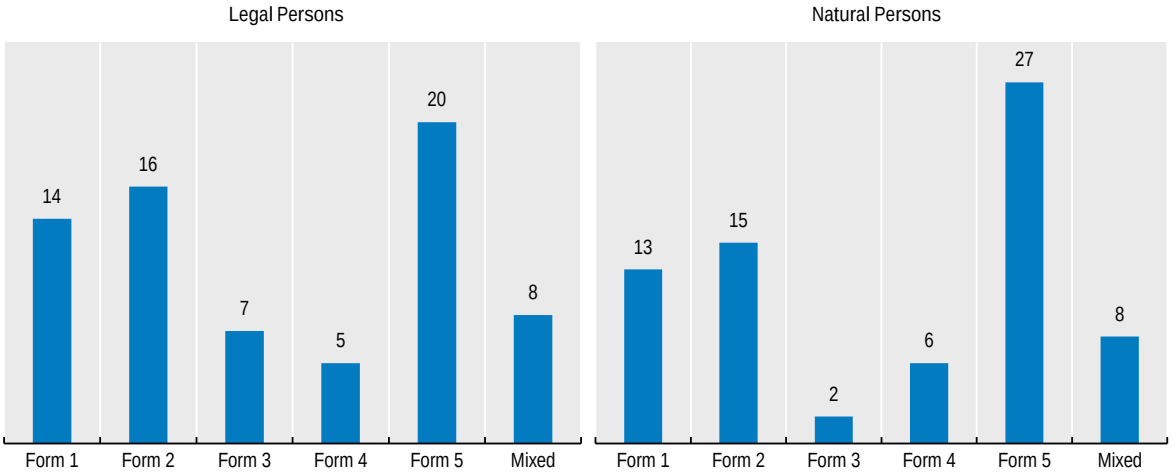
A majority of the 27 countries covered in the Study has several non-trial resolution systems to resolve a foreign bribery case (74%). Each system applies either to natural or legal persons, or to both. **Argentina**, **Brazil** and **Germany** have different systems for legal and natural persons. Other countries have a single resolution system available to both. This is the case for 26% of countries analysed in the Study, including the **Czech Republic**, **Norway** and **Spain**. Finally, some countries, such as **France** and the **United States**, have resolution systems available for both legal and natural persons, and one system that can be used solely for legal persons.

The following sections will examine the various categories of non-trial resolutions that can be found across the 27 countries covered in the Study. Despite the specificities of each non-trial resolution system, resolutions have been grouped here in categories, or "forms", based on their main features.

Following this approach, five forms of non-trial resolution applicable to foreign bribery cases have been identified. Form 1 results in the termination of an investigation without prosecution or in the termination of another enforcement action, subject to the fulfilment of specific conditions, notably disgorgement of profits. Form 2 leads to the suspension or deferral of a prosecution or other enforcement action, subject to the fulfilment of specific conditions. Form 3 encompasses all administrative and civil proceedings that result in a final decision imposing sanctions without criminal conviction. Form 4 includes resolutions that amount to a conviction, but do not imply an admission of guilt. Form 5 covers the resolutions equivalent to plea agreement, which require the defendant's admission of guilt and amounts to a conviction. Finally, there are some non-trial resolution systems, identified as "Mixed", which belong to more than one category, because they can take multiple forms or lead to different outcomes depending on the facts of the case.

Figure 10 shows the number of non-trial resolutions available across the 27 Parties to the Convention covered in this Study that pertains to each of the five forms identified.

Figure 10. Forms of Non-trial resolutions



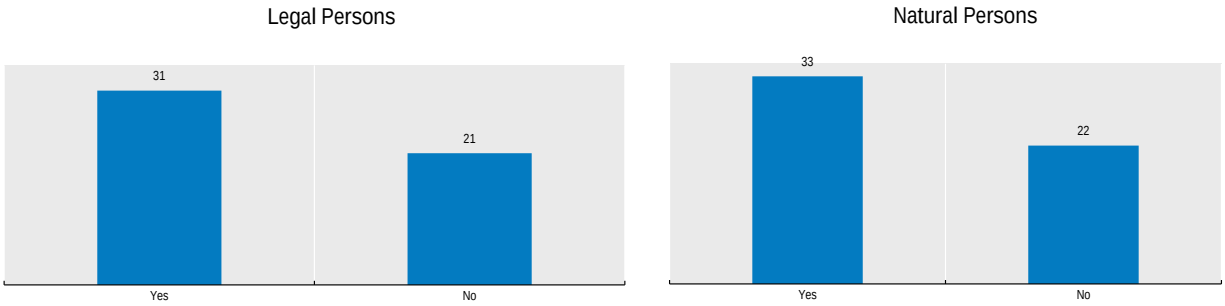
Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

From a methodological point of view, these forms (or categories) attempt to highlight the most distinctive features of non-trial resolutions.

- First, the different forms distinguish resolution systems based on the outcome for the alleged offender. While the first two forms result in an early termination or suspension of the proceedings, the other three result in a final decision imposing sanctions (even if not all involve a finding of guilt).
- Second, the categorisation under one form also depends on the nature of the proceedings characterising the resolution. Form 3 encompasses resolutions that are almost exclusively civil or administrative in nature. Conversely, forms 4 and 5 refer to criminal proceedings resulting in the conviction of the defendant. Forms 1 and 2 include resolutions that are both criminal and civil/administrative in nature.

With regard to the outcome for the alleged offender, as illustrated in Figure 11, around 60% of all resolution systems can result in a conviction or in a final civil or administrative decision imposing sanctions (i.e. they fall into Forms 3, 4 or 5). This is true for both legal persons (31 out of 52 systems) and natural persons (33 out of 55 systems).

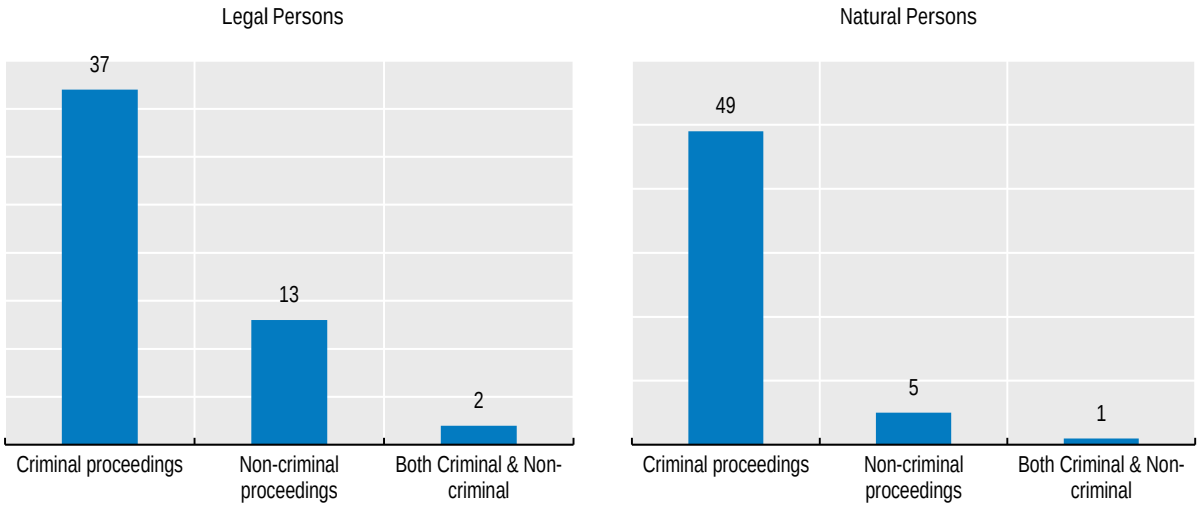
Figure 11. Number of non-trial resolutions that can result in a conviction or in a final civil or administrative decision imposing sanctions



Source: OECD data collection questionnaire results, Tables 12, 13, 16 and 17.

With regard to the nature of the proceedings, Figure 12 shows that 37 of the 52 resolution systems that can be used with legal persons (71%) are wholly criminal in nature, with another 2 being both criminal and non-criminal (4%). The remaining 13 resolution systems (25%) are wholly civil or administrative in nature. For natural persons, the vast majority of resolution systems (49 of the 55, or 89%) is wholly criminal in nature, 1 system (2%) is both criminal and non-criminal and the remaining 5 (9%) wholly civil or administrative.

Figure 12. Number of resolutions available by nature of proceedings



Source: OECD data collection questionnaire results, Tables 3 and 4.

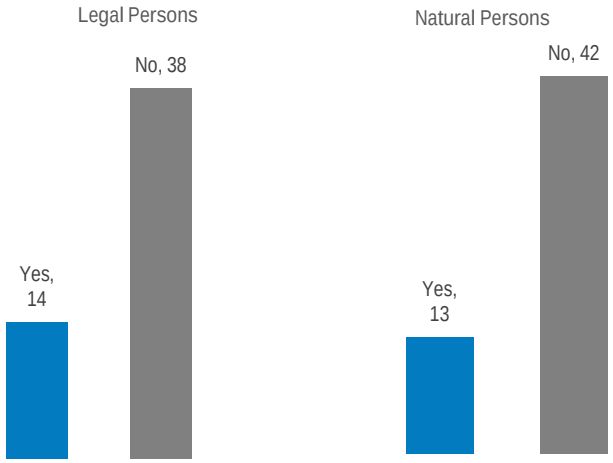
2.1. Form 1 – Termination of an investigation without prosecution or other enforcement action, with imposition of sanction and/or confiscation ("Declination/NPA-like resolution")

When applied in criminal matters, the main characteristic of these resolution systems is that they resolve a case before charges are filed. They correspond, *inter alia*, to the *Declination with Disgorgement* and *Non-Prosecution Agreement (NPA)* available to the **United States** DOJ. While *NPAs* are available for both legal and natural persons, *Declinations with Disgorgement* are only available for legal persons. Other examples include **Austria**'s *Diversion* and *Withdrawal from prosecution due to cooperation*, which can be used with both legal and natural persons, **Brazil**'s *Cooperation Agreement* and **Hungary**'s *Possibility of Avoidance of Criminal Liability*, both available for natural persons only. In total, 14 systems that can be used with legal persons and 13 systems that can be used with natural persons fall under this form of non-trial resolutions.

The non-trial resolution systems in this category are generally designed for offenders who self-report and/or fully cooperate with the prosecution, including, when relevant, through providing information on third parties. When this happens, the same case against multiple alleged offenders may be concluded with different forms of non-trial resolutions depending on the person (whether legal or natural) with whom it is resolved.

Declinations and NPA-like resolutions do not require an admission of guilt. Most resolutions in this category must be approved by a court or another authority. The role of the court can however vary. The extent of judicial scrutiny is further discussed in Chapter 5.1.

Figure 13. Total number of resolution systems available in Form 1



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

Box 3. Declinations with Disgorgement and Non Prosecution Agreements in the United States

Declinations with Disgorgement

Under a Declination with Disgorgement, the DOJ may decline a case, provided that the company disgorges the profits it obtained through the misconduct. The use of declinations is treated in the FCPA Corporate Enforcement Policy (November 2017), which supplements the Principles of Federal Prosecution of Business Organizations and is incorporated into the Justice Manual.

According to the Policy, when a company has engaged in an FCPA violation but voluntarily self-discloses the misconduct, fully cooperates with the authorities, and timely and appropriately remediates, there will be a presumption that the company will receive a declination, absent aggravating circumstances involving the seriousness of the offense or the nature of the offender (such as involvement by executives in the misconduct, significant profit to the company and pervasiveness of the misconduct within the company). Even when the company engages in model behaviour once it learns of the misconduct, it should not be permitted to keep the proceeds of the illegal scheme. The company is therefore required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

Non Prosecution Agreements in criminal proceedings

Under a Non Prosecution Agreement (NPA), the DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA (usually two or three years). Unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties. In circumstances where an NPA is concluded with a company for FCPA-related offenses, it is made available to the public through the DOJ's website.

The requirements of a NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty. If the company complies with the agreement throughout its term, the DOJ will not file criminal charges. If an individual complies with the terms of the NPA, namely, truthful and complete cooperation and continued law-abiding conduct, the DOJ will not pursue criminal charges against that individual related to the underlying conduct.

Source: United States submission for the Study

Declination/NPA-like resolutions can also be of a civil and/or administrative nature. This is the case for the SEC *NPA* in the **United States,** the *Consent Order for Civil Recovery* in the **United Kingdom (**available for both legal and natural persons), as well as the *Forfeiture Order* in **Germany** (available to resolve a case without a trial for legal persons only).

Box 4. Declination/NPA-like resolutions in civil matters

Forfeiture Order in Germany

In Germany, no legal provision expressly affords the possibility for a legal person to resolve a case with the prosecution authorities in a non-trial resolution *per se.* In certain cases, a legal person can be held liable and sanctioned by the prosecution authorities under the administrative offence of violation of supervisory duties by a senior manager.[74] This administrative procedure is described under Box 7 and pertains to Form 3.

In addition, German prosecutors in some *Länder* have also been using *Forfeiture Orders* under section 29a OWiG as non-trial resolutions with companies that have self-reported and cooperated. The use of forfeiture orders to resolve a case with a legal person is based on the administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG) but does not establish corporate liability. These resolutions hence allow to recover illicit gains from companies while not holding them liable (and without imposing a regulatory fine). Forfeiture Orders have been used by prosecutors to resolve some foreign bribery cases with legal persons in order to address situations where companies self-reported foreign bribery cases that would not otherwise have been detected. There is room and incentive for both sides to come to a mutually acceptable solution in light of the fact that legal persons have the right to be heard as well as the possibility to appeal both the Forfeiture Order and the regulatory fine.[75] *Forfeiture Orders* were considered as *a de facto* resolution system by the Working Group in Germany Phase 4 evaluation.

Source: Germany Phase 4 Report

Consent Order for Civil Recovery in the United Kingdom

Under the Proceeds of Crime Act 2002 (POCA), the SFO and Crown Prosecution Service (CPS) can apply for civil recovery orders before the High Court. Such orders permit the recovery of "property obtained through unlawful conduct". A criminal conviction is not required; the applicant only has to show on a balance of probabilities that the property sought to be recovered was obtained through unlawful conduct. A civil recovery order relating to foreign bribery does not trigger automatic exclusion from public procurement.

Article 276 (1) of the POCA creates the "Consent Order", which allows the prosecution and alleged offender to agree on the amount of the recovery and conclude an order without going before the High Court. Once the parties have agreed on the amount and other terms of the order, the order is drawn up, signed by a High Court Judge and entered in the court registry.

Source: United Kingdom Phase 4 Report.

[74] Corporate liability under section 30 Administrative Offences Act (Gesetz über Ordnungswidrigkeiten, hereafter OWiG) triggered by the violation of supervisory duties under section 130 OWiG.

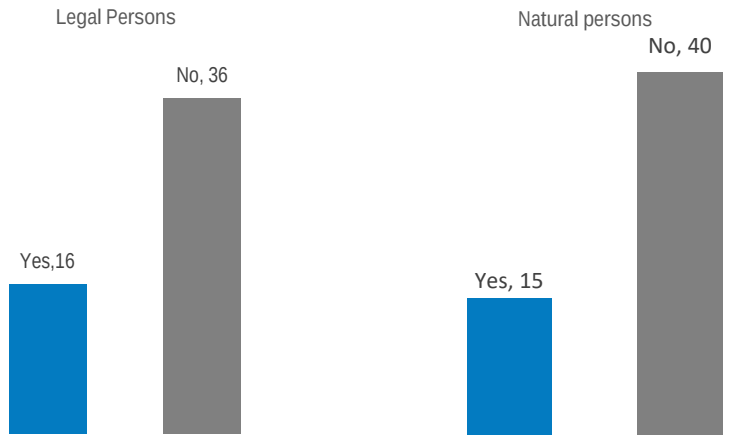
[75] The right to be heard is provided under art. 103 Grundgesetz (Basic Law).

2.2. Form 2 – Suspension, deferral or withdrawal of prosecution or other enforcement action, subject to the fulfilment of specific conditions ("DPA-like resolution")

A second form of non-trial resolution system available to resolve foreign bribery cases consists in a suspension, deferral or withdrawal of a prosecution or other enforcement action, subject to the fulfilment of specific conditions. For the purpose of this Study, this category is named "DPA-like" resolutions. As for the first form, most resolution systems falling in this category are available in criminal matters, but others are of a civil/administrative nature.

As shown in Figure 14, of all non-trial resolution systems available to resolve a foreign bribery case across the countries covered in this Study, 16 resolution systems for legal persons (31%) and 15 resolutions for natural persons (27%) pertain to this category.

Figure 14. Total number of resolution systems available in Form 2



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

When applied in criminal matters, DPA-like systems usually consist in an agreement between the prosecution authority and the accused to defer prosecution, subject to the fulfilment of specified conditions. Unlike NPA-like resolutions, charges are normally filed. This form of criminal resolution corresponds, *inter alia*, to the *DPAs* concluded by the DOJ with both legal and natural persons in the **United States**,[76] the *Conditional Suspension of Proceedings* in **Chile** and the *Transaction* in the **Netherlands.**

[76] See Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12.

Several countries have similar instruments but that can be used only with legal persons.This is the case with the *Remediation Agreement* in **Canada**, *Convention Judiciaire d'Interêt Public* (*CJIP*) in **France** and *DPA* in the **United Kingdom** (all described under Box 5). Fewer countries have DPA-like resolutions of criminal nature that can only be used with natural persons. These include **Brazil's** *Conditional Suspension of procedure,* **Costa Rica's** *Suspension of Proceedings* and **Germany**'s *Section 153a.*

DPA-like resolutions have been an important enforcement vehicle since the entry into force of the OECD Anti-Bribery Convention. Several countries have recently introduced or are considering introducing a form of DPA to resolve foreign bribery cases (as discussed in Chapter 1.3.4). In 2017, **France** added the *CJIP* to its enforcement tools. In **Canada**, as of 19 September 2018, prosecutors can use *Remediation Agreements* to resolve cases under the Corruption of Foreign Public Officials Act. Finally, draft legislation in **Australia** has been prepared, which would, if adopted, create a DPA mechanism, while in **Switzerland**, the Ministry of Justice has begun considering whether to introduce its own DPA system.

The main characteristics of a DPA-like resolution are generally as follows: criminal charges are laid against the defendant, as in the **United States** and in the **United Kingdom**, but are then deferred for a set period of time, during which the alleged offender must fulfil the conditions of the agreement. Under some of the resolution systems included in this category though, the prosecution is withdrawn rather than suspended, because the nature of the conditions usually imposed (such as the payment of a monetary sanction) will result in a nearly instantaneous resolution. This is the case for the *Transaction* in the **Netherlands**.

The terms of resolution under DPA-like resolutions usually include the payment of a sum of money and in some instances, a prison sentence for natural persons. For corporate defendants, the conditions often include the imposition of a compliance programme the effectiveness of which may be assessed by an appointed monitor (see the discussion in Chapter 4.7). The payment of damages to victims can also be part of the conditional resolution of the case in a number of countries.[77] Under the **Netherlands'** *Conditional Dismissal* (available for legal and natural persons), the prosecution is suspended on fulfilment of conditions, with the prosecutor retaining the right to prosecute if the conditions are not met. However, unlike most DPAs, there is no agreement between the parties. The prosecutor decides to conditionally dismiss the case, sets the terms and the defendant either adheres to them or does not.

DPA-like resolutions of a criminal nature are not tantamount to a conviction and they usually do not trigger the consequences that a formal conviction would entail, such as debarment from national and/or international public tenders[78]. They usually involve a recognition of the facts but not of the guilt of the accused person, whether a natural or a legal person. Approval of a court or other authority is usually required.

[77] See discussion on victims' compensation in Chapter 4.6.4.

[78] See discussion on collateral consequences of a conviction in Chapter 3.3.3.

Box 5. Deferred Prosecution Agreements in the criminal context in Canada, France and the United Kingdom

Remediation Agreements in Canada

Remediation Agreements, introduced with an amendment to the Criminal Code adopted in June 2018, are now available to prosecutors in Canada to resolve foreign bribery cases against legal persons.[79] The prosecution will enter into this kind of resolution if it is in the "public interest". This entails *inter alia* consideration of the nature of the offence, the degree to which corporate management was involved, whether the company has helped identify the individuals involved in the offence, and whether measures have been taken to remediate the harm caused by the offence or to prevent similar offences. The terms and entry into force of the agreement are subject to court approval.

If a *Remediation Agreement* is concluded, the prosecution will be able to drop criminal charges if the company fulfils specified conditions within a prescribed period of time. These include obligations to pay a fine, cooperate in investigations or prosecutions, and forfeit the profits. In addition, a company can be required to make reparations to victims. It can also be required to implement or strengthen an anti-bribery compliance programme and to engage a compliance monitor to report on progress.

Each agreement would include an agreed statement of facts describing the misconduct, and the company would have to admit responsibility for the acts underlying the offence.

Source: Canadian Criminal Code, Part XXII.1.

Public Interest Judicial Agreement **in France (Convention Judiciaire d'Intérêt Public -CJIP)**

The Sapin II Law, enacted on 9 December 2016, introduced the Public Interest Judicial Agreement (CJIP) into France's legal system. Often described as largely modelled on the US and UK Deferred Prosecution Agreements (DPAs), it is only available to legal persons.

Stages of the procedure when it is available and legal implications

Prior to public prosecution, it provides the possibility for a French Public Prosecutor to offer a legal person allegedly liable of foreign bribery (and/or a closed list of other specified offences) the possibility to enter into a *CJIP*, and hence to end criminal proceedings. Once charges have been laid and the formal criminal investigation led by an investigative judge has started, a *CJIP* may also be offered to a legal person upon the prosecutor's request or with his agreement, provided that the entity admits the facts, the offence and its criminal status as set out by the prosecution. The formal investigation ("*l'instruction*") is hence suspended but can resume if the obligations under the *CJIP* are not met.

Obligations imposed under a CJIP

One or more of the following obligations may be imposed under the *CJIP*:

- Obligation to pay a public interest fine to the French Treasury that will be proportionate to the advantages obtained through the offence, within the upper limit of 30% of the average annual turnover, based on the three last known turnovers;
- Obligation to implement a compliance programme under the supervision of the French Anti-Corruption Agency (AFA), for a maximum period of three years, the AFA costs being born by the legal person; and
- Obligation to compensate any identified victims in an amount and following modalities determined in the CJIP.

Source: French Code of Criminal Procedure (CCP), Article 41-1-2

Deferred Prosecution Agreements in the United Kingdom

DPAs were introduced in the United Kingdom in February 2014 by Section 45 and Schedule 17 of the Crime and Courts Act 2013. DPAs are a recent concept in the United Kingdom and their use is currently restricted. They are only available for certain economic crime offences, including foreign bribery. Only a designated prosecutor (either the SFO or the UK CPS) can negotiate a DPA. Moreover, DPAs are not available to natural persons.

The conditions that can be imposed under the DPA are mostly similar to those imposed in the United States, and are listed in Schedule 17 to the Crime and Courts Act 2013. These can include a financial penalty, compensation to the victims of the alleged offence, disgorgement of profits and implementing a compliance program or improving an existing one. Prosecution costs can also be claimed. The financial orders imposed can also be significant, partly because there is no maximum fine in the United Kingdom. Negotiations, although initially between the prosecution and the defence, are therefore subject to Court review (as discussed in Chapter 5.I).

Source: United Kingdom Phase 4 Report

DPA-like resolutions can also be of a civil/administrative nature. This is the case for the **United States** *DPA,* available to the SEC for both legal and natural persons (described in Box 6), and the *Leniency Agreement* in **Brazil**, available for legal persons only. A *Leniency Agreement* can fall under several forms of non-trial resolutions as defined for the purpose of the Study. Box 10 describing the *Leniency Agreement* is included in Chapter 2.6 on "Mixed resolutions".

Box 6. Deferred Prosecution Agreements (DPA) in the civil context in the United States

In the civil context, a deferred prosecution agreement is a written agreement between the SEC and a potential cooperating individual or company in which the SEC agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in the SEC's investigation and related enforcement actions; (2) enter into a long-term tolling agreement; (3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and (4) in most cases, agree either to admit or not to contest the underlying facts that the SEC could assert to establish a violation of the federal securities laws.

If the agreement is violated during the period of deferred prosecution, the SEC staff may recommend an enforcement action to its Commission against the individual or company without limitation for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, the staff may use any factual admissions made by the cooperating individual or company to file a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

Source: United States submission for the Study

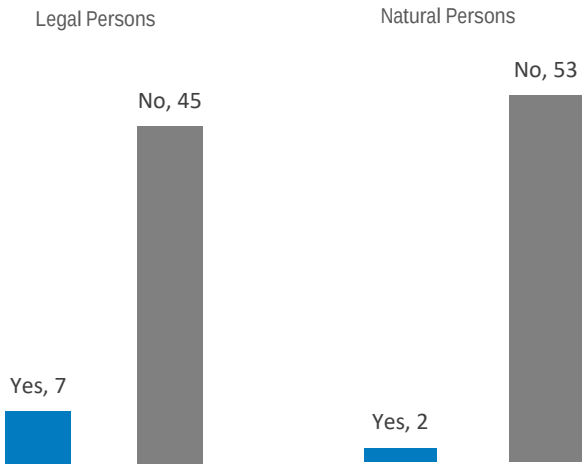
[79] Criminal Code, Part XXII.1 (introduced by the Budget Implementation Bill 2018, Act C-74).

2.3. Form 3 – Resolution resulting in a decision imposing sanctions without criminal conviction "civil/administrative-like resolutions")

A third form of non-trial resolution system available to resolve foreign bribery cases encompasses resolutions resulting in a final decision that does not amount to a criminal conviction. This category includes all the procedures that are mainly civil or administrative in nature. Not all these resolution systems result in a final judicial finding of liability. However, they are included in this category because they can impose sanctions and confiscation that are comparable to the ones imposed through criminal non-trial resolutions, and share some of the collateral effects of the latter.[80]

For legal persons, as shown in Figure 15, of all non-trial resolution systems available (as covered under this Study), 7 (13%) are of this form. For natural persons, this form of resolution system is less common, with only 2 of the resolution systems (4%) available in this category.

Figure 15. Total number of resolution systems available in Form 3



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

This form includes the *Civil* and *Administrative Resolutions* that can be entered by the SEC in the **United States**. These two resolutions are the only purely civil/administrative systems that apply to both natural and legal persons. An example of a system available only for legal persons is the **United Kingdom's** *Administrative Order*.

These kind of civil/administrative resolutions are also made available in jurisdictions where the liability of legal persons is administrative in nature, notably because the national legal system can only impose criminal liability on individuals.[81] This is the case for **Germany**'s *Administrative Resolution*, described in Box 7, and **Brazil**'s *Leniency Agreement*, which will be illustrated in Chapter 2.6. Although **Italy**'s liability of legal persons is also

[80] See, for instance, the discussion on debarment, Chapter 4.6.1.

[81] OECD (2016), The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report, page 21.

administrative in nature, the Italian resolution system is illustrated in the Form 4, because liability is established through criminal proceedings that can result in a conviction.

Box 7. Administrative resolution between the prosecution authority and a legal person in Germany

In **Germany**, corporate liability under section 30 Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*- OWiG) is triggered either by a (i) a criminal offence committed by a senior manager (foreign or commercial bribery)[82] or (ii) by a criminal offence by a lower-level person resulting in an administrative offence of violation of supervisory duties by a senior manager (section 130 OWiG). No legal provision affords the possibility for a legal person to resolve a case with the prosecution in a non-trial resolution *per se.* However, a legal person can be held liable and sanctioned by the prosecution acting as an administrative body, without a conviction and court validation in a purely administrative proceeding. As the legal person is afforded the right to be heard before the imposition of such a regulatory fine and the fine can be appealed, there is room and incentive for both sides to come a mutually acceptable solution.

The regulatory fine that can be imposed under this procedure is considered a monetary penalty having both a "punitive" component and a "confiscatory" component. The amount of the regulatory fine imposed through this resolution system is subject to judicial review if the legal person appeals it.

Source: Germany Phase 4 Report

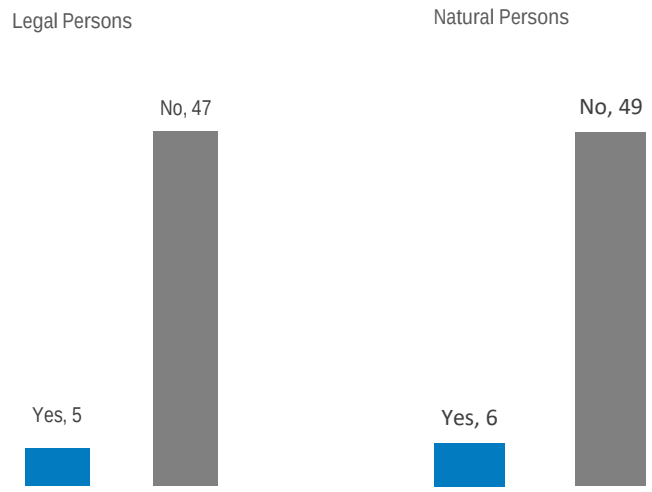
2.4. Form 4 – Resolution with conviction or tantamount to a conviction, but without an admission or finding of guilt *("Patteggiamento*-like resolution")

The fourth form of non-trial resolutions includes resolutions that result in a conviction or can be considered as tantamount to a conviction, but are not contingent on an admission or finding of guilt. This category is named for convenience "*Patteggiamento*-like resolution" because **Italy**'s *Patteggiamento* (illustrated under Box 8), though equated to a conviction, does not imply admission of the facts or recognition of guilt by the defendant in the criminal proceedings.

Of all non-trial resolution systems available across countries Party to the OECD Anti-Bribery Convention to resolve a foreign bribery case covered under this Study, 5 resolution systems for legal persons (10%) and 6 resolution systems for natural persons (11%) pertain to this category. See Figure 16.

[82] Sections 334-335a or 299-300 German Criminal Code.

Figure 16. Total number of resolution systems available in Form 4



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

The main characteristic of the resolutions under Form 4 is that, as opposed to plea agreements (see Form 5 discussed), they do not require a guilty plea by the defendant. The outcome of these resolutions is nonetheless a final decision that is tantamount to a conviction, by which the parties agree on (or one of them adheres to) a proposed sentence. These resolution systems do not have the same consequences as a judicial finding of guilt.[83] Some resolution systems under Form 4, however, amount to a finding of guilt.

Besides **Italy**'s *Patteggiamento*, other examples of resolution systems within this category are **Switzerland**'s *Summary Punishment Order* and **Norway**'s *Optional Penalty Writ*, both available for legal and natural persons. **Switzerland**'s *Summary Punishment Order* is drawn up by the prosecutor, includes a sanction, and, if uncontested by the defendant, has a similar status as a court judgment. It differs from the Italian *Patteggiamento* in that it requires an admission of the contested facts.[84] Similarly, **Norway**'s *Optional Penalty Writ* is issued by the prosecuting authority, if it finds that a case should be decided by imposition of a fine or confiscation or both. The defendant can decide to accept or reject the writ. Imprisonment for natural persons is not available, but the penalty notice specifies the term of imprisonment to be served if the fine and/or confiscation is not paid.[85]

Finally, **Germany**'s *Penal Order* (only available for natural persons) and the **Netherlands**' *Punitive Order* could be considered as *Patteggiamento*-like resolutions because they are not expressly conditioned upon a confession by the defendant nor an admission of guilt. However, the Netherland's Punitive Order amount to a finding of guilt. Under **Germany**'s *Penal Order* the defendants' consent it is not required. They must

[83] See, Tables 38 and following (Answers to Question 23 of the Data collection questionnaire).

[84] Switzerland Submissions to the Resolution Study.

[85] Norway Phase 3 Report, para. 63.

nevertheless be heard by a court before the application of the order and can appeal it, which triggers a full trial.[86] Under the **Netherlands**' *Punitive Order*, as with **Norway**'s *Optional Penalty Writ*, the prosecutor drafts an order imposing a sanction to the suspect, who can either accept or reject it. Custodial sentences cannot be imposed on natural persons under these resolutions.[87]

Box 8. *Patteggiamento* in Italy

A *Patteggiamento* (the official name is "*applicazione della pena su richiesta delle parti*", i.e. sentencing upon the parties' request) applies to both individuals and legal persons and allows the suspect/defendant and the prosecutor to ask the court to impose an agreed-upon sentence.[88] A *Patteggiamento* does not imply admission of the facts or recognition of guilt by the defendant. However, it expressly "amounts to a conviction" unless otherwise provided by statute. In case of foreign bribery allegations (*inter alia*), the admissibility of the request is subject to the full disgorgement of "the price or the proceeds of the crime."

Individuals can request a *Patteggiamento* when the envisaged sentence is an alternative sanction or a monetary sanction, or if it is a prison term not exceeding five years (alone or in conjunction with a monetary sanction). Legal persons can always enter into a *Patteggiamento* if only a monetary sanction is envisaged or if a decision against the defendant individual was reached or could be reached through a *Patteggiamento*.

The judge retains the discretion to accept or reject the *Patteggiamento* and, if accepted, orders its application by judgment. The request can be presented during the preliminary investigation, and until the opening of the first instance hearing. The request presented by either the defendant or the prosecution is subject to the other party's consent.

Sources: Italian Code of Criminal Procedure (CCP), art. 444-448; DL 231/2001, art. 63; Italy Phase 3 Report .

2.5. Form 5 – Plea agreement, or equivalent resolution, which requires the defendant's admission of guilt and amounts to a conviction ("Plea Agreement-like resolutions")

A fifth form of non-trial resolution system available to resolve foreign bribery cases consists in plea agreements, or equivalent resolutions, which require the defendant's admission of guilt and amount to a conviction (hereafter, plea agreement). Compared to other resolution procedures, many of which are more recent innovations, a plea agreement is a classic way of resolving a case, particularly in common law jurisdictions.

In Parties to the Convention, plea agreements are the most common form of non-trial resolution available to prosecution authorities to resolve foreign bribery cases as shown in Figure 17. For legal persons, resolutions of this type make up 20 (38%) of the total

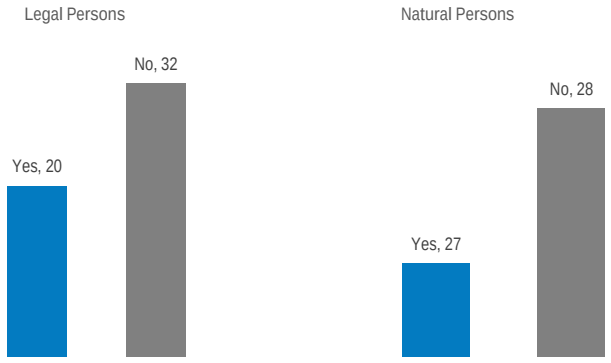
[86] Germany Phase 4 Report, para. 195;

[87] Netherlands Phase 3 Follow-up Report, page 29.

[88] The rules for natural persons are contained in the Italian Code of Criminal Procedure (CCP), articles 444-448. As for legal persons, the legal basis for the procedure is contained in the Legislative Decree on administrative liability of legal persons (LD 231/2001, art. 63), but part of the CCP rules also apply.

resolution systems. It is also the most common form of resolution available for natural persons (27, i.e. 49% of the resolution systems available).

Figure 17. Total number of resolution systems available in Form 5



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

There are distinctions in how plea agreements operate in each country. For the purpose of the Study, this category contains various permutations of this form of resolution: from acceptance by the defendant to plead guilty to certain charges or counts (like in the *Conformidad* in **Spain**)[89] to agreements as to the applicable sentence (like in **Israel**'s *Plea Agreeement*).[90] Almost all countries reported that these resolutions must be approved by a court or other authority (18 of the 20 resolutions for legal persons and 25 of the 27 resolutions for natural persons). In **Australia**, the prosecution and accused can negotiate charges and enter a plea deal. The court is then responsible for setting the sanction. However, in the three foreign bribery cases successfully concluded to date, the accused persons accepted the charges that were being held against them without negotiation**.** .[91] The procedure is similar in the **United Kingdom** with the *Plea Agreement*.

Guilty pleas are often entered without any guarantee with respect to the ultimate sanction the court will impose. However, in the **United Kingdom**, under the *Plea Agreement*, at any point up to the start of the trial, the defence can ask the judge for an indication of the maximum sentence that would be imposed, should the defendant enter a plea deal at the time the question is asked. This is commonly known as a "Goodyear" indication.[92] Once the judge has given an indication of that maximum, the court is not entitled to pass a harsher sentence if the defendant pleads guilty. In many jurisdictions, however, such as **France** through the *CRPC*, the prosecutor is responsible for setting the sentence imposed through a plea agreement (albeit in this case the decision is subject to approval by the court).

[89] Spain Phase 3 Report, para. 113.

[90] Israel Phase 1 Report, para. 122.

[91] See Tables 52 and 53.

[92] From the case R v Goodyear [2005] EWCA Crim 888.

Box 9. Plea Agreements in Germany, Switzerland and the United States

Negotiated Agreement in Germany

Pursuant to section 257c CCP, the court and the defendant can conclude a *Negotiated Sentencing Agreement*. The negotiations aiming at such an agreement can take place either in advance of a contested trial or even when the trial has progressed to some extent with a view to finding an amicable settlement. The agreement itself has to be concluded in a main hearing where the presiding judge has to introduce the facts and the essential elements of negotiation including the grounds for mitigating a sentence. As a rule, a *Negotiated Sentencing Agreement* has to include a confession on the part of the defendant.

Unlike a conditional exemption from prosecution under section 153a CCP, both a *Penal Order* under section 407 CCP and a judgement following a *Negotiated Sentencing Agreement* under section 257c CCP have the consequence of convicting the accused. Both can be appealed.

Source: Germany Phase 4 Report

Simplified/Accelerated Procedure in Switzerland

The so-called "simplified" or "accelerated" procedure allows the parties to negotiate the defendant's sentence, among other conditions, in exchange for their recognition of the charges. The mutually agreed charges are transmitted to the court, which verifies that the accused recognises the facts and the deposition is consistent with the file. The court does not examine any evidence, but verifies the evidence examined by the prosecutor. If the legal conditions are met, the court issues a judgment. In principle, it is up to the accused to launch plea bargaining, and he is free to accept or reject the arrangement proposed by the prosecutor.

If however during the proceeding it becomes clear that the sentence would fall within the range that would allow the prosecutor to issue a *Summary Penalty Order*, the prosecutor will issue the order, which does not need to be approved by a court.

Source: Switzerland Phase 3 and Phase 4 Reports and submission for the Study.

***Plea Agreement* in the United States**

Plea agreements, whether with legal persons or individuals, are governed by Rule 11 of the Federal Rules of Criminal Procedure. The defendant generally admits to the facts supporting the charges, admits guilt, and is convicted of the charged crimes when the plea agreement is presented to and accepted by a court. The plea agreement may jointly recommend a sentence or fine, jointly recommend an analysis under the U.S. Sentencing Guidelines, or leave such items open for argument at the time of sentencing. In certain circumstances, the government and the defendant (either corporate or individual) may present the court with a plea agreement that the court must either accept in totality (including the agreed-upon sentence) or reject in totality. In addition to being publicly filed, the DOJ places all of its plea agreements on its website, unless such agreements were filed confidentially (under seal) to protect the safety of cooperating witnesses or the integrity of the investigation. Once the plea agreement is unsealed, it is then posted on the DOJ's website.

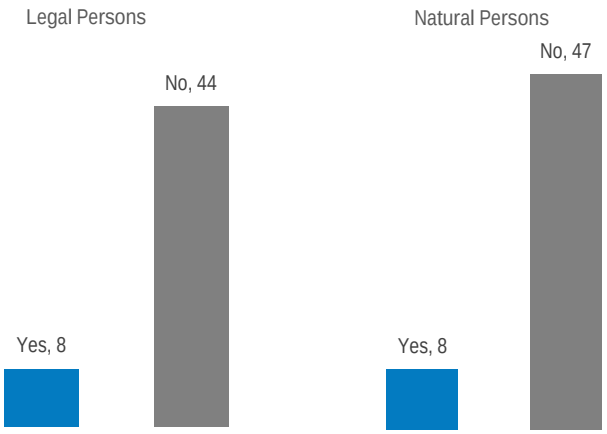
Source: United States Submission for the Study

2.6. "Mixed" resolutions

Some non-trial resolution systems, identified here as "Mixed", belong to more than one category as they can take multiple forms or lead to different outcomes for the alleged offender. These systems usually have their legal basis in a general legal framework that allows enforcement authorities to choose different types of resolutions depending on the specificities of the case at hand. This is the case of **Brazil**'s *Leniency Agreement*, available for legal persons and which, depending on the circumstances, may fall under one of the first three above listed Forms of resolutions (more details on this system are provided in Box10).

Only a small number of resolutions analysed in this Study qualifies as mixed, as shown in Figure 18. Eight resolutions for legal persons and natural persons respectively pertain to more than one form. This represents, respectively, 12% and 13% of all the resolution systems covered by the Study.

Figure 18. Total number of mixed resolutions



Note: Some resolution systems fall into more than one form. Where this is the case, the procedure is counted in all the applicable forms. The aggregate totals are thus higher than the total number of resolutions analysed.
Source: OECD data collection questionnaire results, Tables 16 and 17.

Some systems can be considered as both Declination/NPA-like resolutions and DPA-like resolutions, because the parties can conclude them either before or after the charges have been laid. This is the case of **Austria**'s *Diversion* and *Withdrawal from prosecution due to cooperation*, which can be used with both legal and natural persons, as well as of the *Alternative Measures* in **Canada** and **Germany**'s resolutions under *Section 153a* (both only available for natural persons).

Resolution systems that can result in different outcomes for the alleged offender include **Argentina**'s *Cooperation Agreement* and **Japan**'s *Agreement Procedure.* Under the latter system, which became available in June 2018, Japanese prosecutors can conclude an agreement with the suspect or defendant, who undertakes to cooperate with enforcement authorities in relation to the investigation of conducts allegedly committed by others. Cooperation by the suspect/defendant (which includes giving statements during the investigation, testifying in court, or providing evidence against third persons) can lead to different favourable outcomes. The prosecutor could suspend or revoke the indictment, only prosecute for certain charges specified in the agreement or seek specific sanctions, as

well as apply for the "speedy trial procedure" (a simplified procedure under which the court can impose a fine or a suspended sentence) or request the issuance of a "summary order" (available for fines of not more than 1 million Yen).[93]

Box 10. Mixed resolutions in Brazil and Germany

Brazil's Leniency Agreement with legal persons

Brazil's leniency program was established by the Corporate Liability Law (N.12.846 of August 1, 2013 (CLL)), which came into effect in January 2014 and introduced in Brazil the administrative liability of legal persons for foreign bribery and other acts of corruption carried out against national or foreign public administrations. This law grants jurisdiction to the Office of the Comptroller General ("CGU") to negotiate leniency agreements with legal persons in case of foreign bribery offences. Based on both a systemic interpretation of the legislation and internal prosecutorial regulations, the Federal Public Prosecutors' Service ("FPS") also negotiates leniency agreements. Both the FPS and the Attorney General´s Office ("AGU") may also handle the offense in the civil sphere, and in such cases, the AGU works together with the CGU to jointly resolve the case and ensure legal certainty for the alleged offender. In Brazil, while legal persons cannot be held criminally liable for acts of corruption, the FPS has criminal jurisdiction in cases involving natural persons and is thus involved in the negotiation of agreements with legal persons. This is in particular relevant when the evidence to be provided by the company stems from statements provided by its executives or employees who may require that a criminal cooperation agreements be reached with them in order to agree to testify in the framework of the procedure against the legal person.

A leniency agreement with a legal person can resolve foreign bribery cases as follows: (i) Close an investigation without prosecution (civil or administrative), thus ensuring, within the terms and conditions of the resolution, that no further civil lawsuit or administrative proceedings will be initiated against the legal person regarding the same facts; and (ii) Resolve a previously initiated prosecution, thus closing civil lawsuits or administrative proceedings that may exist.

In both cases, the legal person has to admit taking part in the wrongful acts, but no recognition of guilt is required. According to the Law, it is mandatory that the company admits its participation in the wrongful act and accepts to continue to cooperate with the investigations and proceedings that may result from the leniency agreement. A leniency agreement concluded with the FPS can take a variety of forms. It thus could be used to defer a prosecution, subject to the fulfilment of conditions to be specified or it may also be used to resolve a prosecution. The requirement to admit guilt will then depend on the specific facts of the case.

A resolution may only be reached if a number of conditions are met during the negotiation and provided for in the leniency agreement. Sanctions imposed may include payments of both a punitive and of a confiscatory nature, and damages to the victims. Leniency agreements may also provide that if the company does not fulfil the terms of the agreement, it will be debarred.

Source: Corporate Liability Law (CLL) 12.846 of August 1, 2013 and implementing texts.

[93] Japan Submission to the Resolution Study.

Germany's resolutions with natural persons under *section 153a CCP*

In Germany, pursuant to section 153a of the Criminal Code of Procedure (CCP), an offender (a natural person) may be conditionally exempted from prosecution where the "public interest" no longer requires the prosecution of the case. The public interest could be mitigated in misdemeanours cases that are not particularly serious but are difficult or complex, necessitating excessive lengthy proceedings. The conditional exemption from prosecution may consist *inter alia* of compensating for the damage, the payment of a sum of money to the treasury or to a non-profit organisation etc. It must be agreed by both the court and the individual and can be modified afterwards with respect to certain aspects (i.e. the time limit for the payment).

Foreign bribery proceedings against individuals can be conditionally terminated at the stage of the investigation (section 153a (1) CCP) and hence be a Declination/NPA-like form of resolution (Form 1); or at the stage of the prosecution (section 153a (2) CCP) and be a DPA-like resolution (form 2). Pursuant to section 153a (1) CCP, the decision is taken by the prosecution with approval of the court and the offender. Pursuant to section 153a (2) CCP the decision is taken by the court with approval of the prosecution and the offender. The same conditions may be imposed in either the exemption from or the termination of prosecution. If the offender fails to fully comply with the conditions and instructions within the time limit, proceedings will be continued.

Source: Germany Phase 4 Report

2.7. The use of different forms of Non-trial resolution for enforcing the foreign bribery offence

The availability of one or multiple resolution systems does not necessarily mean that they are used in practice to enforce foreign bribery laws. Some countries where multiple resolution systems are available have not used any of them in foreign bribery cases at the time of drafting this Study. This is the case, for instance, for **Estonia** and **Latvia**. Conversely, some countries with a single system have used it to resolve several foreign bribery cases. For instance, **Italy** used its *Patteggiamento* in 10 foreign bribery cases to sanction 14 individuals and 6 legal persons.[94]

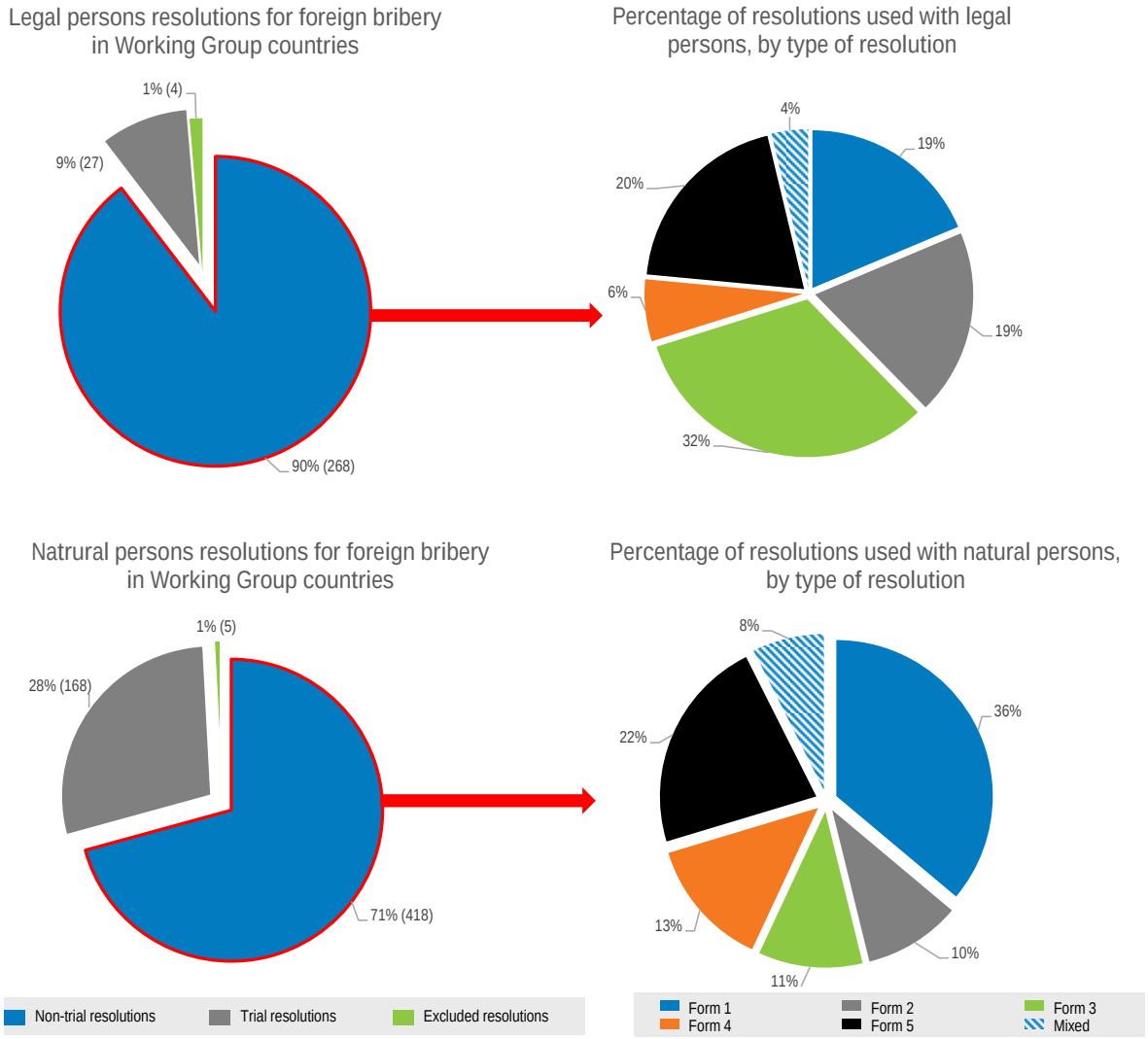
Data provided by the countries Party to the OECD Anti-Bribery Convention covered in the Study show that 15 Parties to the Convention have used at least one non-trial resolution system to resolve a foreign bribery case.

As shown in Figure 19, the Parties to the Convention have resolved foreign bribery cases through non-trial resolutions in the vast majority of cases: 90% of the resolutions concluded with legal persons and 71% of the resolutions concluded with individuals ("Legal persons resolutions for foreign bribery in Working Group countries" and "Natural persons resolutions for foreign bribery in Working Group countries"). The Figure also indicates the percentages of the use in practice of each form of non-trial resolution by the Countries covered in the Study ("Percentage of resolutions used with legal persons, by type of resolution" and "Percentage of resolutions used with natural persons, by type of

[94] The database of concluded foreign bribery cases maintained by the OECD.

resolution"). In total, enforcement authorities of these countries have entered 268 non-trial resolutions with legal persons, and 418 with natural persons.

Figure 19. Percentages of enforcement actions by type of resolution since the entry into force of the Anti-Bribery Convention



Source: OECD database of concluded foreign bribery cases.

Declination/NPA-like resolutions have been used in 19% of resolutions involving legal persons. For instance, the **United States**' DOJ has concluded seven Declinations with disgorgement in FCPA matters up through 30 June 2018.[95] In contrast, the only declination/NPA-like resolution used in practice for individuals is under *section 153a(1)* in **Germany**.[96] These resolutions alone account for 36% of the total number of resolutions with natural persons.

[95] See DOJ website: www.justice.gov/criminal-fraud/pilot-program/declinations

[96] The database of concluded foreign bribery cases maintained by the OECD.

DPA-like resolutions have been used in 19% of the concluded cases involving legal persons and 10% of the cases involving natural persons. Major cases with significant sanctions have been resolved through DPAs. These include the ***Rolls-Royce case*** (which was resolved concomitantly in the **United Kingdom** through a *DPA*, in the **United States** through a *DPA* as well, and in **Brazil** through a separate resolution procedure).[97] **France** used its *CJIP* for the first time in a foreign bribery case to resolve prosecution with the ***Société Générale case*** in coordination with the United States, where the bank concluded a DPA with the DOJ.[98]

The percentage of Civil/Administrative resolutions entered into by legal persons (32%) is significantly higher than for natural persons (11%). Several significant cases have been resolved through this category, alone or combined with other forms of resolutions, as discussed in more detail in Chapter 4 on sanctions and confiscation. These cases include large multi-jurisdictional cases as the ***Odebrecht/Braskem*** case.[99] In **Germany** large cases have also been resolved with legal persons using the *purely administrative procedure* of section 30 OWiG predicated on section 130 OWiG: these include *Siemens AG, MAN Ferrostaal* and more recently *Airbus Defence and Space GmbH*.[100]

The *Patteggiamento*-like resolutions have been used in the 6% of cases involving legal persons and 13% of cases involving natural persons. The lower use of this form of resolution can be explained by the fact that there are few resolution systems falling within this category. However, some of these systems have been used in major cases: for instance, the Italian authorities entered into three *Patteggiamento*, with two companies and an individual, in the ***AgustaWestland*** case.[101]

Plea agreements have been used in 20% of resolutions involving legal persons and in 22% of resolutions involving natural persons. In the **United States,** since the entry into force of the Convention, plea agreements have been the only type of resolutions system through which legal persons have been criminally convicted for foreign bribery (45 resolutions), since no legal person has ever been convicted through a full trial.[102]

Finally, mixed forms have been used in 4% of resolutions with legal persons and 8% with natural persons. Among the resolutions that are here qualified as "mixed", the ones that have been used in practice are **Brazil**'s *Leniency Agreement* (for legal persons) and *Cooperation Agreement* (for natural persons), and **Germany**'s *section 153* for natural persons.

[97] See Annex B.

[98] See Annex B.

[99] See Annex B.

[100] Germany Phase 4 Report, page 62.

[101] See Annex B.

[102] The database of concluded foreign bribery cases maintained by the OECD.

Chapter 3. The process towards the adoption of a resolution

3.1. Procedures and conditions to adopt a resolution

Procedures and conditions to adopt a resolution can vary from one country to the other and from one resolution to the other even in the same country. Certain features are nonetheless common to all types of resolutions. This Chapter identifies these common features and general trends within the countries Party to the Convention that responded to the OECD data collection questionnaire.

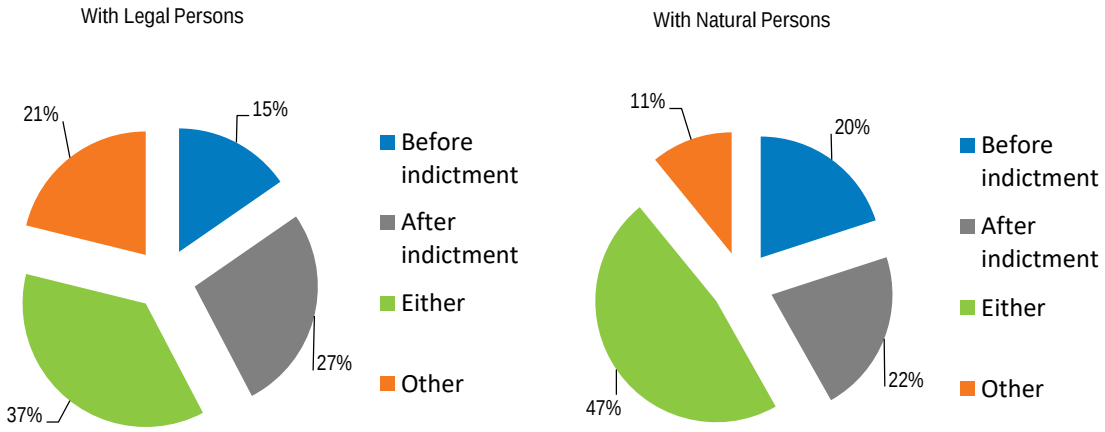
3.1.1. When can a resolution be reached?

The vast majority of the resolution systems available for foreign bribery in the Parties to the Convention can be used in criminal proceedings (75% for legal persons and 91% for natural persons). Reportedly, a few of these resolutions, such as **South Africa**'s *Plea Agreement* (for legal and natural persons) and **Slovenia**'s *Agreement on the Confession of Guilt* (for legal persons only), can be used in either criminal or non-criminal proceedings (4% of resolutions with legal persons and 2% of the resolutions with natural persons). Finally, 25% and 9% respectively for legal and natural persons can only be used in non-criminal proceedings, such as civil or administrative enforcement actions.[103] Fewer resolution systems are available under non-criminal proceedings for natural persons than for legal persons. (This is further discussed in Chapters 1.1. and 2.)

In terms of timing, non-trial resolutions can be reached before or after the indictment of the accused person, or in some cases either before or after. As shown in Figure 20, for legal persons, 15% of the resolution systems can be reached before charges are brought, 27% after charges are brought, and 37% either before or after charges are brought. For natural persons, the proportions are comparable. Fewer than a quarter (20%) of the resolution systems are only possible before indictment, while 22% are only available after indictment. Nearly half (47%) of these resolutions are available either before or after indictment.

[103] OECD data collection questionnaire results, Table 3 and 4.

Figure 20. When can a resolution be reached?



Source: OECD data collection questionnaire results, Tables 18 and 19.

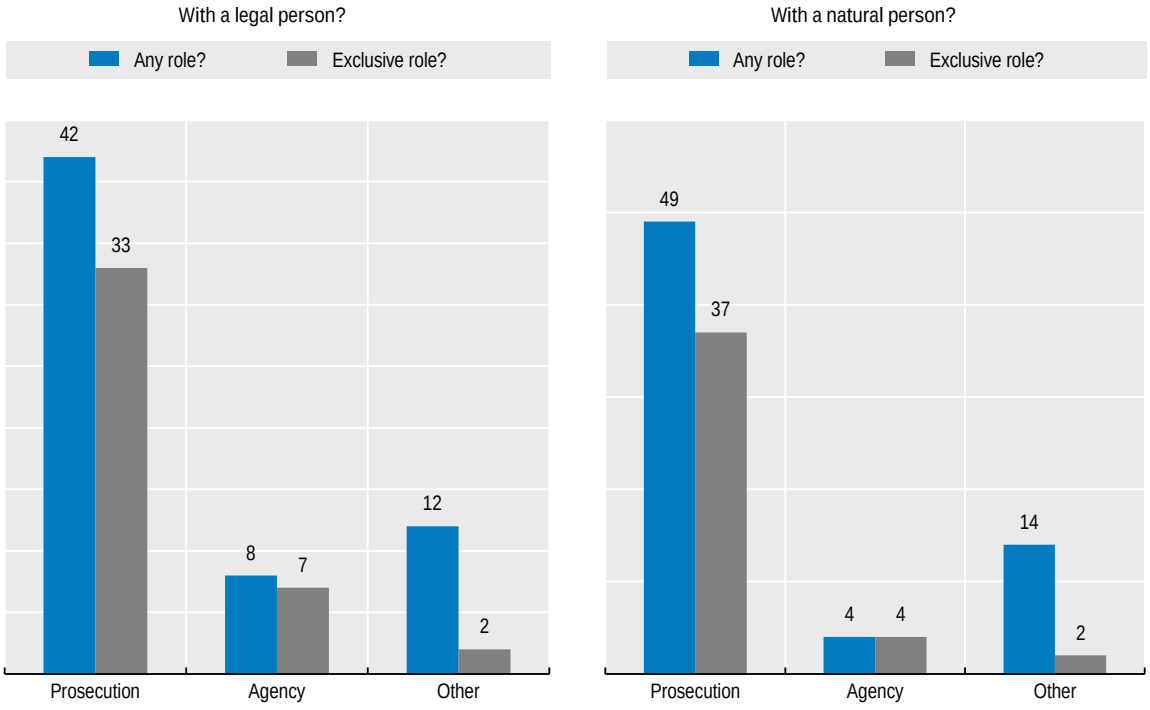
This shows that a wide range of possibilities exist within the countries Party to the Convention on when to use a non-trial resolution to conclude a foreign bribery case. At times, this is because a given country has multiple resolutions, with some available before and others after charges are filed (e.g. the NPAs or the *DPAs* in the **United States**). In other instances, a country can resort to a particular resolution either before or after proceedings have begun (e.g. **France**'s *CJIP* or **Germany**'s *resolution under section 153a*, which can be reached with natural persons either before or after indictment). The fact that over half of the resolutions available for natural and legal persons can be reached before indictment[104] enables law enforcement authorities in countries Party to the OECD Anti-Bribery Convention to enforce their foreign bribery laws from the relatively early stages of proceedings. By avoiding the costs associated with taking complex criminal cases to trial, these resolutions thus provide an interesting potential for a broader and more frequent use than achieved to date. The following sections will further this analysis with the assessment of the reasons and incentives for both the prosecutors and a natural or a legal person to prefer a resolution over a full court procedure before an indictment is filed or the proceedings are otherwise commenced (see Chapter 3.3).

3.1.2. Which authority can conclude a resolution?

Figure 21 shows that the prosecution plays a dominant role across resolution systems, as compared with other agencies or courts, in concluding resolutions with both legal and natural persons (in 42 and 49 of the respective resolution systems). This pattern is slightly more accentuated for natural persons. This reflects the fact that the vast majority of resolutions are available in criminal proceedings, in particular for natural persons. Even when the prosecution's role is not exclusive, for instance in administrative and civil proceedings, it remains prominent in a large majority of cases.

[104] This is based on the addition of the percentage of resolutions that can be reached before indictment or either before or after indictment.

Figure 21. Authorities' role in concluding resolutions



Source: OECD data collection questionnaire results, Tables 18 and 19.

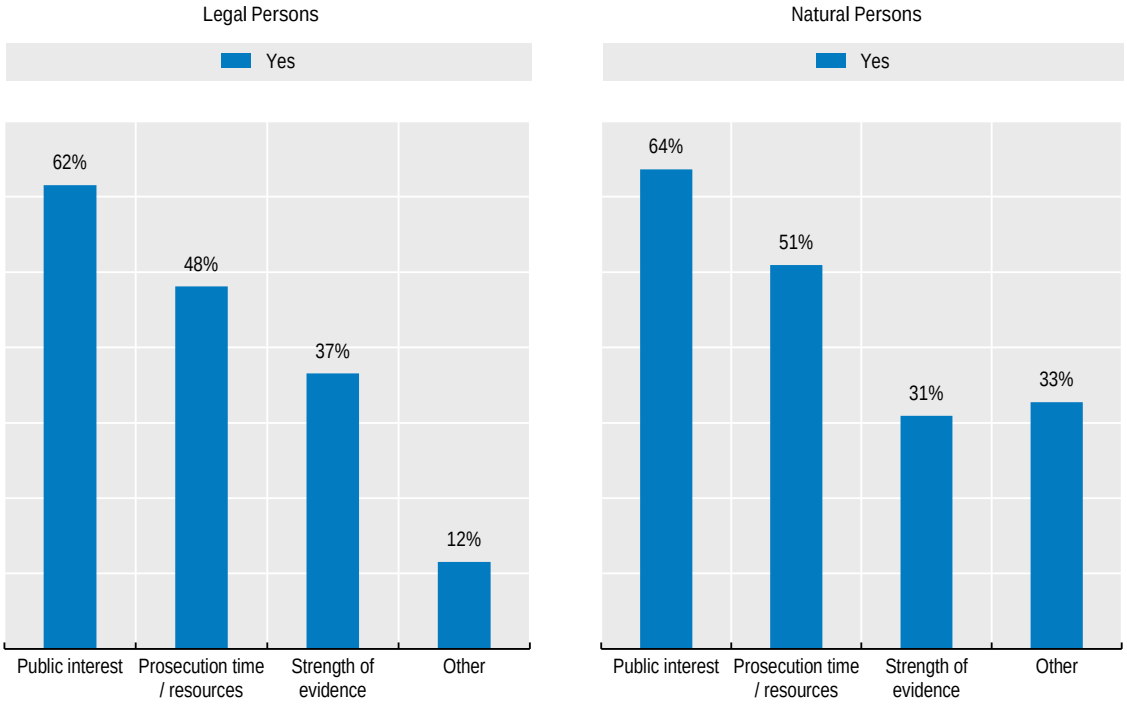
3.2. Criteria and factors considered by prosecution or other relevant authority to offer a resolution

When deciding to resort to a resolution, prosecutors and other relevant government agencies in charge of concluding a resolution in foreign bribery matters consider a number of factors.

3.2.1. Three commonly cited factors: public interest, prosecution time/interest, and strength of evidence

The most common factors considered by prosecutors are (as shown in Figure 22): the public interest, the time and resources available to the prosecution (or other enforcing agency), and the strength of evidence already available at the stage of making this decision. Figure 22 shows that the factor that is most frequently taken into account is the public interest (in 62% and 64% of the resolution systems for legal and natural persons, respectively). It is followed by considerations linked to the prosecutors' time and resources (in respectively 48% and 51% of the resolution systems for legal and natural persons). Time and resource management is a constant challenge for law enforcement authorities. The transnational dimension of foreign bribery, as well as the complexity of the offence and its hidden nature compounds the difficulties faced by prosecutors in the resolution of these cases. This point is further discussed in Chapter 3.2.3. The strength of evidence, which one might have hypothesised would incentivise a defendant to enter into a resolution, is only considered in respectively 37% and 31% of the cases. The incentives to enter into a resolution are further discussed in Chapter 3.3.

Figure 22. Factors considered by authorities when deciding to resort to a resolution



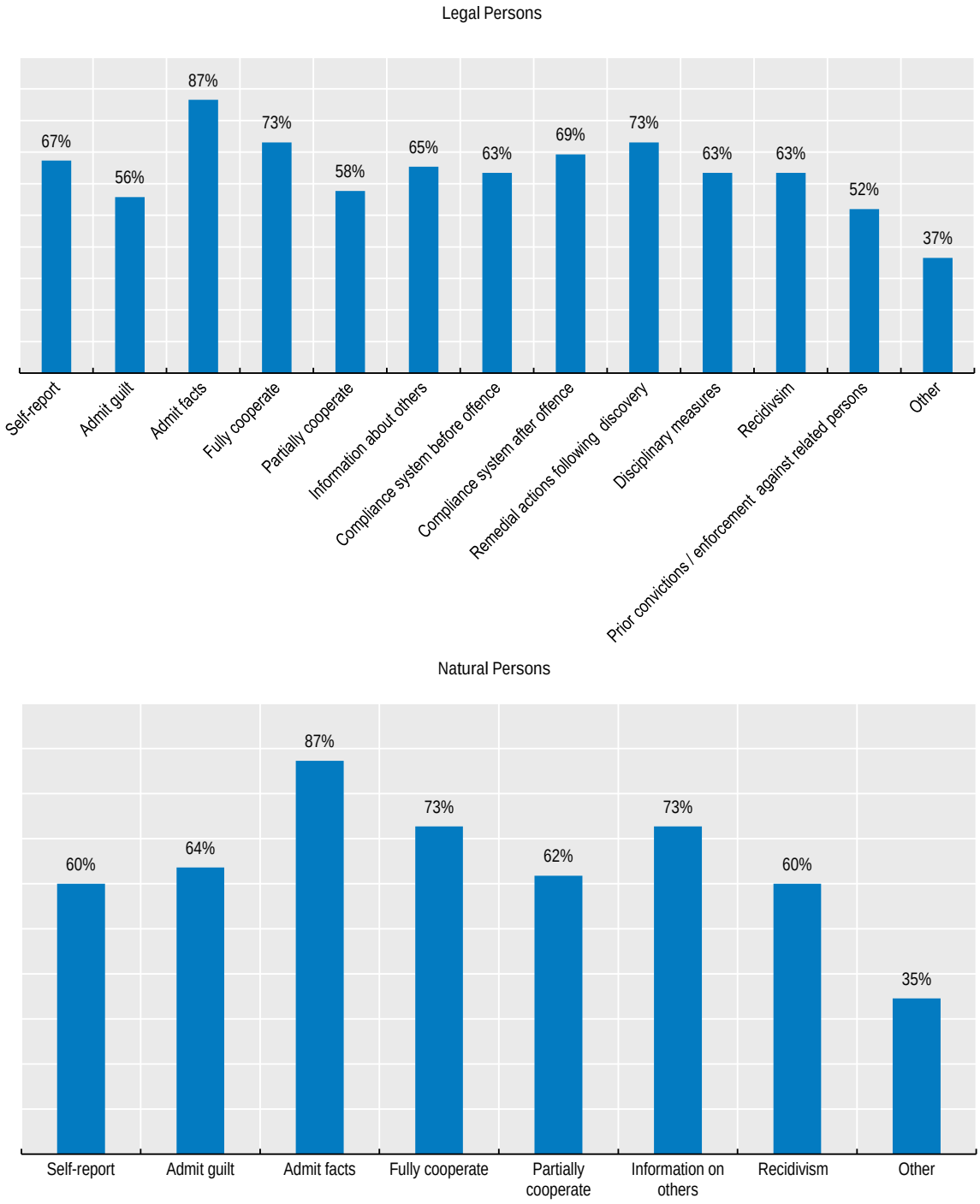
Source: OECD data collection questionnaire results, Tables 22 and 23.

3.2.2. Criteria and factors pertaining to the behaviour of the alleged offender

Several countries have adopted policies and guidance outlining the alleged offender's actions required or considered to access a non-trial resolution. These policies generally promote and reward the alleged offenders' good behaviour at different stages of the resolution process. This approach (further discussed in Chapter 3.3.4) illustrates the extent to which an alleged offender's behaviour can influence both the nature of the resolution (trial or non-trial and, in the latter case: conditional agreements or non-prosecution agreement for instance), as well as the content of a resolution (in particular, sanctions and conditions). Such behaviour includes self-reporting and cooperation, but also preventive efforts and remedial actions. In the context of a trial, these behaviours could mitigate the sanction. The section below examines how these behaviours can weigh on the non-trial resolution process itself. This potentially broader impact of an alleged offender's behaviour on the type and outcome of a resolution is to be balanced with the fact that in most non-trial resolutions, the offender gives up his constitutional rights to a trial and waives other means of defence.

Figure 23 shows that a number of factors pertaining to the behaviour of the alleged offender are considered by prosecutors and/or other relevant authorities when deciding whether a resolution should, or should not be used in a given case. Some of these factors are common to both resolutions for legal and natural persons, while others are more specific.

Figure 23. Frequency in which factors pertaining to the alleged offender's behaviour are taken into account in resolution systems



Source: OECD data collection questionnaire results, Tables 20 and 21.

Behaviour of the alleged offender prior to the resolution process

- Remedial action and disciplinary measures

As shown in Figure 23, remedial action is among the most frequent factors for resolutions involving legal persons, after admission of facts and full cooperation (discussed below). It is considered for 73% of the applicable resolution systems. For legal persons, the remedial action may include disciplinary measures taken following the discovery of the wrongdoing, including the firing of the natural persons involved in the wrongdoing (in 63% of the resolution systems).

- Compliance system

The existence of a compliance system in a company is taken into account in over half of the resolution systems. For 63% of the resolutions, authorities will consider whether a compliance system existed before the offence occurred. For 69% of the resolutions, the authorities will consider efforts to develop a compliance system after the offence occurs. This factor is also a key element in the assessment of the liability of the legal person in line with the 2009 OECD Council Recommendation (Annex 1.B.).[105]

- Recidivism and/or previous convictions/enforcement actions against related persons

Finally, recidivism (for both legal and natural persons) and/or previous convictions or enforcement actions against related persons (for a legal person) are also taken into account in over half of the resolution systems (63% and 52% of the resolutions for legal persons; and 60% for natural persons). This is a key aspect for anti-corruption NGOs and academics. Corruption Watch UK, for example, has emphasised that "settlements should not be given to companies that have had previous enforcement or regulatory action taken against it."[106] The consideration of recidivism may not necessarily be enshrined in the law or implementing texts. It is nonetheless at least a matter of policy in a number of the above countries not to offer the advantages attached to a resolution to recidivists. In other countries, recidivism, while taken into account, may not *per se* prevent the prosecution from resorting to a resolution. This is for instance the case in the **United States** under certain circumstances as illustrated by the ***Biomet case.*** In this case, while the company had been in breach of the terms of a first 2012 DPA, it entered into a second DPA with the DOJ in January 2017. (See summaries of cases in Annex B).

Behaviour of the alleged offender during and after the resolution process

- Admission of facts

The admission of facts appears to be the most common denominator across resolution systems for both legal and natural persons (considered in 87% of the resolution systems). Given that one of the main objectives pursued by resolutions is to shorten investigations and proceedings, this factor unsurprisingly confirms as a prerequisite in most resolutions

[105] OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Council on 26 November 2009.

[106] See "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?", Corruption Watch (2016), and "*Should criminal settlements be available to corporate recidivists?*", Jessica Tillipman and Samantha Block, 20 February 2018.

systems. Both trials and non-trials resolutions are resource intensive and costly in complex multi-jurisdictional cases as foreign bribery cases often are. Nonetheless, non-trial resolutions allow for speedier and more cost effective conclusion of cases, often involving shorter investigations, in particular when the facts are admitted, which is often the case with the types of resolutions encouraging self-reporting and cooperation. In the case of companies, this could include sharing the results of internal investigations. In addition, requiring the accused to admit facts helps ensure that those who resort to a resolution can justify the decision, whether it is subject to review or public scrutiny.

- Full or partial Cooperation

The second most frequent factor to be taken into account, which is also closely tied to the admission of facts, is the full cooperation of the accused. This factor is considered in 73% of the resolution systems for legal and natural persons. Even partial cooperation would be considered in over half of the resolution systems for legal and natural persons, namely: 58% and 62% of resolutions, respectively). For resolutions with natural persons, the third most frequent factor considered is whether the accused has or is willing to provide information about others involved in the wrongdoing (73% of resolutions). The forms this cooperation can take are discussed below, followed by an analysis of internal investigations.

- Forms of cooperation either required or considered before concluding a resolution

Cooperation is logically the factor that is mentioned the most frequently across the foreign bribery cases studied in this Study, irrespective of the countries where they were concluded and even if taken together with other relevant factors (e.g. firing responsible individuals and other remedial actions, including reinforced and other prevention measures). For instance, in the ***Ballast Nedam/KPMG cases***, when deciding to extend an out-of-court resolution to KPMG, **the Netherland** Public Prosecution Service primarily took into account KPMG's cooperation with the investigation, even if other factors also contributed to this decision (e.g. the remedial action KPMG had taken to strengthen its compliance policy or the fact that the criminal offences took place a long time ago).

Figures 24 and 25 show what forms of cooperation are either required or considered before concluding a resolution with either a legal or a natural person.

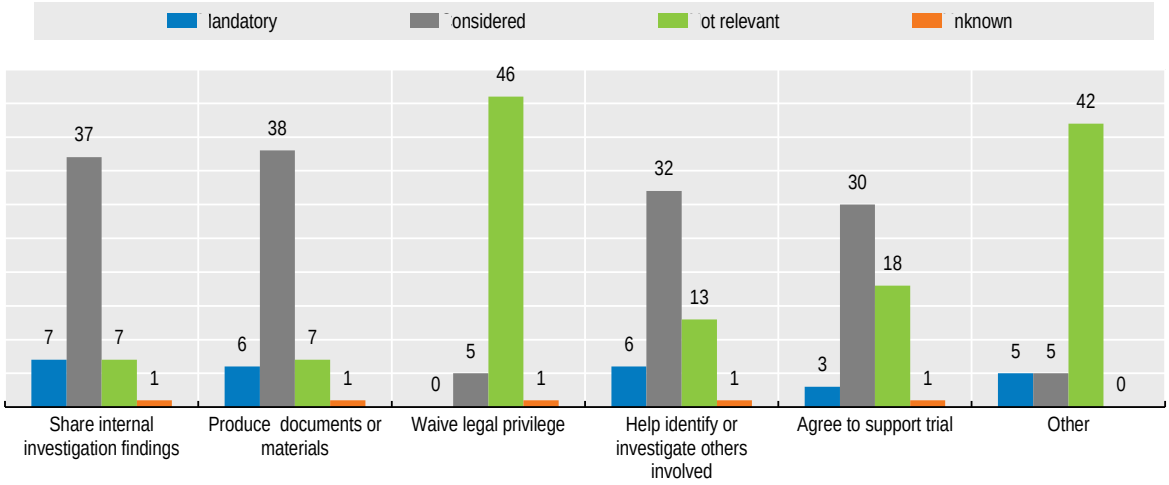
In the vast majority of countries, one or more forms of cooperation appearing in Figure 24 and 25 are considered but not required. In the **United States** all forms of cooperation are considered before concluding a resolution with either a natural or a legal person. The same applies in **Germany** when deciding to enter into a *resolution under section 153a* with a natural person. The most frequently cited forms of cooperation considered when deciding whether to resort to a resolution with either a legal or a natural person is the production of evidence, followed by the sharing of internal investigation findings for legal persons, and by helping identify or investigate others. Obviously, "others" could potentially include legal persons.

A few countries, including some that have relatively recently introduced a resolution system, expressly require specific forms of cooperation. For instance in **Brazil**, to conclude a *leniency agreement* with the prosecutors or the CGU and the AGU, a legal person is required to share internal investigation findings, produce documents and materials, help identify or investigate others involved and agree to provide support for trial. Also in Brazil, to conclude a *cooperation agreement*, a natural person is required to confess, produce documents or materials, help identify or investigate others involved, and to testify or

provide support for trial or other relevant proceeding. In **Argentina**, the *Penalty Exemption* and the *Effective Cooperation Agreement* both require that the accused help identify or investigate others involved, while the other forms of cooperation are only considered.

For legal persons, sharing internal investigations and producing documents or materials are the most frequently considered forms of cooperation (in 37 and 38 types of resolutions, respectively). The next most frequent forms of cooperation are helping to identify or investigate others and agreeing to support trial (in 32 and 30 types of resolutions, respectively). These forms of cooperation are in fact mandatory for a number of resolutions (see Figure 24), in particular sharing internal investigation findings.

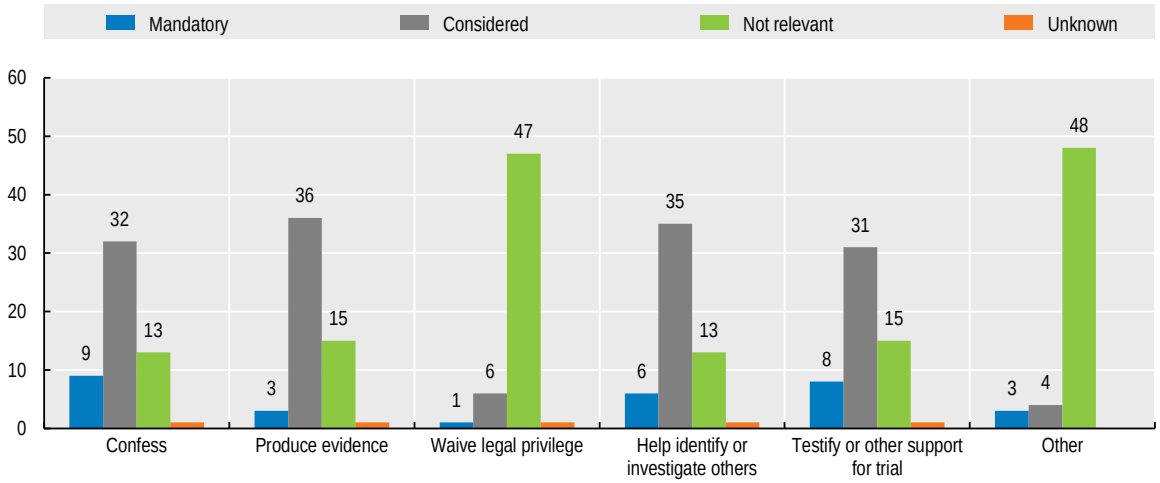
Figure 24. Forms of cooperation required or considered for Legal Persons (by resolution type)



Source: OECD data collection questionnaire results, Table 25.

For natural persons, producing evidence and helping to identify or investigate others are the two most frequently considered forms of cooperation (36 and 35 types of resolutions, respectively). These are followed by confession and agreeing to testify or otherwise support trial (31 types of resolutions). Confessing or testifying or otherwise supporting trial is mandatory for respectively 9 and 8 types of resolutions. Other factors may also be mandatory as reflected in Figure 25.

Figure 25. Forms of cooperation required or considered for Natural Persons (by resolution type)



Source: OECD data collection questionnaire results, Table 26.

- Internal investigations

In practice, for legal persons, the above-listed forms of cooperation all depend primarily on the initiation of an internal investigation by the company concerned. Internal investigations are a common feature of most non-trial resolutions for foreign bribery or related offences. These investigations have in practice been a key element for assessing the level of cooperation and thus for authorities deciding whether to offer the possibility of a non-trial resolution. While this has long been a practice for FCPA resolutions in the **United States**, the broadening of the cooperation among the Parties to the Convention in large foreign bribery cases has extended this approach to other Countries. (Examples of these multi-jurisdictional cases are discussed in Chapter 1. 4.)

These internal investigations are often conducted by large law firms and audit firms. In in 2008, in the ***Siemens case***, the German firm hired more than 300 outside lawyers, forensic accountants and support staff for a two-year internal investigation.[107] Certain anti-corruption NGOs have raised concerns that prosecutors may rely too heavily on these internal investigations instead of seeking information independently. Corruption Watch considers that "there is a danger that it is in a company's interest to limit or contain any investigation rather than revealing new information that arises from such investigations".[108]

While the risk exists, it could not be evidenced from the selected prominent cases reviewed for this Study.[109] In the cases studied, internal investigations may be conducted consecutively or in parallel to the investigation led by the country's investigators. The

[107] The investigation covered 34 countries and included 1750 interviews 100 million documents collected totalling an estimated 1.5 million billable hours. The internal investigation reportedly costed Siemens around Euros 550 million.

[108] Submission from Corruption Watch in response to the consultation for the Resolution Study.

[109] Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?"

company may share information uncovered with the authorities, as for instance, with the Netherlands Public Prosecution Service in the ***Ballast Nedam/KPMG cases***. In April 2015, in the ***Standard Bank case***, the bank self-reported foreign bribery suspicions to the UK authorities and initiated an internal investigation in parallel to the probe conducted by the SFO. In the **Norway** ***Yara case***, the company similarly received credit for cooperating in a way that did not interfere with the investigation by ØKOKRIM.[110]

However, this trend needs to be slightly nuanced. In countries where sharing internal investigations and producing documents or materials is not mandatory, certain authorities have recently reported difficulties in obtaining information about the results of internal investigations. During the Phase 4 evaluation of **Germany**, prosecutors indicated that companies are less likely to share internal investigations findings than in the past. The Phase 4 evaluation report notes in particular the increased tendency of companies to carry out their own internal investigations without coordinating these with the investigating authorities. The risk of losing evidence and influencing both co-defendants and witnesses was emphasized by the German prosecutors. They also pointed out that, in spite of new provisions on witness cooperation (section 46b CC), the willingness to cooperate on the part of the accused persons has decreased radically in the past years.[111] One prosecutor stated in Germany's questionnaire answers that hardly any accused persons voluntarily confesses to the public prosecutor's office to get a more lenient sentence. This was confirmed by both prosecutors and lawyers at the on-site visit.

Decreased willingness to cooperate could be the consequence of the sanctions pronounced in multiple jurisdictions against at least one prominent German company and a large number of its employees (or former employees) including years after the conclusion of the main coordinated non trial-resolutions with the company. This is a possible downside of the increased cooperation among investigating and prosecuting authorities reflected in the growing number of multi-jurisdictional cases and the subsequent investigation of either the same company or its subsidiaries as well as employees in the same or other jurisdictions. The ***Odebrecht case*** is an illustration of the consequences for a number of individuals in a number of countries that were not part of the initial coordinated resolution.

As discussed above, entering into a resolution may obligate the accused to help identify and investigate others as well as to agree to support any trial. Cooperation may thus initially generate a steadier enforcement of the foreign bribery offence with more individuals and company investigated and sanctioned in multiple jurisdictions (whether simultaneously or consequently), including through non-trial resolutions. Over time, however, companies and their lawyers may become aware of the risks of long and costly proceedings in multiple jurisdictions for themselves and their employees. This may negatively impact willingness to cooperate unless clear policies frame both the benefit of such cooperation and the use that can be made of information obtained through cooperation in parallel or subsequent proceedings. (This is further discussed in Chapter 6.)

- Self-reporting

Self-reporting is mentioned as a factor in 67% of the resolution systems. For natural persons, it is relevant in 60% of the resolution systems.

[110] ØKOKRIM press release, published 15 January, 2014, updated 28 November, 2017, www.okokrim.no/forelegg-til-yara-paa-295-millioner-kroner.5990608-411472.html

[111] German Phase 4 Report, paras. 171-172.

Although self-reporting is sometimes compared with full cooperation, the Parties to the Convention that responded to the OECD data collection questionnaire results report that it is less frequently considered as a factor to decide to enter into a resolution. Different legal traditions and systems, and in particular the right not to self-incriminate, which exists in many countries, may at least partly explain this difference. Furthermore, resolutions that are more akin to plea deals, may not place as much importance on self-reporting as *NPA*- or *DPA*-like resolutions do, or similar resolutions. They often take place at a stage of the proceedings where evidence has been gathered through other means.

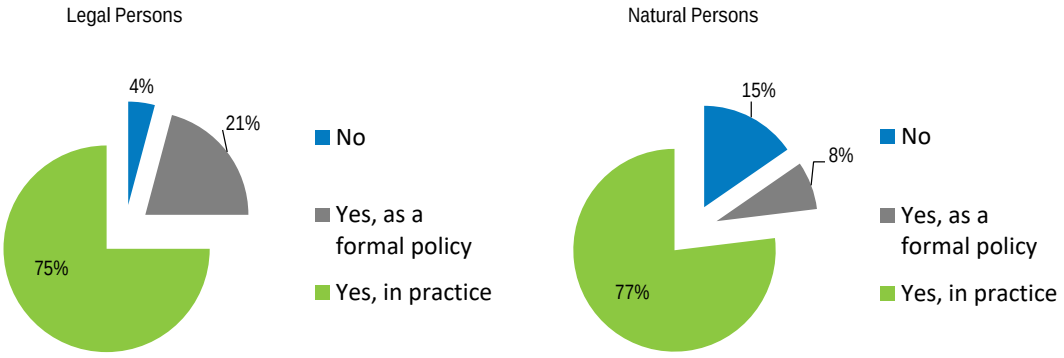
The importance granted to self-reporting is better reflected when analysing how many countries Party to the OECD Anti-Bribery Convention have at least one resolution system that encourages voluntary disclosure (see Figure 26). For legal persons, this is true for 96% of the Parties to the Convention that responded to the OECD data collection questionnaire results, which report they encourage self-reporting either as a formal policy (21%) or in practice (75%). The percentage is only slightly lower for natural persons, with 85% of the countries encouraging self-disclosure either as a formal policy (8%) or in practice (77%) for at least one resolution system. As discussed in Chapters 3.2 and 4.2, the benefits attached to self-reporting vary from one country to the other.

As noted in the Working Group's 2017 Study on *The Detection of Foreign Bribery*, self-reporting is often taken into account as part of the wider picture relating to the cooperation by the company in any subsequent investigation. Clear guidance as to the definition or criteria used to define self-reporting, together with any ongoing expectations relating to cooperation, will greatly assist any company considering whether to report. The Study also provides examples of such guidance provided by countries Party to the Convention.[112]

Self-reporting has played a prominent role in a number of major foreign bribery cases. They provide multiple examples of the importance granted to self-reporting as part of the decision to offer a non-trial resolution. In the ***SBM Offshore case***, the company voluntarily disclosed to the Dutch Public Prosecutor's Office that it had initiated an internal investigation into potentially improper payments made to its sales agents for services. This initiated a reportedly good level of cooperation that was taken into account by the different authorities eventually involved in the non-trial resolution of the case. In the ***Biomet case***, in 2012, some of the facts were voluntarily disclosed to the DOJ. The importance granted to self-reporting varies from one country to the other and also depends on the circumstances of the case. For instance, in the ***Och-Ziff case***, in spite of the company's failure to voluntarily self-disclose the misconduct and its failure to cooperate in a timely manner at the early stages of the investigation, the overall level of cooperation that ensued led the DOJ to invite the company to enter into a *DPA*. This lack of early cooperation was, however, factored in the calculation of the sanctions imposed. (This is further discussed in Chapter 4.2) The same pattern of eventual cooperation after failing to self-report can be noted in the ***Rolls-Royce case***.

[112] OECD (2017), *The Detection of Foreign Bribery*.

Figure 26. Do countries encourage voluntary disclosure?



Source: OECD data collection questionnaire results, Table 24.

- Admission of guilt

Admission of guilt is a factor considered in over half of the resolution systems for legal and natural persons (56% and 64% of the resolutions, respectively). Admitting facts (but not guilt) contributes to effective investigations while still leaving room for the accused to mitigate the effects and consequences of the resolution. Conversely, an admission of guilt can carry consequences resembling those of a full trial, including in many cases the debarment of the company from public procurement. For instance, in **Italy**, while akin to a plea deal and involving recognition of facts, the *Patteggiamento* does not involve an admission of guilt. Similarly, in **France**, the *CJIP* only requires that the legal person must have admitted the facts and accepted the penal qualification retained (CCP Art. 180-2), but it does not *per se* require an admission of guilt. A wide range of nuances exist among the different resolution systems in this regard. For instance in **Brazil**, to enter into a *Leniency Agreement* with the FPS, an admission of guilt may be taken into consideration "depending on the facts". No such admission, however, is required.[113] In contrast, in **Austria**, in the context of a *Withdrawal from Prosecution due to Cooperation***,** the perpetrator has to "confess remorsefully" (art 209a(1) CCP).

3.2.3. Other factors arising from the Working Group on Bribery evaluations

The Working Group has identified other factors in the course of its country evaluations. One is the challenge of resolving complex multi-jurisdictional cases, and the other is the risk that long and complex investigations may ultimately run up against the statute of limitations. The conjunction of both factors was highlighted in **Italy** Phase 3 evaluation, where the Working Group noted that Italian prosecutors reported that they mainly resorted to the *Patteggiamento* procedure to resolve foreign bribery cases in order to "avoid […] the dismissal of cases because of the statute of limitations" and to "choos[e] the most economically viable solution against a background of complex investigations and scarce resources."[114] In addition, the Working Group has stressed that countries should not consider the factors prohibited by Article 5 of the Convention when deciding to resort to a resolution. These three sets of factors are analysed below.

[113] Law 12846/2013, Article 2 ("responsabilidade objetiva").

[114] Italy Phase 3 Report, para. 96.

Complexity of foreign bribery cases

Foreign bribery cases, with their inherent transnational dimension, typically require long, complex and resource-intensive investigations, often including the need for Mutual Legal Assistance. As foreign bribery is an intentional offence, there is a heavy evidentiary burden to prove beyond any reasonable doubt that the offence was committed in such complex cases. For a number of Parties to the Convention, the Working Group has noted that it could be challenging to gather sufficient admissible evidence to meet this high threshold. In certain cases, this may have impeded the enforcement of the offence at trial. In the Phase 4 evaluation of **Finland**, for example, the Working Group noted that the difficulty in meeting this high threshold may, at least partly, explain why each of the five cases that had progressed to prosecution since 1999 had resulted in the acquittal of all parties for foreign bribery.[115] Transparency International has also observed that non-trial resolutions "allow prosecutors to weigh different issues: the strength of their evidence, the likelihood of conviction and the resource needed".[116]

In this regard, in its Phase 4 evaluation of **Germany**, the Working Group noted that the high level of enforcement of the foreign bribery offence against individuals in Germany "has been achieved through the continued pragmatic approach in using alternative offences to sanction cases within the foreign bribery sphere and through the use of a range of proceedings, including conditional resolutions with individuals" (i.e. *resolutions under section 153a CCP*).[117] In the Phase 3 evaluation, German prosecutors and judges explained this pragmatic approach during the on-site visit by "the necessity to achieve a quick solution for both economic reasons (the cost of justice should be kept as low as possible in achieving a comparable result) and human rights reasons (article 6 of the European Convention on Human Rights and the right to a 'fair and public hearing within a reasonable time')".[118]

Statute of Limitations/Prescription

The impact of the statute of limitations on the decision to enter into a non-trial resolution is relatively complex for both the prosecution and the accused. A number of parameters must be in place to allow the non-trial resolution to operate. It emerges from the Working Group evaluations that while prosecutors may have an interest in offering the possibility to resolve a case through a non-trial resolution swiftly in order to, *inter alia*, limit the costs of justice and prevent the case from becoming time-barred, defendants have usually limited interest in agreeing to such a resolution in the absence or serious threat of enforcement at trial. No such threat exists in countries where the statute of limitations is likely to expire before a final court decision is reached.

In **Italy**, the Working Group Phase 3 Report noted that "the *Patteggiamento* procedure appears to have played (even if to a limited extent) the role of a safety net in a system where

[115] Finland Phase 4 Report.

[116] Transparency International, (2015) Policy Brief, "*Can Justice Be Achieved Through Settlements?",* www.transparency.org/whatwedo/publication/can_justice_be_achieved_through_settlements.

[117] Germany Phase 4 Report.

[118] Germany Phase 3 Report.

most cases would otherwise be time barred."[119] However, the report also noted that "prosecutors and members of the legal profession who participated in the on-site visit admitted that, in the vast majority of cases, the possibility to reduce penalties does not have much weight in comparison to the total impunity a defendant can expect from the lapse of the limitation period".[120] For this reason, the use of Patteggiamento to resolve foreign bribery cases had, at the time, been used in only a limited number of cases.[121]

Factors forbidden under the OECD Anti-Bribery Convention

As for all enforcement decisions, the Working Group closely monitors countries' use of non-trial resolutions, to ensure that they do not take into account factors forbidden under Article 5 of the Convention, namely: "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved". Parties to the Convention should not be influenced by these factors when deciding to enter into a resolution nor should they take them into consideration when deciding on the types and level of sanctions (as further discussed in Chapter 4.2).

Some countries have enshrined the non-consideration of these factors in their implementing legal framework. This is for instance the option that **Brazil** has taken: Following the entry into force of a new Corporate Liability Law (Law 12 846), Brazil enacted an implementing Decree and several other legal texts in support of the CLL. These clarify in particular the non-consideration of factors forbidden under Article 5 of the Convention "in *leniency agreement* preliminary investigation".[122] In addition, the **United Kingdom**'s DPA Code of Practice, which was developed by the SFO and the CPS, provides that prosecutions considering whether it is in the "public interest" to enter into a *DPA* should recall the United Kingdom's "commitment to abide by the OECD [Anti-Bribery] Convention […] in particular Article 5".[123]

3.2.4. Is there a right for an alleged offender to enter a resolution?

Discretionary power of prosecution or other relevant authorities to enter a resolution

When the criteria to enter a resolution are met, depending on the countries, the prosecution or other relevant authorities may or may not have discretion on whether to use a resolution in a given case. Where prosecutors are required to enter a resolution when criteria are met, it generates a *de facto* "right to a resolution" for the alleged offenders. For instance, in **Austria**, prosecutors are required by law to enter a *Diversion* when the legal criteria are met. In a foreign bribery case, *Diversion* must indeed be used if: (i) the facts of the case are sufficiently clear, (ii) the offence has not caused death, (iii) the criminal act has little

[119] Italy Phase 3 Report, para. 96.

[120] Italy Phase 3 Report, para. 94.

[121] Italy Phase 3 Report.

[122] Brazil Follow-up to Phase 3 Report; Ordinance nº 910 of 7th April 2015, article 40.

[123] DPA Code of Practice, Section 2.7 (expressly prohibiting "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved").

"disruptive value", (iv) criminal proceedings are not necessary to prevent further crimes and (v) the offence is not punishable by more than three years.[124] This does not pre-empt the fact that a margin of discretion remains in the appreciation of most of these criteria. In countries where prosecutors have discretion as to whether to use a non-trial resolution, they may still opt to systematically use it when the legal conditions are met as a matter of policy. This is for instance the case in **Norway** where, "[i]f the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority *may* issue a writ giving an option to this effect […] instead of preferring an indictment" (emphasis added). In practice, ØKOKRIM almost systematically extends penalty notices to legal persons accused of foreign bribery, regardless of whether the company self-reported or cooperated[125] In contrast, in Italy, both the defendant and prosecution can present a request for a *Patteggiamento*. The request is subject to the other party's consent. A dissent from the prosecutor must be motivated. If the trial judge finds that the prosecutor's dissent was not justified, they can decide to nevertheless issue the judgment validating the *Patteggiamento*.[126]

Rewarding voluntary disclosure and cooperation without exonerating offenders

Civil Society representatives have on recent occasions expressed the view that access to a resolution should not be a right but should rather be contingent on an alleged offender's good behaviour. In their view, justice may not be adequately delivered if enforcement authorities are too lenient in granting access to such instruments based in particular on the consideration that considerable time and resources can be saved in resolving cases this way. Transparency International and Corruption Watch have hence recommended that prosecutors only grant resolutions when the alleged offender has self-reported the wrongdoing, admitted guilt and cooperated with law enforcement authorities.[127] In March 2016, the two organisations, along with Global Witness and the UNCAC Coalition called for the Working Group on Bribery to adopt international standards on resolutions, including that resolutions should only be used where a company is prepared to admit wrongdoing.[128]

Certain academic experts advocate for this approach as well, but often with the distinct objective of supporting enhanced corporate compliance and deterring white collar crime. Considering that alleged offenders have better access to incriminating information than authorities, academics argue that offenders have a key role to play in the resolution process.

[124] Austrian Code of Criminal Procedure, Section 198 (1) and (2), Austrian Criminal Code, Section 302 para 1. Diversion cannot be applied to offences punishable by more than five years (Austrian Code of Criminal Procedure, Section 198 (2)). However, diversional measures cannot be applied to corruption and related offences that are punishable by more than three years. Diversion can and must be applied only when the amount of the advantage does not exceed EUR 50 thousands. If the advantage is greater, the maximum imprisonment sentence is five years, which precludes the use of Diversion.

[125] Norway CPA Section 255, Norway Phase 4 para. 80-84.

[126] Italian Code of Criminal Procedure (CCP), art. 446 and 448.

[127] See Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?", and Transparency International, (2015) Policy Brief, "*Can Justice Be Achieved Through Settlements?"*

[128] See article on this subject here: www.fcpablog.com/blog/2016/3/15/ngos-to-oecd-corporate-pretrial-agreements-can-work-but-we-s.html.

Enforcement authorities should therefore leverage access to non-trial resolution instruments to both obtain cooperation of alleged offenders in the investigation process, and encourage good behaviour, including through the development and implementation of enhanced compliance systems. For instance, according to Professor Jennifer Arlen; "government[s] can structure corporate liability to simultaneously ensure firms do not benefit from misconduct, while also incentivizing them to detect, self-report and cooperate. […] firms that engage in effective policing should be rewarded through a less severe form of liability, such as a civil sanction or an alternative form of criminal settlement (such as a deferred prosecution agreement […])".[129] Similarly, the 2016 letter from the four NGOs to the Working Group on Bribery (mentioned in the paragraph above) recommended that non-trial resolutions "be used to leverage full disclosure of wrongdoing within a company".

While civil society generally consider that making access to a non-trial resolution contingent on the alleged offender's good behaviour is a good practice, they also warn against the risk of being too lenient with offenders that systematically come forward and cooperate with enforcement authorities. Referring to "jurisdictions [where] self-reporting and cooperation can be used as a complete defence for foreign bribery offences", Corruption Watch expresses concern on "the impact such an approach may have on public confidence, and most importantly on exposing corruption given that few if any details of wrongdoing emerge from such an approach".[130] The Working Group on Bribery shares this view. In Phase 2, the Working Group recommended that the **Czech Republic**, the **Slovak Republic** and **Slovenia** amend their respective legislation in order to exclude the defence of "effective regret" from the offence of foreign bribery. It was also an issue for follow-up in **Greece**. In Phase 3, it also gave rise to a similar recommendation to **Spain** and **Portugal**. The Working Group also recommended that the Slovak Republic ensure that "the provision of immunity to cooperating offenders is not an impediment to the effective enforcement of the foreign bribery offence."[131]

A business community increasingly in favour of non-trial resolutions

While most systems do not create a right for alleged offenders to enter a resolution, business organisations and companies in several countries have advocated in favour of the adoption of resolution systems. In France, in the year preceding the adoption of the law that created the *CJIP*, the national union of employers advocated for the design of a French *DPA*.[132] In Canada, before the adoption of the *Remediation Agreement*, a leading engineering company that was accused of bribing officials in Libya was among the loudest voices in favour of

[129] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page 2.

[130] Submission from Corruption Watch in response to the consultation for the Resolution Study.

[131] Phase 2 Reports of the Czech Republic, para. 244, the Slovak Republic, para 244, Greece, para.134-136; Phase 3 Reports of Spain, para. 39; and Portugal, para. 41-42.

[132] See *Note d'information sur l'inflation des normes anti-corruption et les risques induits pour toute entreprise française ayant une activité à l'International*, MEDEF, March 2015 ; www.medef.com/uploads/media/node/0001/04/f32f888f19f1465961d35b51fbf31a7e1623256c.pdf and *Corruption : État des lieux juridique et pratique d'une lutte mondiale*, Table Ronde published by Option Droit & Finance, www.optionfinance.fr/droit-affaires/les-rencontres-dexperts/compliance/corruption-etat-des-lieux-juridique-et-pratique-dune-lutte-mondiale.html

the adoption of a *DPA* scheme in the country. This involvement from the business community might be grounded in the perception that resolutions are more adapted than traditional justice to resolve offences that arise in the context of international business and trade. The fact that certain forms of resolution are based on an agreement between the prosecution and alleged offender, often leading to lesser sanctions or less stringent consequences than in a trial, might also explain this involvement and pressure for change. Another reason is that, although international *ne bis in idem* is not recognised by most Parties to the Convention, resolving a case with prosecutors "at home" is often perceived as more manageable and less costly by companies potentially involved.

Going a step further, a company publicly advocated for a right to a non-trial resolution in a specific case. In October 2018, a few month after the *Remediation Agreement* became available to Canadian prosecutors, the Public Prosecution Service of Canada announced that it would not use this instrument to settle foreign bribery charges against an engineering company accused of bribing Libyan officials. The Public Prosecution Service explained that the case did not meet the criteria set forth in the law. In response, the company issued an open letter claiming the right to a resolution, essentially putting forward economic arguments. The company argued that "a lengthy court process may be a waste of taxpayers' money and resources", while the conclusion of a Remediation Agreement would "increase trade and tax revenue".[133] The growing involvement of the business community in favour of non-trial resolutions reflects what certain experts have called a "shift in paradigm" in the resolution of economic crimes, including foreign bribery.[134] While non-trial resolutions were originally designed as an instrument to facilitate enforcement, these academics argue that these resolutions have also contributed to rebalancing powers between law enforcement authorities and corporate offenders by giving the latter a greater negotiating power than they typically have in the context of a trial.

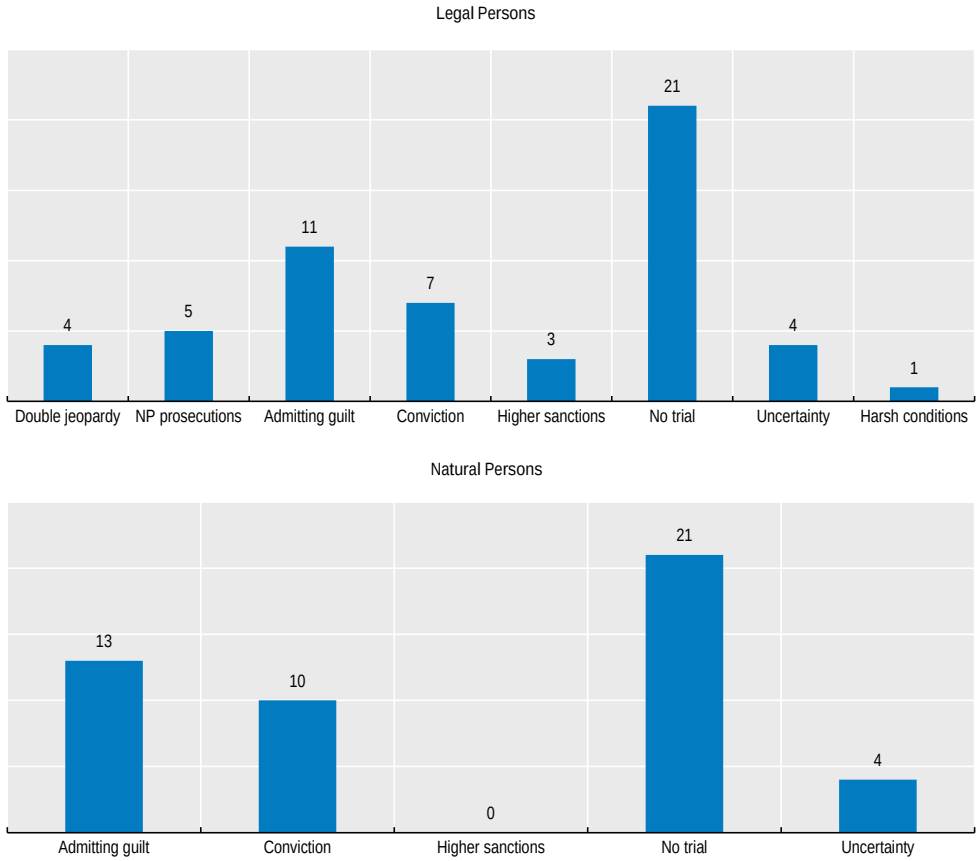
3.3. Incentives and guidance for an accused person to enter into a resolution

As shown in Figure 27, entering a resolution can present significant drawbacks for an alleged offender, including waiving the right to a full court procedure, carrying out a costly internal investigation (for legal persons), admitting the facts or, in some cases, admitting guilt. In order to be viable alternatives to a full trial, resolutions must offer incentives that outweigh the disadvantages for alleged offender, without creating an "easy way out" that would fail to deter recidivism. While some incentives are common to all types of resolution systems, others vary according to each type of system. The present section examines the incentives that can lead alleged offenders, whether legal or natural persons, to resolve foreign bribery allegations or charges without going through a full trial.

[133] *Thank you for considering our position*, Open letter by SNC-Lavalin, 26 October 2018, www.snclavalin.com/en/files/documents/publications/snc-lavalin-open-letter-october-26-2018_en.pdf

[134] Antoine Garapon, Pierre Servan-Schreiber, *Deals de Justice, Le marché américain de l'obéissance mondialisée,* 2013, PUF.

Figure 27. Countries' views on disincentives for entering into resolutions (by resolution)



Source: OECD data collection questionnaire results, Table 33 and 34.

3.3.1. No incentive without deterrence

No matter how strong an incentive to enter a resolution might seem, it will be ineffective unless the alternative is a strong likelihood of trial and conviction. This critical prerequisite was discussed during the 2018 OECD Global Anti-Corruption and Integrity Forum.[135] In a panel dedicated to non-trial resolution of foreign bribery cases[136], speakers used the "carrot and stick" metaphor to explain how resolution systems can only work where a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public. In other words, the carrot is only as enticing as the stick is menacing. Regardless of the incentives provided by a non-trial resolution, they will

[135] OECD Global Anti-Corruption & Integrity Forum.

[136] The panel, entitled "*Settling Foreign Bribery Cases with Non-Trial Resolutions*" formed part of the consultation process conducted for this study. Jennifer Arlen, Professor at New York University School of Law, moderated the panel. Speakers included: Susan Hawley, Policy Director of Corruption Watch; Daniel Kahn, Chief of the Foreign Corrupt Practices Act Unit of the US Department of Justice; Astrid Mignon Colombet, Lawyer at Partner at Soulez Larivière & Associés; and Robert Sikellis, Chief Counsel Compliance of Siemens. Download the panel discussion note: www.oecd.org/corruption/Panel-on-settling-foreign-bribery-cases-non-trial-resolutions.pdf

remain meaningless if the most probable alternative for an alleged offender is to escape any form of judicial reckoning.

In its evaluations, the Working Group on Bribery has observed this dynamic, noting that "there is little incentive to settle even for a defendant who has bribed in a system that is generally unable to bring cases to a conclusion".[137] In several instances, the Working Group on Bribery found a correlation between weak foreign bribery enforcement and the infrequent use of resolution systems.

In **Italy**, for example, the Working Group on Bribery noted that the statute of limitations was the "primary reason" explaining why Italy's "significant enforcement efforts have led to only limited results in terms of sanctions imposed on offenders". The statute of limitations undermined the *Patteggiamento* in the resolution of foreign bribery cases, despite the multiple benefits it presents to the offender, including the possibility of reducing the maximum penalty by one-third or even conditionally suspending the sentence.[138] The period of limitation has since been extended and the Working Group will assess its impact on Italy's enforcement of the foreign bribery offence in Phase 4.[139]

A similar dynamic seems to be occurring in the **Czech Republic**, where insufficient funding hinders enforcement of anti-bribery laws. To this day, no individual or corporate entity has ever been sanctioned under the foreign bribery offence.[140] At the same time, the *Agreement on Guilt and Punishment,* which allows an alleged offender to secure a lower sentence and avoid a lengthy trial,[141] has never been used to solve a foreign bribery case. In the responses to the OECD data collection questionnaire results, Czech Republic explains that alleged offenders lack interest in the procedure as "they are hoping for an acquittal." It is likely that the lack of enforcement, because it nearly nullifies the risk of being sanctioned for foreign bribery, neutralises the benefits that an alleged offender can obtain from an *Agreement on Guilt and Punishment*, therefore undermining its relevance as an alternative enforcement mechanism.

3.3.2. Incentives deriving from the process of a non-trial resolution

Reducing the time of resolution

The speed of the proceedings is the most common advantage that derives from the conclusion of a non-trial resolution. Countries consider that it is a benefit in 81% of resolution systems that can be used with a legal person (42 out of 52), and 80% of resolution systems that can be used with a natural person (44 out of 55). This can be explained by the fact that non-trial resolution systems virtually always reduce the time of proceedings.

[137] Argentina Phase 2 Report, para 115. Also, in its Finland Phase 4 Report (page 4), the Working Group noted that "in a context where the courts' interpretation and application of the foreign bribery offence creates an extremely low likelihood of conviction, they note that there are few incentives for individuals to enter into a plea bargain."

[138] Italy Phase 3 Report, paras. 13 and 94.

[139] Law 103 of 23 June 2017, "Modifiche al codice penale, al codice di procedura penale e all'ordinamento penitenziario" (Amendments to the Criminal Code, the Criminal Procedure Code and the Penitentiary System), Gazzetta Ufficiale n.154 of 4-7-2017, in force on 03/08/2017

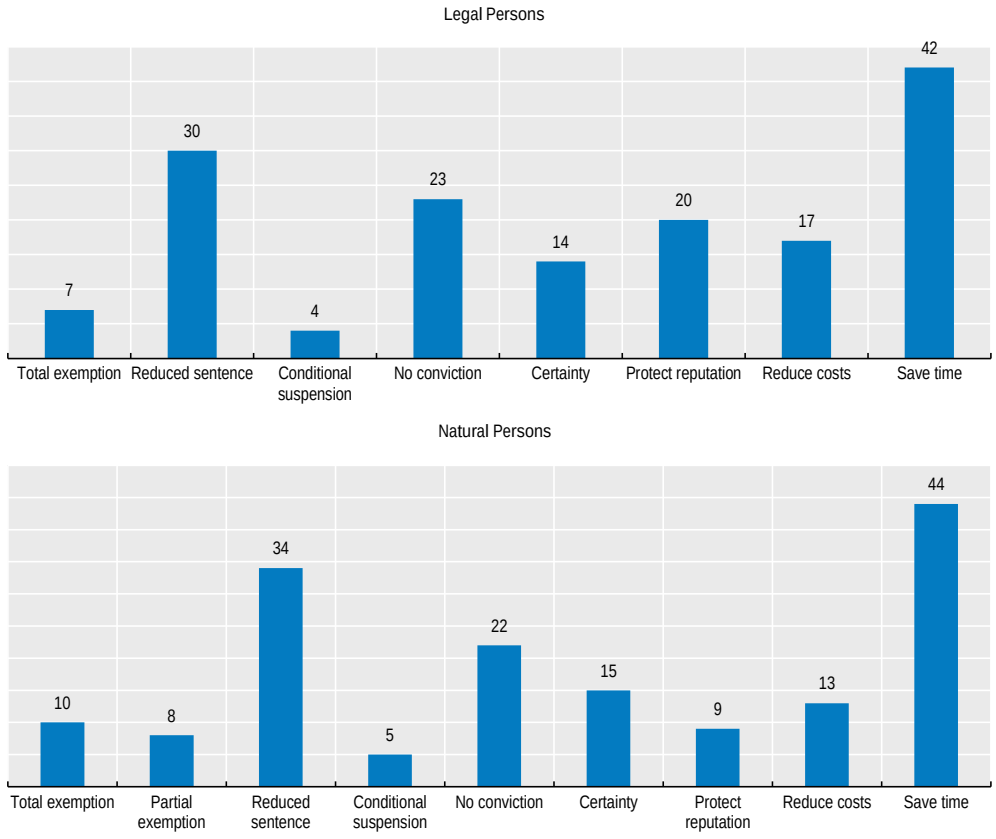
[140] Czech Republic Phase 4 Report, paras. 27 and 75.

[141] Information provided in the Data collection questionnaire.

Whereas the outcome of a resolution depends on the specific features of the system, the swift nature of non-trial resolutions derives from the process itself, regardless of the type of instrument used. Responses to the OECD data collection questionnaire results show that shorter proceedings is a benefit for defendants who enter into *NPA*-like or *DPA*-like resolutions, such as the **Dutch** *Transaction*, as well as resolution systems that are akin to a plea agreement, including the **Italian** *Patteggiamento* and the **French** *CRPC*.

According to the countries Party to the OECD Anti-Bribery Convention' response to the OECD data collection questionnaire results, speed does not necessarily outweigh other incentives in the defendant's decision to enter a resolution. For instance, while a *DPA*-like resolution could potentially be concluded more swiftly than trial, the offender's incentive to enter the agreement might be mainly driven by the opportunity to escape a conviction.

Figure 28. Views of countries Party to the OECD Anti-Bribery Convention on incentives for accused to enter into resolutions



Source: OECD data collection questionnaire results, Tables 31 and 32.

In the responses to the OECD data collection questionnaire results, however, several countries mention incentives that are direct consequences of shorter proceedings associated with non-trial resolutions. Referring to its *Optional Penalty Writ* resolution, **Norway** reports that "a practical incentive is that the case is solved fast and without lengthy and expensive trial and publicity that can be the result of such proceedings".

Limiting costs

Shorter proceedings mean fewer costs incurred by the alleged offender. In its responses to the OECD data collection questionnaire results, **Australia** reports that the *Plea Agreement* allows a defendant to "avoid lengthy trial and conviction processes and associated expenses." Expenses associated with trial typically include court costs and attorney fees. Considering that trial resolutions of foreign bribery cases can take years in some Parties to the Convention, the cost of legal representation can reach significant amounts. In the responses to the OECD data collection questionnaire results, reduced cost is expressly identified as an incentive for 17 resolutions that can be used with legal persons, and 13 that can be used with natural persons. While these figures seem low, it should be noted that, as explained above, reduced cost is one of the direct consequences of shorter proceedings, which is the most common benefit of resolution systems.

The low figures can also be explained by the fact that the alleged offender might have to incur expenses that they would not have had to spend in a trial procedure. Indeed, while the swift nature of a resolution reduces costs, offenders may have to agree to cooperate with the prosecution and investigate wrongdoings, which can be very costly.[142] In addition, the conditions imposed on the defendant in the context of a *DPA*, which may include the adoption of a robust compliance system and appointment of a monitor, require significant expenses. Experts tend to include the costs of such measures in the overall amount of the sanction.[143] Nonetheless, it might explain why reduction of costs is seldom mentioned as an incentive for the defendant in the OECD data collection questionnaire results.

Mitigating reputational damages

Non-trial resolutions limit the length and intensity of a defendant's exposure to bad publicity. Indeed, thanks to the swift nature of the proceedings, the accused person remains in the public eye for a shorter period.[144] Publicity generated from a non-trial resolution is also likely to be less intense than the media attention generated by pre-trial proceedings and a public trial. By limiting bad publicity, non-trial resolution of a foreign bribery case can mitigate the reputational ramifications that derive from it. Countries consider that this element constitutes an incentive for the defendant in 38% of non-resolution systems that can be used with a legal person (20 out of the 52), and 16% of systems that can be used with a natural person (9 out of the 55).

The important variation in the figure between legal and natural persons can probably be explained by the fact that reputational ramifications affect businesses to a greater extent than they do individuals. In particular, they could entail a drop in the share value as well as

[142] See Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12.

[143] See Jennifer Arlen, Reinier Kraakman, "*Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*", October 1997, New York University Law Review, Volume 72, Number 4.

[144] In the Norway Phase 3 Report, the Working Group on Bribery found that "companies sometimes also prefer a swifter conclusion to a case, to minimise the reputational risks to their corporation which prolonged media exposure may cause." (para. 64).

the loss of investor confidence and future business opportunities. These potentially significant losses may explain why legal persons are willing to renounce a trial and, in some cases, plead guilty to the offence in exchange for seeing their case resolved outside the courtroom. **Chile**, for example, reports in the OECD data collection questionnaire results that its *expedited procedure* requires that the defendant admit guilt and "renounce to the possibility of an acquittal", but it "saves the company from a lengthy trial, and prevents its reputational damage".

On the other hand, to the extent that reputational risk is an effective deterrent to corporate crimes,[145] mitigating the harm to the defendant's reputation may reduce the resolution's deterrent effect. By announcing when a resolution is concluded or even publishing its terms, countries can, at least to some extent, try and circumvent this effect. Publication of the terms of resolutions is further analysed in Chapter 5.2.

3.3.3. Incentives deriving from the outcome of a non-trial resolution

Incentives deriving from the outcome of a resolution are tied to the specific features of the resolution system. Several countries have designed resolution systems so that the outcome would be preferable for defendants than a trial outcome. The following segment explores the incentives that derive from the outcome of a non-trial resolution.

Avoiding a conviction and its consequences

Countries consider that avoiding a conviction is an incentive in 23 out of 52 resolutions concluded with legal persons (44%), and 22 out of 55 resolutions concluded with natural persons (40%). This type of resolutions include, among others, the **United States**'s *NPAs* and *DPAs* in criminal matters, the **United Kingdom's** DPA, the Netherland's *conditional dismissal* and, since 2016, the **French** *CJIP* for corporate defendants.

Avoiding a conviction and its collateral consequences presents obvious benefits for alleged offenders. According to Transparency International Canada: "the prosecution of companies can have serious consequences on innocent third parties such as employees, customers, suppliers and investors. Potential unintended impacts include losses in jobs, pensions, shareholder value and supplier contracts, resulting in damages to related businesses and markets.[…] Non-conviction-based resolutions, such as *DPA*s can protect internal and external stakeholders against at least some of these consequences."[146] One way that DPAs-like resolutions mitigate these risks is by shielding the defendant from being disqualified from public contracting. Indeed, as debarment is generally conviction-based, an offender who avoids a conviction also escapes being debarred.[147]

[145] *See* John Karpoff & John Lott, Jr., The Reputational Penalties Firms Bear from Committing Criminal Fraud, 36 J. Law & Econ. 757 (1993)

[146] Transparency International Canada (2017), "*Another Arrow in the Quiver - Consideration of a Deferred Prosecution Agreement Scheme in Canada*", page. 7, http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf.

[147] In the Data collection questionnaire, **Austria** reports that *Withdrawal from Prosecution due to Cooperation with the Public Prosecutor's Office* allows defendants to keep a clean criminal record is "especially important for the participation to international public procurement procedures".

Avoiding debarment from public contracting can be a powerful incentive for companies to enter into a resolution which does not automatically carry this consequence.[148] Unlike a fine, which impacts the finances of a company at a given time and can sometimes be handled strategically,[149] debarment affects future business opportunities and revenues. In the **United Kingdom**, *DPA*s and *civil resolutions* fall outside the mandatory exclusion scheme because they do not result in a conviction for the corporate defendant. When approving the *DPA* in the ***Rolls-Royce case***, the Court considered this as part of the consequences a full court trial would have if the DPA was not approved: "Debarment and exclusion would clearly have significant impact, and potentially business critical, effects on the financial position of Rolls-Royce. This could lead to the worst case scenario of a very negative share price impact, and, potentially, more serious impacts on shareholder confidence, future strategy, and therefore viability."[150]

A high-profile case against a leading Canadian engineering company illustrates how the anticipation of a conviction and its collateral damages can affect a company's business. **Canada** engaged proceedings against the company in 2015, based on allegations that it had paid bribes to secure several government contracts in Libya. At that time, no DPA-like system was available for prosecutors to dispose of charges arising under the Corruption of Foreign Public Officials Act (CFPOA), and a conviction under the CFPOA led to an automatic 10-year suspension from public contracting.[151] In 2018, while the proceedings against the company were still ongoing, Canada announced a project to design a DPA-like instrument in its legal system to resolve foreign bribery cases.[152] The prospect that the company could eventually resolve charges without being convicted and subsequently debarred from public contracting, which lead to a sharp increase of its stock price.[153] In October 2018, a few weeks after the *Remediation Agreement*, became available to resolve offences under the CFPOA without a trial, the Public Prosecution Service announced that it would not use it to resolve charges against the company, as the latter did not meet the conditions laid out in the Criminal Code. As this announcement restored the likelihood of

[148] In its Netherlands Phase 3 Report (para. 54), the Working Group on Bribery found that "an out-of-court settlement would not be taken into account for EU debarment purposes. This may prove a very serious incentive to companies to try and settle (foreign) corruption cases out-of-court."

[149] An increasing number of insurers in the United States offer coverage of FCPA fines. An article on this subject can be consulted here: www.fcpablog.com/blog/2017/8/2/oehninger-and-fehling-a-primer-on-insurance-coverage-for-fcp.html.

[150] United Kingdom Phase 4 Report, para 171, referring to Judgment of Sir Brian Leveson, 17 January 2017, UK SFO and Rolls-Royce Plc & Anor, paras. 52-57, www.sfo.gov.uk/cases/rolls-royce-plc/.

[151] The Canadian Integrity Regime was revised in 2015. Under the Regime's Ineligibility and Suspension Policy, which became effective on 4 April, 2016, suspension can be reduced by five years if the alleged offender cooperates with authorities or addressed the causes of the misconduct.

[152] News release, March 27, 2018 - Gatineau, Quebec - Public Services and Procurement Canada. www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html.

[153] Nicolas Van Praet, "*Corporate-misconduct laws could aid SNC-Lavalin*", The Globe and Mail, 23 February 2018, /www.theglobeandmail.com/report-on-business/snc-lavalin-shares-rise-as-ottawa-moves-ahead-on-deferred-prosecutions/article38085435/.

a conviction, in the hours that followed, the company's stock price reached its lowest point for years.[154]

The significant benefits that derive from a lack of conviction might explain why businesses are willing to accept some of the drawbacks that come with the resolution process. In the responses to the OECD data collection questionnaire results, the **United Kingdom** refers to such drawbacks as a potential disincentive for defendants, explaining that the "the conditions attached to a *DPA* can be robust and onerous". In the **United States**, *DPA*s and *NPA*s often require firms to adopt an effective compliance programme and may even require them to engage a monitor to supervise the implementation of the programme. These resolution systems "require firms to materially increase compliance expenditures", with some of them requiring "the appointment of a Chief Compliance Officer with authority to report directly to the board, the addition of specific independent directors, the establishment of new board or senior management committees, or the separation of the positions of CEO and Chairman of the Board."[155]

Insulation from a conviction and its collateral consequences, in particular debarment, is equally beneficial to businesses as it is concerning to some experts. Many governmental and institutional stakeholders, including the EU and the United Nations, view debarment as a strategy to curb the risk of corruption.[156] The United Nations Office on Drugs and Crime, for example, states that "suspension or debarment from public contracts has proven to be an effective tool in the fight against corruption".[157] However, while debarment helps prevent corruption in public tendering, several experts have warned that shielding corporations from the reputational and business consequences of a conviction, in particular debarment, waters down the deterrent effect of legal action.[158] For this reason, Civil Society representatives have called for a cautious use of the possibility not to debar a company

[154] "SNC-Lavalin shares fall to lowest since 2016 on news foreign bribery case will go to court", CBC News, 10 October 2018, www.cbc.ca/news/business/snc-lavalin-1.4856869.

[155] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page.4.

[156] Emmanuelle Auriole, Tina Søreide, "*An Economic Analysis of debarment*", International Review of Law and Economics Volume 50, June 2017, www.sciencedirect.com/science/article/pii/S0144818817300066.

[157] UNODC (2013), "*Guidebook on anti-corruption in public procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*", p. 25, www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf.

[158] Corruption Watch argues that "one of the key reasons why the use of DPAs and NPAs limits the full deterrent value of the law is that they shield companies from potential debarment". See Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?" page. 14.

under a non-trial resolution, including a review by a judge of the considerations that have led to such a decision by the prosecution authority.[159]

Other experts contend that increased monetary sanctions could perform the same deterrent function as debarment.[160] Resorting to the carrot and stick narrative, they argue that efficient corporate liability regimes requires enlisting the aid of the alleged offenders, which can only be achieved by offering meaningful rewards, including the deferral of prosecution.[161]

Obtaining a reduced sanction

Obtaining a reduced monetary sanction is usually seen as a common benefit for alleged offenders under a non-trial resolution. Countries consider that it is an incentive in 58% of resolution systems available against a legal person (30 out of 52), and in 62% of resolution systems available against a natural person (34 out of 55). Reduced monetary sanctions is a common incentive in resolution systems based on the defendant's admission of guilt. This is the case for resolution systems akin to plea deals, for instance in **Italy**, the **United Kingdom**, the **United States**, or **Latvia**. In **Australia**, under the *Plea Agreement*, the alleged offender has an opportunity to be considered by the court for a more lenient sentence in recognition of an early guilty plea.[162]

In a large majority of resolutions concluded with legal persons (at least 36 out of 52) and natural persons (at least 34 out of 55), the maximum monetary sanction that prosecutors can impose on the alleged offender is limited. In part, this limitation can be explained by countries' wish to set limits on what prosecutors can impose through non-trial resolutions. The few resolution systems (at least ten) in which there is no limitation on the monetary sanction that can be imposed by the prosecutor include **Norway**'s *Optional Penalty Writ*, and **South Africa**'s *Consent Order*. [163]

Figure 29 shows that in resolutions concluded with legal persons, the maximum amount of the monetary sanction is based on the benefit generated by the bribe in a bit less than a third of the resolution systems (15 out of 52). This is the case in **Argentina**. Under the *Effective Cooperation Agreement*, the sanction is equivalent to half the minimum sanction provided in Law 27.401, which is itself two to five times the undue benefit obtained or that could have been obtained. The second most common basis for the sanction is a maximum amount of monetary sanction provided in the law. In 14 resolutions designed for legal persons, the maximum amount of the monetary sanction is statutory-based. In 7 resolutions designed for legal persons, the maximum amount is based on the turnover of the legal person. It may

[159] Letter from Transparency International UK to David Green, former Director of the UK Fraud Office, 9 March, 2018, and Submission from Corruption Watch in response to the consultation for the Resolution Study.

[160] Matthew Stevenson, "*Is the "Too Big to Debar" Problem a Problem? And Is Partial Debarment a Solution?*", The Global Anticorruption Blog, 29 January 2015, globalanticorruptionblog.com/2015/01/29/is-the-too-big-to-debar-problem-a-problem/.

[161] See Jennifer Arlen's submission on response to the OECD Public consultation on liability of legal persons: Compilation of responses, November 2016, www.oecd.org/daf/anti-bribery/Online-consultation-compilation-contributions.pdf.

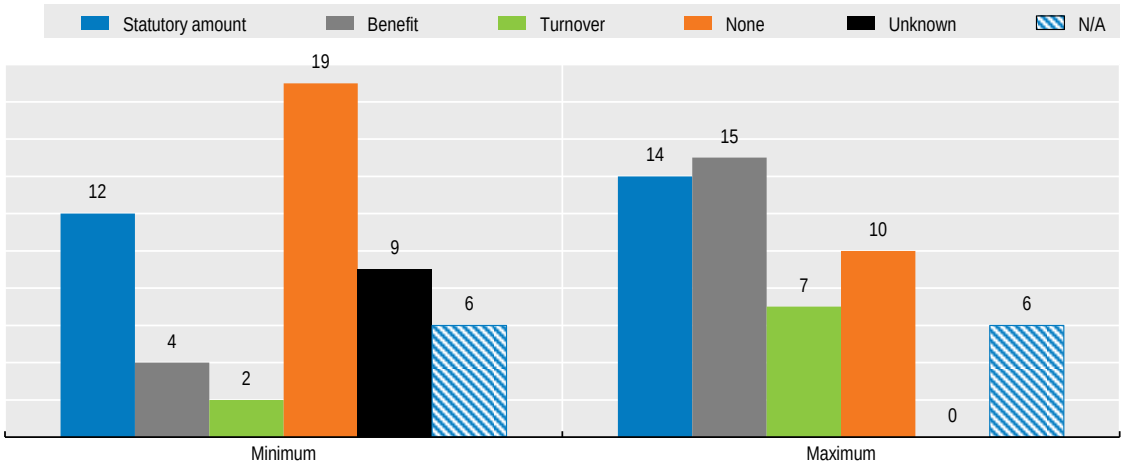
[162] Responses to the Data collection questionnaire.

[163] Norway Phase 3 Report, para.63.

also be a combination of the different approaches, for instance in **France**'s *CJIP*, the amount of the fine is both based on the benefit generated by the bribe ("proportionate to the advantages derived from the offence") and capped at 30% of the average annual revenue calculated on the basis of the last three annual revenues known at the date of the observation of the offence.[164]

In resolutions concluded with natural persons, the minimum and maximum amount of the monetary sanction that can be imposed with a resolution is most commonly based on the statutory amount provided for the offence. This is the case is **Israel**, where, in a *plea agreement,* the alleged offender and the prosecutor can determine the level of sanction within the minimum and maximum monetary sanction provided in the law for the offence that the offender admits.[165] In other countries, the prosecutor can only impose a fine up to a percentage of the maximum statutory fine. In **Finland**, for instance, the sanction that results from a *plea bargain* must amount at least to the minimum statutory fine, and at most, to two-thirds of the maximum fine.[166]

Figure 29. Basis for calculating the minimum and maximum monetary fine that can be imposed in resolutions concluded with a legal person (by resolution)



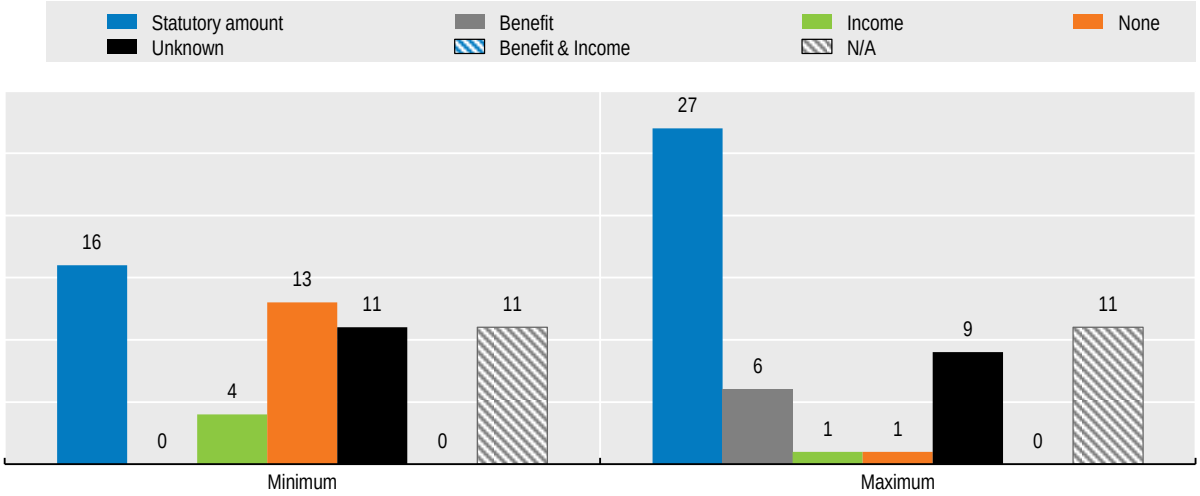
Source: OECD data collection questionnaire results, Tables 36 and 37.

[164] Article 41-1-2. of the Code of Criminal Procedure, created by Law n°2016-1691 of 9 December 2016 on transparency, the fight against corruption, and the modernisation of the economy - article 22.

[165] Answers to the Data collection questionnaire.

[166] Finland Phase 4 Report, para 96.

Figure 30. Basis for calculating the minimum and maximum monetary fine that can be imposed in resolutions concluded with a natural person (by resolution)



Source: OECD data collection questionnaire results, Tables 36 and 37.

In 17 of the 52 resolutions (33%) available for legal persons the reduction that can be applied to determine the monetary sanction is limited. This is only true for 5 out of the 55 resolutions (9%) available for natural persons. In **Italy**, for instance, the maximum monetary sanction that can be imposed through a *Patteggiamento* is up to one third of the statutory maximum.[167] However, unlike the *Plea Agreement* in **Finland**, prosecutors are allowed to impose a monetary sanction that in fact amounts to the statutory maximum.

Reduced monetary sanctions, however, are not systematic. In certain forms of resolutions, including *DPA*s, the monetary sanction can be equivalent to what it would have been after trial, or even higher. In the **United Kingdom**, the Sentencing Guidelines[168] require that any financial penalty in a *DPA* "be broadly comparable to the fine that a court would have imposed on [the defendant] on conviction for the alleged offence following a guilty plea". The accused may be willing to accept high fines as part of non-conviction resolutions like *DPA*s because they do not have to admit guilt and can avoid conviction. Arguably, companies are sometimes prepared to bargain for a higher fine as the price for avoiding conviction. While a lower fine would compensate for the fact that an alleged offender has pleaded guilty in a resolution that requires this admission, in a *DPA*, the alleged offender's compensation would be the opportunity to avoid a conviction and its consequences. Some experts suggest that while the reduction of a fine is greater in plea deals than in *DPA*-like agreements, non-monetary sanctions (such as the imposition of a corporate monitor in such agreements) can raise the total cost incurred by a company. They however point out that "because DPAs and NPAs insulate companies from the collateral and reputational

[167] Italy Phase 3 Report, para 94.

[168] UK Sentencing Council, Definitive Guidelines for Fraud, Bribery and Money Laundering, October 2014, www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf

consequences of having a criminal conviction, the overall financial impact of a *DPA* or *NPA* may not be as great as a plea bargain".[169]

Furthermore, certain resolutions that, unlike a *DPA*, will actually impose a conviction still do not necessarily result in the imposition of a lower sanction. For instance, in **Norway**, the acceptance of the *Optional Penalty Writ* is tantamount to a conviction, even though the defendant does not have to recognize guilt. This resolution mechanism does not guarantee a lower fine for the defendant. In fact, the sanction could be higher than what it would have been at trial. The main incentive for defendants to agree to the *Optional Penalty Writ* is the chance to mitigate reputational damages. The Working Group found that in Norway, "companies will often be prepared to accept a fine, rather than have a full hearing in court, not because they hope to be less severely sanctioned, but because of the risk to their reputation that a court case may involve, due to, for instance, media attention". The same incentive drives corporate offenders to self-report suspicions or knowledge of foreign bribery, even though the benefit of self-reporting is unclear at this stage."[170]

Similarly, prison sanctions can be lower as a result of a non-trial resolution. In 7 of the 55 resolution systems that can be used with a natural person, the imprisonment sentence can be reduced down to a certain time, usually calculated as a percentage of the maximum sentence. This is the case in **Finland**, where the prison sentence can be reduced down to one third of the maximum amount. In other countries, the defendant can still be imprisoned, but only up to a certain threshold. In **France**, for instance, under the *CRPC*, the duration of a prison sentence cannot be greater than 1 year, nor exceed half of the sentence that would have been applied in a classic procedure.[171]

Finally, in some countries, prosecutors cannot impose imprisonment through a resolution. This is the case in **Norway**, where imprisonment cannot be ordered through an *Optional Penalty Writ*. The Norwegian Criminal Procedures Act provides that: "if the prosecuting authority finds that a case should be decided by the imposition of a fine or confiscation, or both, the said authority may issue a writ giving an option to this effect […] instead of preferring an indictment."[172] This means that the prosecutor who is seeking a prison sentence for an individual must take the case to trial.

Tying positive outcomes to the defendant's behaviour

Several Parties to the Convention have designed non-trial resolution systems in a way that encourages good behaviour on the part of the accused. Some of them, in particular, have made access to a non-trial resolution contingent on the defendant's good behaviour. The most notable systems that have followed this approach are the **United States's** *DPAs* and *NPAs* in criminal matters and the **United Kingdom**'s *DPA*.

[169] Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?" page 9.

[170] Norway Phase 4 Report, paras. 24, 83 and 135.

[171] *Code de Procédure Pénale*, Article 495-8.

[172] Criminal Procedures Act, Section 255.

In the **United Kingdom**, a company's access to a *DPA* is largely contingent upon self-reporting.[173] While the ***Rolls-Royce case*** has clarified that self-reporting is not a precondition for a DPA, the emphasis put on self-reporting by the SFO has contributed to increasing the enforcement rate.[174] The United Kingdom Phase 4 Report notes that "a large proportion of the finalised foreign bribery cases, as well as ongoing investigations, have been triggered by corporate self-reports". This report also finds that *DPAs* and other forms of resolutions had encouraged companies to self-report.[175]

Likewise, in the **United States**, access to *NPAs* or *DPAs* is not systematic and is contingent, among other factors, on the defendant's good behaviour. The criteria that criminal prosecutors should consider when deciding whether to dispose of the charges with an *NPA* or a *DPA* are listed in the DOJ's Justice Manual,[176] while the procedures and conditions that the SEC considers for civil prosecutions are contained in the Enforcement Manual.[177] Experts have noted that while criminal prosecutors have discretion with respect to which factors to emphasise, self-reporting of the misconduct is particularly important.[178] Both *NPA*s and *DPAs* can also be used to encourage compliance, as the alleged offender is typically required to design and implement a compliance system as part of the terms of the agreement.

In **Brazil**, the possibility for natural persons to enter into a *cooperation agreement* is available only where the accused has cooperated effectively and voluntarily with the investigation.[179] By the same token, *leniency agreements* for legal persons are available provided that they "effectively collaborate with the investigation and proceedings, and that such collaboration results in the identification of the persons involved in the wrongful act and the rapid obtaining of information and documents proving the illegal acts under investigation".[180] By entering into such agreements and satisfying their conditions, legal persons can reduce the applicable fines by up to two-thirds and be exempted from certain sanctions.

[173]UK Serious Fraud Office Guidance on Corporate Self-Reporting (2012), www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/

[174] OECD (2017), The Detection of Foreign Bribery, page.15.

[175] United Kingdom Phase 4 Report, para 21.

[176] United States Department of Justice, Justice Manual, www.justice.gov/usam/united-states-attorneys-manual.

[177] United States Securities and Exchange Commission, Enforcement Manual, www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[178] Jennifer Arlen, "*Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops*", April 2017, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 17-12, page. 6.

[179] The Organized Crime Law (Law 12,850 of 2013) and Brazil Phase 3 Report, para 100.

[180] Brazil Phase 3 Report, para 103, referring to Article 16 I of the Corporate Liability Law.

3.3.4. Raising awareness of the incentives through a clear framework or guidance

In its evaluations, the Working Group has regularly recommended that a clear framework be developed to increase consistency and transparency in the application of a resolution system. The objective is both to ensure a consistent exercise of discretion by the prosecutors (and/or other relevant authorities) and to enhance predictability and transparency regarding its application.[181] It should be noted that guidance does not necessarily need to be contained in materials prepared by the government, but can derive from other sources, including case precedents. It can also be enshrined in the law or implementing legal instruments. (Accessibility and publicity of non-trial resolutions are examined in Chapter 5.2.)

From the standpoint of alleged offenders, a clear framework or guidance (hereafter "guidance") increases certainty as to the outcome of the process, and how their behaviour can positively or negatively impact this outcome. Certainty of a resolution's outcome can be an incentive for defendants to voluntarily disclose wrong doings and cooperate. To corporate defendants, increased certainty gives more visibility in their approach to resolve a case. The Working Group grants a lot of importance to the transparency of the process and the guidance available to the accused regarding what a legal person seeking to enter in a non-trial resolution can expect. In the Phase 4 evaluation of Germany, the Working Group recommended that Germany "clarify, through any appropriate means, including building on the body of concluded foreign bribery cases, the criteria by which the prosecutors may dispense with prosecution, including the level of cooperation expected from the defendants throughout the investigation, with a view to ensuring a consistent exercise of discretion by the prosecutors across *Länder* and to enhance predictability and transparency regarding the application of section 153a CCP." To natural persons, certainty can be a determining factor when the chance to lower or avoid a prison sentence is at stake. Guidance can hence be instrumental in a defendant's decision whether or not to voluntarily disclose wrongdoings, cooperate and enter a resolution inasmuch as it provides answers to two questions: why enter a resolution, and how?

Guidance on *why* to enter a resolution is important to convey the benefits of a resolution over trial to the interested parties. In some cases, the *why* is relatively clear. As explained above, when resolutions allow alleged offenders to avoid a conviction, the value of a resolution over trial is inherent to the procedure. However, when resolutions also, or solely, result in a lower fine, alleged offenders should be able to know the type and amount of reduction that they can obtain. In its Phase 4 evaluation of **Norway**, the Working Group noted that the lack of sufficient guidance concerning *Optional Penalty Writs* may deter offenders to systematically come forward and cooperate with the authorities and decided to follow up on the efforts made by the country to enhance predictability of Optional Penalty Writs and voluntary disclosure. In this country, legal persons accused of aggravated corruption tend to accept *Optional Penalty Writs*, but are driven by the need to see their case resolved promptly and avoid reputational damages.[182]

Guidance on *how* to enter a non-trial resolution is particularly critical when access to the resolution is contingent on the behaviour of the defendant, which is commonly the case with *DPA*s. As explained in Chapter 3.2, voluntary disclosure and cooperation with law

[181] For instance: Australia Phase 3 Report, recommendation 9, Germany Phase 4 Report, recommendation 3.a.

[182] Norway Phase 4 Report, para. 24, 84-85, follow-up 6 a., page 68.

enforcement authorities are often determining factors in the prosecutor's decision to extend a *DPA* offer. In contrast, in resolutions that take the form of a *plea deal*, these factors tend to rather play out as mitigating circumstances. The **United States** and the **United Kingdom** provide good examples of guidance on how the offender's behaviour, in particular voluntary disclosure, can increase chances to access a *DPA*. In both countries, voluntary disclosure also reduces the monetary sanctions imposed through the *DPA*, provided that certain conditions are met.

In the **United Kingdom**, the time and scope of voluntary disclosure is decisive to determine the extent to which it will benefit the offender. The *DPA* Code of Practice[183] provides that in giving weight to the company's self-report, consideration will be given to "the totality of information" provided (2.9.1) and "how early" the self-reporting takes place (2.9.2). In the **United States**, voluntary disclosure and cooperation are among the ten factors considered by the DOJ when determining whether to extend a DPA offer to the accused person. The *FCPA Guide*, published in 2012, provides that "while the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters". [184] The Guide further clarifies the DOJ and SEC's expectations regarding those factors.

Under the US Pilot Program of 2016, the DOJ further actively encouraged voluntary self-reporting by companies. The Program, which the DOJ made permanent in November 2017, now called the FCPA Corporate Enforcement Policy, provides that a company that voluntarily self-discloses FCPA misconduct, fully cooperates, and remediates in an appropriate and timely manner may obtain a declination to prosecute or a reduction of up to 50% below the low end of the applicable United States Sentencing Guidelines fine range.[185] In its Study on detection, the Working Group found that "the United States DOJ FCPA Self-Reporting Pilot Program has the most structured guidance on self-reporting".[186]

[183] UK SFO and CPS, *Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013,* www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.

[184] FCPA Guide, A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, page. 54.

[185] OECD (2017), The Detection of Foreign Bribery, page 19.

[186] OECD (2017), The Detection of Foreign Bribery, page 22.

Box 11. Good Practices on Providing Guidance on What a Company Seeking to Enter in a Non-Trial Resolution can Expect: The Example of the FCPA Corporate Enforcement Policy

The FCPA Corporate Enforcement Policy provides detailed information on what a company can expect, in particular in terms of:

1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters:

"If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

   a. will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

   b. generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program."

2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure:

"If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range."

Source: FCPA Corporate Enforcement Policy, Justice Manual USAM 9-47.120, www.justice.gov/criminal-fraud/corporate-enforcement-policy

Chapter 4. Terms and obligations of both parties under a resolution

This Chapter covers the main terms and obligations appearing in the different resolution systems available across countries and discusses their consequences for both the person sanctioned and the authority. While Chapter 3.2. discusses when and why a resolution may be an attractive option for resolving bribery allegations, this Chapter focuses on the content and the consequences of these resolutions.

4.1. Baseline terms of resolutions

The baseline terms for non-trial resolutions vary across the resolution systems available in countries Party to the OECD Anti-Bribery Convention. Certain terms are specific to one of the five forms of resolutions discussed in Chapter 2, but others are common to different forms of resolutions. Figures 31 and 32 show the frequency with which the 15 most common terms may be included in a non-trial resolution with legal and natural persons. They thus help identify the most common denominators across the forms of non-trial resolutions, drawing a clearer picture of this multifaceted tool. It may also contribute to determine (among other criteria) a number of good practices.

A financial penalty is unsurprisingly a term that may be included in almost all non-trial resolutions covered in this Study (in 87% of the resolution types available to legal persons and 80% of those available to natural persons). It is logically followed by confiscation although confiscation terms may be included less frequently (in 85% of the resolution types available to legal persons and 75% of those available to natural persons). Of the resolutions available for legal persons covered in this Study, only seven do not include the possibility to impose a financial penalty (**Argentina**'s *Penalty Exemption*, **Germany**'s *Forfeiture Order*, **Mexico**'s *Conditional Suspension of the Process*, the **Netherlands**' Conditional Dismissal, the **United Kingdom**'s *Consent Order* as well as its *Civil Resolution* (available in Scotland), and the **United States**' *Declination with Disgorgement* in criminal matters.) They, however, include the possibility to impose confiscation. Fewer resolutions available to natural persons provide for a financial penalty, but 60% provide for prison sentences.

Restitution to victims ranks third in terms of frequency, being available in 69% of the resolution systems available to legal persons and in 76% of those for natural persons. While restitution to the victims may indeed be available (and very likely used in similar proportions for domestic offences), practice shows that it has only occasionally been used when resolving foreign bribery offences. In these complex cases, those harmed by foreign bribery are, with the exception of competitors, often difficult to identify, or may be the population of a country as a whole, and restitution may present particular challenges because the harm may be difficult to quantify or because the money could be corruptly diverted again. This may explain the low frequency with which restitution to foreign NGOs and restitution by Official Development Aid can be found in resolutions available to legal persons (respectively 8% and 84%). The same pattern can be found in resolutions available to natural persons (respectively 2% and 0%). Restitution in practice is discussed in Chapter 4.6.4. An admission of facts, usually found in a formal statement of facts, is among

the most frequent terms across resolutions in countries Party to the OECD Anti-Bribery Convention. The percentage of resolutions where admission of facts can be required is slightly higher for natural persons than for legal persons (69% versus 62% of the respective resolutions). An admission of facts can take different forms depending on the system. In the **United Kingdom**, a *DPA* is based on a mandatory statement of facts, which is later published on the UKSFO's website.[187] A *DPA* or *NPA* issued by the SEC in the **United States** contains an admission of facts within the resolution itself or annexed to the agreement.[188] Depending on the amount of discretion bestowed upon a procurement authority in assessing corruption risks, the admission of facts in a non-trial resolution could be potentially relevant when deciding whether to disqualify or even debar a company. Resolutions that contain a statement of accepted facts may also create a powerful incentive to encourage the accused wrongdoer to comply with the terms of the resolution. If not, the admission of facts would almost certainly support a conviction in a subsequent trial. However, in some legal systems, the statements and documents obtained in the context of the negotiation of a resolution cannot be used in court.

Of the resolution systems with legal persons in which an admission of facts is required, around a third contain either a prohibition from making a public statement contrary to the agreed facts (25% of all resolution systems), or a prohibition on contesting facts in any subsequent procedure (23% of all resolution systems). For example, in the **United Kingdom**, a term within the *DPA* confirms that an acceptance of the resolution can be treated as an admission of the facts, if the legal person is subsequently prosecuted.[189] Noticeably fewer resolution systems for natural persons available contain similar prohibitions, even when they can require an admission of facts (15% of all resolution systems). This is for example the case in **Israel**'s *Plea Agreement* (where a prohibition on making contrasting public statements may apply) and **Brazil**'s *Cooperation Agreement* (where there is a prohibition on contesting facts in a subsequent resolution).

An admission of guilt is required in a far smaller, but still relatively significant proportion of resolutions with legal persons (in 33% of the resolution types). Presumably, the rationale is that its inclusion in a resolution may entail serious consequences for a legal person, including an automatic debarment from public procurement lists. (This is further discussed in Chapter 4.6.1). The percentage of resolutions where a recognition of guilt is required is slightly higher for natural persons (in 44% of the available resolution systems) than for legal persons. A reason is that a large number of countries have resolution systems for natural persons resembling plea deals, which, by their nature, involve an admission of guilt (see Chapter 2). A smaller number of countries, for example **Australia**, have resolutions resembling plea deals available for legal persons. In the **United States**, all but one of the

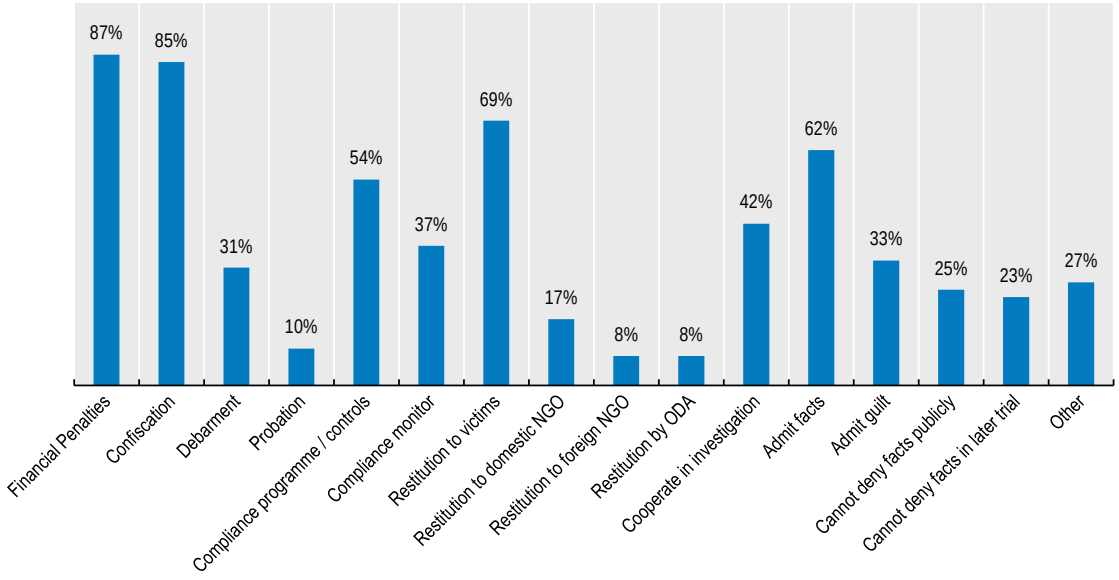
[187] See for example, the statement of facts in UK SFO v Rolls-Royce PLC [January 2017], www.sfo.gov.uk/download/deferred-prosecution-agreement-statement-facts-sfo-v-rolls-royce-plc/. The Rolls-Royce DPA itself contained a clause providing that Rolls-Royce "agrees that the Statement of Facts is true and accurate to the best of its knowledge and belief".

[188] See for example, the statement of facts annexed to the NPA against Ralph Lauren Corp [2013], www.sec.gov/news/press/2013/2013-65-npa.pdf.

[189] An admission under Section 10 of the Criminal Justice Act 1967.

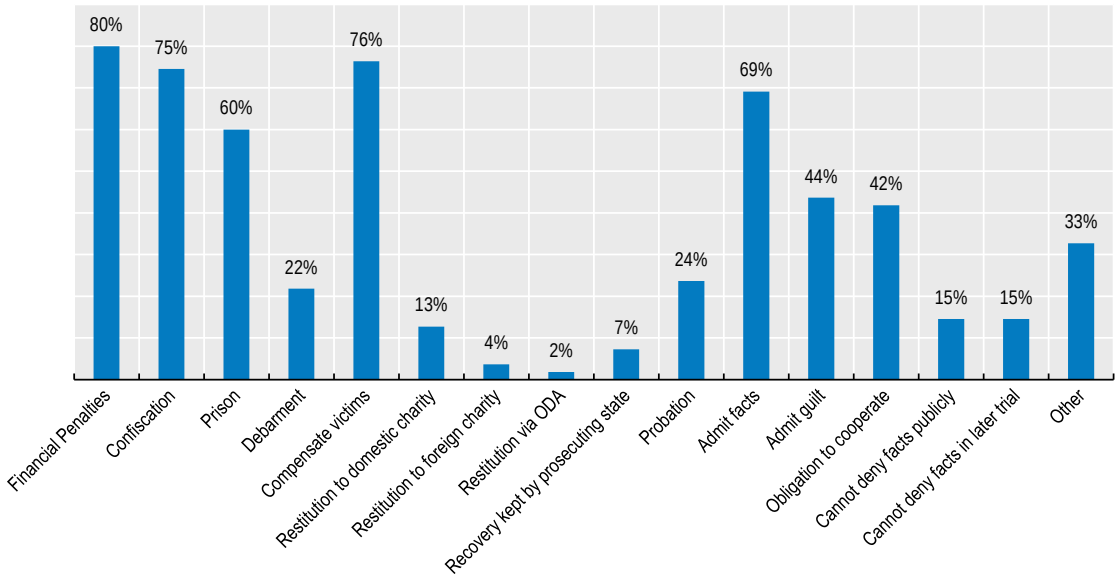
resolution systems featured in this Study (7 out of 8) do not require an admission of guilt although they generally require an admission of the facts.[190]

Figure 31. Possible terms in Legal Persons resolutions, by frequency



Source: OECD data collection questionnaire results, Tables 38 to 40.

Figure 32. Possible terms in Natural Persons resolutions, by frequency



Source: OECD data collection questionnaire results, Tables 41 and 42.

[190] A declination with disgorgement does not require admission of the facts. A plea agreement requires a recognition of guilt.

While people often link non-trial resolutions with requirements to adopt and/or improve compliance programs and controls, these types of obligations may be included in only about half of the non-trial resolutions for legal persons (54%). Even when compliance programs may be part of the terms of a resolution, it does not necessarily trigger the appointment of a compliance monitor as this term may only be included in 37% of the resolutions available to legal persons.

Similarly, cooperation with the investigation may be part of the terms of a resolution with a legal or a natural person in only 42% of the resolutions available. For instance, while it would be a term in most *DPA* and *NPA*-like resolutions, it may not necessarily be contained in plea deals. Another explanation is that cooperation may be a consideration at the stage of deciding whether to offer the possibility to enter into a resolution at all, but it may not always translate into a term of the resolution itself.

4.2. Sanctions imposed through resolutions

Article 3 of the Anti-Bribery Convention requires the Parties to ensure that the bribery of foreign public officials is punishable by "effective, proportionate and dissuasive criminal penalties". Additionally, it obliges the Parties to ensure that "the bribe and the proceeds of the bribery" or property to a value which corresponds to proceeds, are subject to seizure and confiscation. Through its peer monitoring process, the Working Group on Bribery closely monitors enforcement of these provisions by how the Parties implement their Article 3 obligations when resolving foreign bribery matters. The analysis below draws some general trends and lessons from both a cross-country comparison of the different resolution systems and their enforcement in foreign bribery cases.

4.2.1. Which entity can impose sanctions?

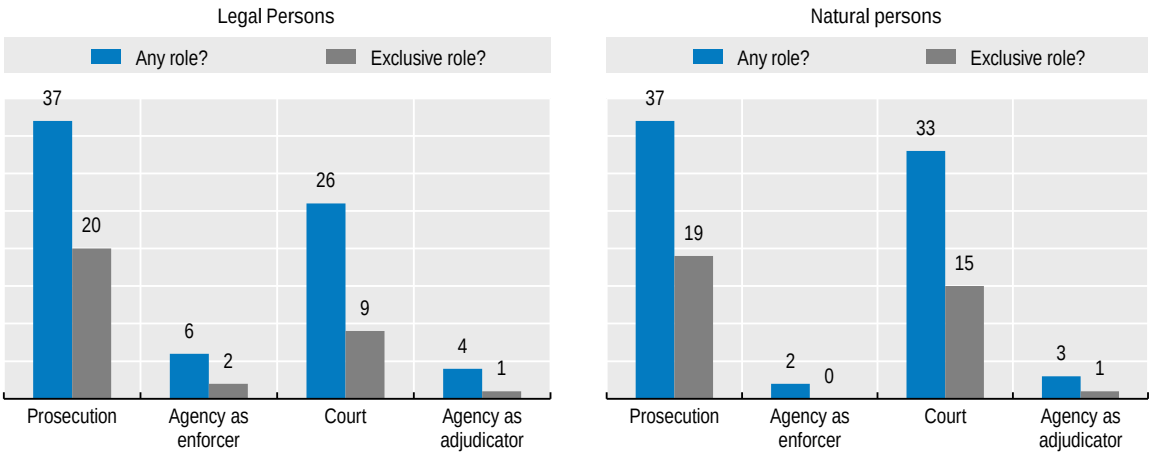
While the prosecution's role in setting sanctions remains prominent and even sometimes exclusive, other authorities have greater involvement in setting sanctions (non-exclusive role of prosecution) than they have in concluding resolutions. The most frequent external authority is the court. This is true for both legal and natural persons.

For legal persons, the prosecution plays at least some role in setting sanctions in a substantial majority of resolutions: 37of the 52 available resolutions (71%). In 20 resolutions (38%), the prosecution in fact has an exclusive role in setting sanctions. In contrast, courts have a non-exclusive role in 26 resolutions (50%) and only have an exclusive role in 8 resolutions (15%). Administrative agencies have a role in setting sanctions for 10 resolutions (19%), but only have an exclusive role in 3 of them (6%).

For natural persons, the prosecution plays a reduced, but still frequent role in setting sanctions in 37of the 55 available resolutions (67%). The prosecution has an exclusive role in setting sanctions in 19 resolutions (35%). In contrast to the situation with legal persons, the courts have at least some role in over half of the resolutions: 33 resolutions (60%). They further have an exclusive role in 14 (25%) of the resolutions. Administrative agencies' role is reduced to only 5 resolutions (9%) and only have an exclusive role in 1 resolution (2%).[191] This reflects the higher number of resolutions available under non-criminal proceedings for legal persons.

[191] The US Securities and Exchange commission has the option of initiating either administrative or civil proceedings to enforce the FCPA. In the former case, no court is involved.

Figure 33. Authorities' role in setting sanctions



Source: OECD data collection questionnaire results, Tables 18 and 19.

4.2.2. Factors taken into account to reduce sanctions in resolutions

Mitigating factors taken into account for legal persons

A range of mitigating factors is taken into account across countries Party to the OECD Anti-Bribery Convention where one or more resolution mechanisms are available to use with legal persons. In the 52 resolution systems for legal persons covered under this Study, cooperation by the legal person is the most common mitigating factor available. This factor applies in 38 resolution systems (73%). More than half of the resolution systems take account of corporate self-reporting (32 systems, or 62%) and admission of the facts (32 systems – 62%). An admission of guilt is a determining factor in 24 of the resolution systems (46%). The waiver of legal privilege (which has the potential to assist an investigation) is a factor in 9 systems (19%).

Providing information on others is a mitigating factor in 33 resolution systems available to legal persons (63%), for example in **Argentina**'s *Effective Cooperation Agreement.* Other systems for cooperating offenders, which allow for either total immunity from prosecution or no sanction, such as **Colombia**'s *Benefits for Collaboration*, are not included in this Study.

The existence of a corporate compliance programme at the time of the offence is also a mitigating factor in more than half of the resolution systems (30 of the 52, or 58%). Remedial measures taken by a company immediately following the discovery of wrongdoing may mitigate the sentence in 34 resolution systems (65%). This is for instance the case in **Brazil**'s *Leniency Agreement*.

In a number of country evaluations, the Working Group has, however, sought to ensure that the mere existence of a compliance programme should not, at least on its own, afford a legal person a complete defence from liability. For example, in **Spain** and **Chile**, the existence of a compliance model, duly implemented, can amount to a complete defence from liability.[192] The position is the same in **Italy**, although its law contains considerable

[192] Spain Phase 3 Report para 52 and Chile Phase 3 Report, paras 151-152.

requirements specifying how a company must demonstrate that it has put into place a sufficiently implemented compliance model. Furthermore, liability is only excluded if a natural person "fraudulently evaded the operation of the model".[193] By contrast, in **Brazil**, the existence of a compliance programme is expressly a "mitigating factor" but not "a defence to avoid liability".[194]

A number of mitigating factors may be aggregated to enable the court or prosecution to determine the sanction that should be imposed. In the **United States**, the DOJ's FCPA Corporate Enforcement Policy of November 2017 (originally adopted as a pilot programme in April 2016) combines the mitigating factors of voluntary self-reporting, full cooperation, and timely and appropriate remediation (as well as the consideration of possible aggravating circumstances) to consider whether a declination should be granted. If a criminal resolution is still warranted, these factors are also considered to determine the extent to which the sentencing fine should be reduced as shown in the diagram in Figure 34.

Box 12. Good Practices in the assessment of a compliance program and its impact on sanctions in a non-trial resolution

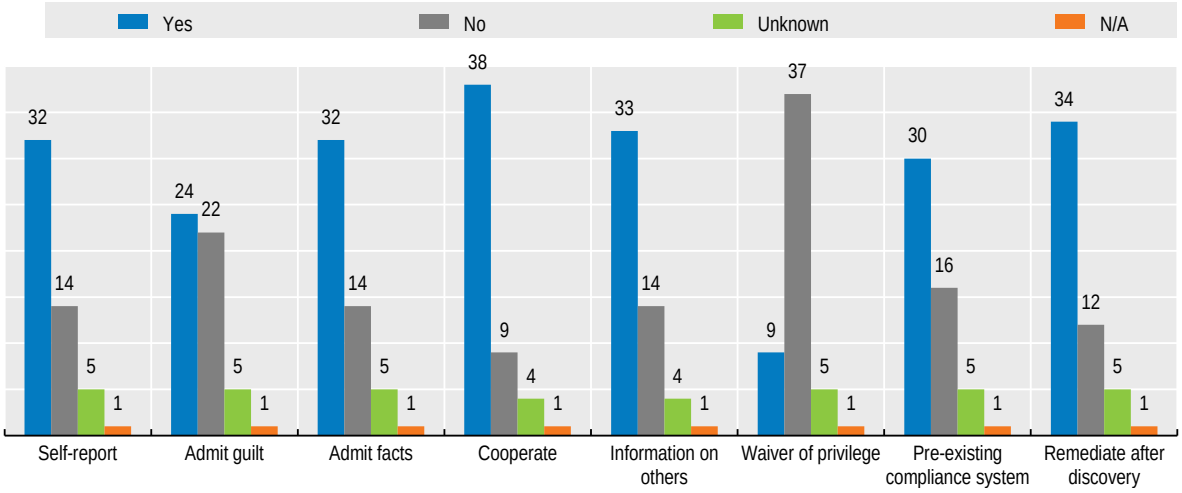
1. The existence and implementation of effective compliance programs by companies at the time of the crime may be considered a mitigating factor in determining the level of sanctions when entering into a non-trial resolution with criminal prosecutors or other responsible authority.
2. It should however not be used as a full defence to avoid liability.
3. The validation of a compliance programme by a government agency prior to the uncovering of the offence should not either allow for the consideration of such programme as a full defence.
4. The assessment of the effectiveness of a compliance program should aim at determining whether the programme is: i. adequate to prevent crimes like those that occurred; ii. successfully implemented; and iii. properly watched over.
5. Guidance should be provided with a sufficient level of detail on the parameters of evaluation of an effective compliance programme to allow both the companies to anticipate what they may be able to expect from good internal controls and compliance and the prosecutors or other relevant authorities to make a consistent use of this mitigating factor.

Source: Working Group on Bribery Country monitoring reports including Italy, Brazil and Chile Phase 3.

[193] Italy Phase 3 Report, para 39-42.

[194] Brazil Phase 3 Report, para 58.

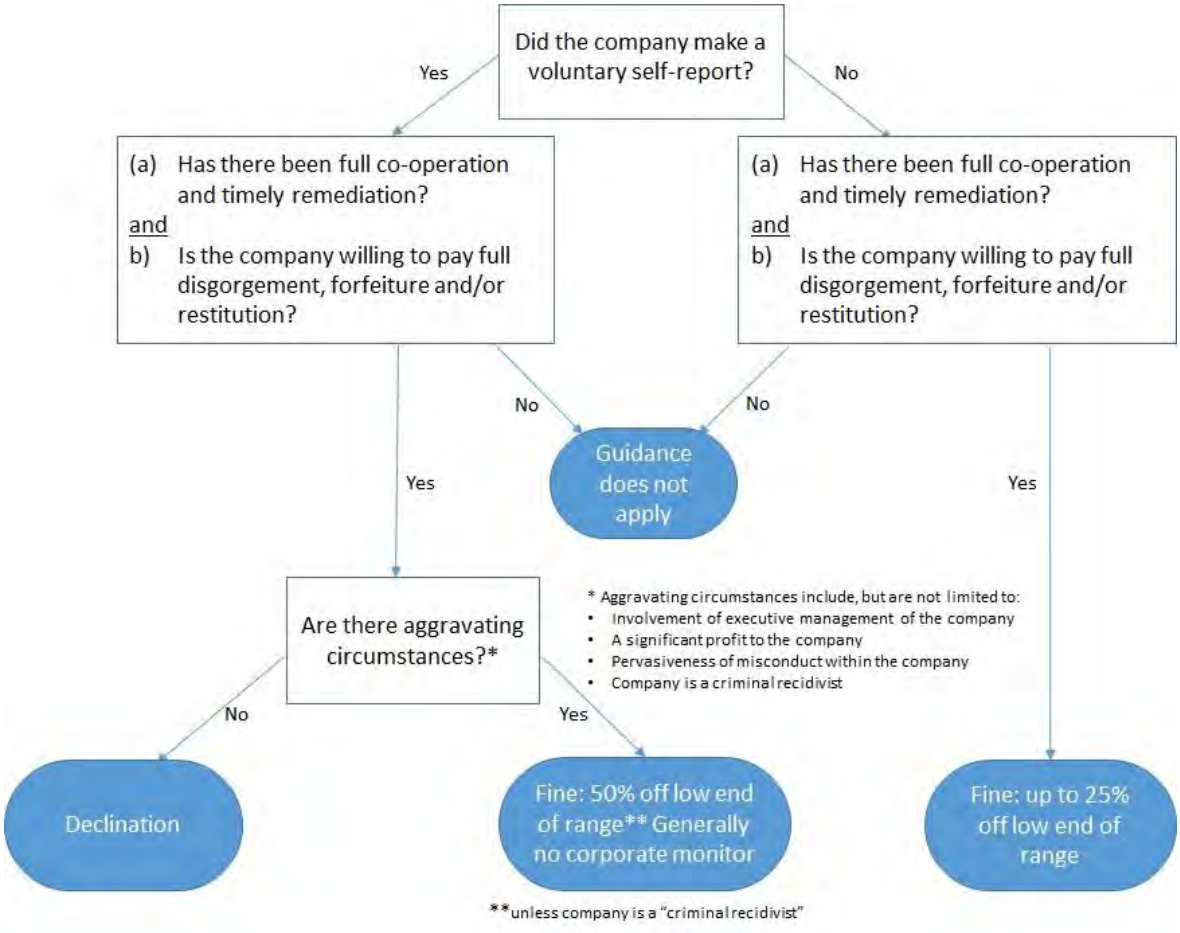
Figure 34. Factors pertaining to legal persons affecting determination of the sanction



Source: OECD data collection questionnaire results, Table 45.

Figure 35. US DOJ's FCPA Corporate Enforcement Policy (November 2017)

Applies to declination with disgorgement, NPA and DPA



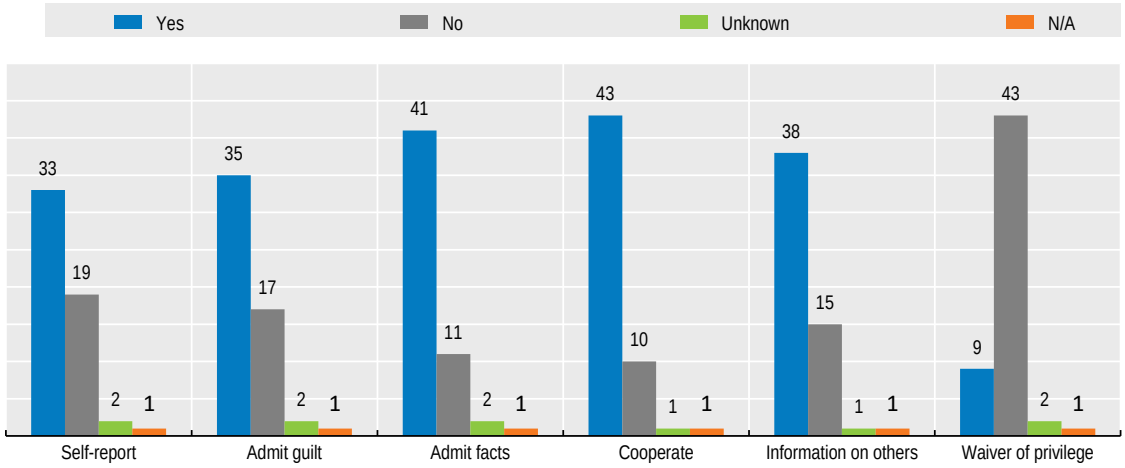
Source: FCPA Corporate Enforcement Policy, Justice Manual 9-47.120

Mitigating factors taken into account for natural persons

The main mitigating factors taken into account for natural persons are similar to those taken into account for legal persons. The factor taken into account in most systems is, as for legal persons, cooperation with law enforcement authorities. This is the case in 43 of the 55 (78%) systems, which is roughly comparable to the situation for legal persons (73% of resolutions). In addition, 41 systems take into account an admission of the facts (55%) and 35 systems take into account an admission of guilt (64%). These figures are higher than for legal persons, reflecting the greater use of plea bargaining systems for natural persons. Self-reporting and voluntary disclosure is taken into account in 33 systems (60%). Finally, the waiver of legal privilege is classed as a mitigating factor in 9 resolution systems (16%): a similar, but slightly smaller, percentage than for legal persons.

Providing information on others, is, as for legal persons, a potential mitigating factor in 38 of the 55 systems (69%). This is a notably similar percentage to the 63% of systems for legal persons that consider it a mitigating factor, suggesting, on this point, that resolution regimes for legal and natural persons seek similar aims.

Figure 36. Factors pertaining to natural persons affecting determination of the sanction



Source: OECD data collection questionnaire results, Table 46.

4.2.3. Reduction of sanctions available through resolutions

A key feature of all non-trial resolution systems is the potential for a reduced sanction or no sanction at all. This is obviously a major incentive for the accused persons in their decision to enter into a resolution rather than going to trial. Some resolution systems do not provide for the imposition of any punitive sanction, but do allow confiscation to take place. An example for legal persons is the **United States's** *Declination with Disgorgement* in criminal matters and an example for natural persons is **Hungary**'s *Possibility of Avoidance of Criminal Liability*.

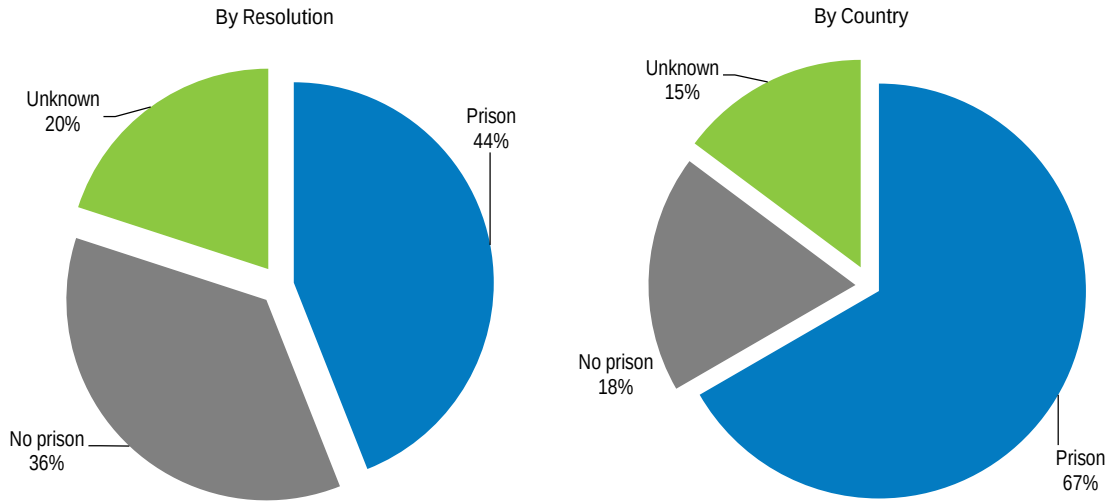
In the resolution systems where a sanction is available, the ways in which the sanction is reduced also varies significantly. Some countries have a maximum sentence that can be imposed through a resolution. This limits the use of these resolution systems to cases falling within that maximum, but there is no express reduction in law for the use of such a resolution compared to the sanction that would have been imposed after trial. Examples

include the *Transaction* procedure in the **Netherlands**, the *Expedited Procedure* in **Chile** (where the sentence cannot be higher than that sought by the prosecutor) and *Diversion* in **Austria**.

Other countries have law or guidance that ensures a percentage reduction from the sanction that would have applied after trial. The amount of the reduction can be grounded in the law as with **Italy**'s *Patteggiamento*, where a sentence can be reduced by up to one third.[195] It can also be founded on sentencing guidelines as in the **United Kingdom**, where a *guilty plea* at the first reasonable opportunity must reduce the sanction that would have been imposed at trial by 33% (i.e. the court is bound to reduce the sentence by a third, subject to a very limited exception where the offender pleads guilty but disputes the facts put forward by the prosecution).[196] In the **United States**, the DOJ's FCPA Corporate Enforcement Policy provides that a 50% reduction off of the low end of the U.S. Sentencing Guidelines (USSG) fine range may be granted to a company as credit for voluntary self-disclosure, full cooperation, and timely and appropriate remediation in FCPA Matters, except in the case of a criminal recidivist.[197]

Examples also include a *Guilty Plea* or *DPA* in the **United Kingdom** and the *Optional Penalty Writ* in **Norway**. Neither **Norway** nor the **United Kingdom** have a maximum fine in law, thus the law allows high monetary sanctions to be set even through a resolution.

Figure 37. Availability of prison sentences through resolutions



Source: OECD data collection questionnaire results, Table 36.

A number of resolution systems for natural persons extinguish the possibility of a prison sentence entirely, giving a powerful incentive for a defendant to enter into a resolution. Examples include **Latvia**'s *prosecutor's penal order* and **Germany**'s *section 153a CCP* resolution. As shown in the figure below, a prison sentence, however, remains available in

[195] Arts. 444-448 CCP. See Italy Phase 3 Report Italy.

[196] UK Sentencing Council, Definitive Guidelines for Fraud, Bribery and Money Laundering, October 2014, applying to cases after 1 June 2017. The procedure is known as a "Newton" hearing where a Judge will normally hear evidence from witnesses to decide which of the disputed facts to base the sentence on.

[197] FCPA Corporate Enforcement Policy, USAM 9-47.120 (November 2017).

half the resolution systems for natural persons. Over a quarter (36%) of resolution systems do not allow for a prison sentence (the position is unknown in 20% of procedures). When considered on a country level, 67% countries have a resolution system where a prison sentence is available.

4.2.4. Sanctions imposed in practice through resolutions

Variation in legal frameworks and in practice

Stark differences exist in the level of sanctions imposed in practice through non-trial resolution procedures. In part, this reflects the wide variation in penalties that the Parties to the Convention can impose on legal and natural persons for foreign bribery before a possible reduction is applied as part of the non-trial resolution. For legal persons, the majority of Parties have a fixed maximum fine, which can be expressed as a fixed sum or as a multiple of a particular variable (e.g. the fine is capped at a certain number of "fine units" whose value can range between a defined minimum and maximum). In other Parties, the maximum fine depends on case-specific variables, such as the amount of the bribe, the benefit obtained or the damage caused by the unlawful scheme, or the company's annual revenue or turnover during a given period. Of the Parties whose maximum fine does not depend on case-specific variables, the highest possible maximum fine is found in the Czech Republic, which can impose a fine of up to CZK 1.46 billion (approx. EUR 56.3 million).[198] In contrast, several Parties have maximum fines set at less than EUR 1 million.[199] A third group of countries has no maximum limit on the fine that can be imposed. For instance, **Norway** has no maximum fine for aggravated corruption, which would include foreign bribery.[200]

For natural persons, the Parties also have widely varying practices for imposing fines and/or imprisonment. Across the Parties to the Convention, offenders can face up to life imprisonment (**South Africa)** or imprisonment between a specified range, such two and eight years (**Costa Rica**).[201] The Parties take varying approaches on whether terms of imprisonment should be suspended or whether a fine should be imposed in addition to, or in lieu of, imprisonment. Finally, for both legal and natural persons, each Party will have its own rules concerning whether multiple sanctions can be imposed when the offender has committed multiple violations and, if yes, whether those sanctions should be enforced concurrently or consecutively.

To illustrate the range of sanctions that can be imposed though non-trial resolutions, across the Parties to the Convention, the highest monetary penalty in a foreign bribery case as of the cut-off date of the Study came in the December 2016 ***Odebrecht*** and ***Braskem*** coordinated resolutions, in which the companies agreed to pay a total of at least USD 3.23 billion to **Brazil**, **Switzerland**, and the **United States** as part of a coordinated resolution. Previously, the 2008 ***Siemens case***, which was the first coordinated resolution between two Parties to the Convention (**Germany** and **United States**) had the highest

[198] OECD (2016), The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report, page 130 (citing 10 countries has having maximum fines less than EUR 1 million); see also Finland Phase 4 Report, para. 117 (reiterating that Finland's maximum fine of EUR 850 000 was too low).

[199] The database of concluded foreign bribery cases maintained by the OECD.

[200] Norway Phase 4 Report, para. 95.

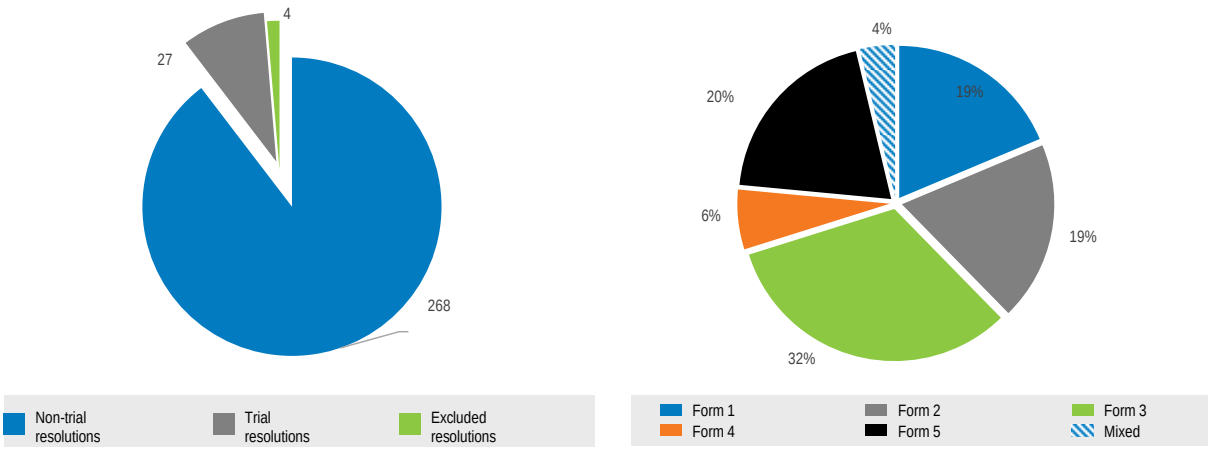
[201] South Africa Phase 3 Report, para. 34; and Costa Rica Phase 1 Report, para. 33.

sanctions imposed for foreign bribery: combined monetary penalties of approximately USD 450 million and combined disgorgement of profits amounting to approximately USD 1.15 billion. One of the lowest penalties imposed on a company in a foreign bribery case was the fine of CHF 1 in the March 2017 ***Banknotes case***, which was resolved through **Switzerland**'s *Simplified Procedure*.

Sanctions imposed in practice on legal persons through non-trial resolutions

Pursuant to the OECD database of concluded foreign bribery cases, 23 enforcing countries have concluded 890 foreign bribery resolutions with sanctions and/or confiscation. Of these, 15 countries have concluded 299 resolutions to impose sanctions on legal persons in foreign bribery cases. In total, 12 countries[202] have concluded 272 non-trial resolutions (91%) to impose sanctions on legal persons in connection with a foreign bribery scheme. Of these, 268 resolutions involved systems analysed in this Study.[203] In 7 countries,[204] 27 legal persons were sanctioned following a conviction at trial.

Figure 38. Overview of Working Group on Bribery's Legal Persons resolutions for foreign bribery



Source: OECD database of concluded foreign bribery cases.

Collectively, the sanctioned entities have paid sums amounting in the aggregate to approximately USD 14.9 billion. This sum includes both monetary sanctions, confiscation, and, if applicable, compensation sums or prosecution costs. Non-trial resolutions were responsible for approximately 95% of this amount, with *DPA*-like resolutions (corresponding to Form 2, as described in Chapter 2) and civil/administrative resolutions (Form 3) responsible for nearly 37% and 29% of the total, respectively. Within this sum, the fines or other monetary sanctions imposed amounted to approximately USD 8.1 billion,

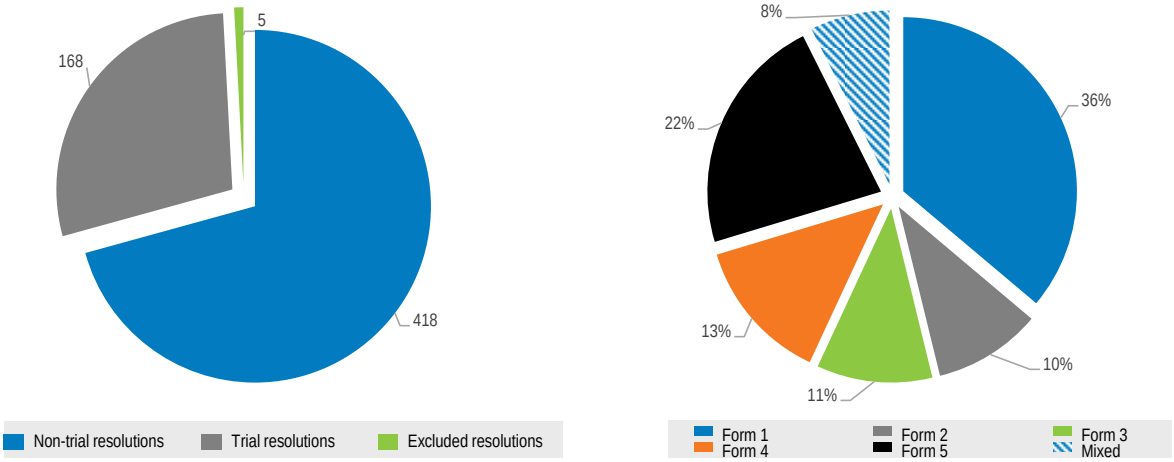
[202] United States (207), Germany (17), Switzerland (11), the United Kingdom (11), Israel (2), Netherlands (7), Italy (6), Norway (4), Canada (3), Brazil (1), Chile (1), and France (1).

[203] Four resolutions were excluded from the Study either because they did not provide for adequate sanctions for legal persons (fine and/or confiscation) or because the Party to the Convention did not provide information about the system in response to the questionnaire completed for the Study.

[204] Germany (12), Korean (8), Belgium (2), France (2), Italy (1), Japan (1) and in the United Kingdom (1).

with over 99% of the fines coming from non-trial resolutions. Of the total fines imposed on legal persons, 52% was collected through *DPA*-like (Form 2) resolutions, with "mixed" resolution forms, such as Brazil's *Leniency Agreement*, constituting just over one quarter of the fines imposed (25%) and resolutions akin to plea agreements (Form 5) constituting approximately 17%.

Figure 39. Overview of Working Group on Bribery's Natural Persons resolutions for foreign bribery



Source: OECD database of concluded foreign bribery cases.

The OECD database of concluded foreign bribery cases contains 591 resolutions in which a natural person was sanctioned for foreign bribery in 21 countries.[205] Although the varying degrees of transparency about concluded cases in the Parties to the Convention prevents a complete analysis of the sanctions imposed on natural persons, at least 423 natural persons (72%) were sanctioned through a non-trial resolution, as shown in Figure 39.[206] A further 168 individuals (28%) were sanctioned after conviction at trial. The forms of non-trial resolutions used to impose monetary sanctions on natural persons varied considerably, with the most prevalent being those that resolved allegations before indictment without a finding of liability (Form 1). These types of resolutions, including NPAs, were used 151 times (26% of all resolutions with natural persons). The next most frequent type of resolution were those akin to plea agreements (Form 5), which were used 93 times (15.7% of all resolutions with natural persons). The remaining forms of non-trial resolutions used for natural persons were those like the *Patteggiamento*, which imposes a conviction without requiring an admission of guilt (Form 4), civil or administrative liability (Form 3), and

[205] In order of enforcement, the five countries that have sanctioned the most natural persons for foreign bribery whether by trial or non-trial resolutions are **Germany** (317), the **United States** (131), **Hungary** (26), **Korea** (22), and the **United Kingdom** (16).

[206] Of the 423 resolutions sanctioning natural persons, 418 were applications of resolution systems covered in the Study, while 5 were applications of resolutions systems that were excluded from the Study either because they did not meet the criteria or because the Working Group member country did not respond to the data collection questionnaire.

DPA-like resolutions (Form 2). These latter forms of resolution systems accounted for 9.5%, 7.6%, and 7.1% of the resolutions with natural persons.

- Monetary sanctions

Fines were imposed on natural persons in 412 of the 591 resolutions (70%). The lowest fines ranged in the low hundreds in constant 2018 US dollars. The highest fine imposed on a natural person, equivalent approximately 3.7 million in constant 2018 US Dollars, was imposed in Germany in the 2008 ***Willi Betz case***. Overall, the natural persons were obliged to pay nearly USD 293 million to the enforcing countries including monetary sanctions, confiscation, plus, if applicable, any compensation orders or orders to cover prosecution costs. Over 90% of the monetary sanctions imposed in the known cases involving natural persons came from non-trial resolutions. Specifically, 85% of the monetary sanctions imposed were connected with plea agreements or other resolutions that impose a conviction with an admission of guilt (Form 5).

- Imprisonment

At least 215 natural persons (36%) received a term of imprisonment. For 122 resolutions (57%), the prison sentences were not suspended. In the other 43% of the resolutions, the sentence was suspended or converted into probation. When natural persons convicted of foreign bribery were sentenced to serve actual time in jail, the average length of the sentence was approximately 14 months. For those who received sentences that were either entirely or partially suspended, the average term of imprisonment imposed was just over 21 months.

For the Working Group as a whole, the average prison term following conviction after trial was slightly shorter than the average term imposed through a non-trial resolution. When directly comparing the countries in which sentences were imposed both through trial and non-trial resolutions, individuals convicted after trial typically had longer sentences than those sentenced through a non-trial resolution. In the United Kingdom and the United States, for instance, the average terms of imprisonment imposed after trial were roughly 287% and 363% longer than the average terms imposed through non-trial resolutions. The longest term of imprisonment recorded in a single matter (15 years) was imposed following a conviction at trial. For the cases in which it is known that jail terms were imposed and not suspended, the average sentence was slightly more than one year whether the sentence was imposed following a conviction at trial or through a non-trial resolution.

4.3. Confiscation

4.3.1. Availability of confiscation through non-trial resolutions

Confiscation is an important component of an effective sanctioning regime for foreign bribery. As prior OECD research has shown, an effective confiscation regime will often provide a crucial means for ensuring that financial crimes such as foreign bribery are not sound economic investments even when the offender is caught.[207]

[207] OECD (2016), "Is foreign bribery an attractive investment in some countries?, in OECD Business and Finance Outlook 2016, OECD Publishing, Paris.

The majority of resolution systems for both legal and natural persons allow confiscation to take place in addition to a financial penalty. The purpose of this Study is not to assess the different confiscation systems available in the Parties to the Convention which in themselves provide for a range of possibilities.[208] It rather focusses on the availability and use of confiscation under the non-trial resolutions covered in the Study.

For legal persons

For legal persons, 37 of 52 resolution systems (71%) allow both a financial penalty and confiscation to take place in the same proceedings. Of those systems that allow both, the vast majority of systems clearly distinguish between confiscation and financial penalty. This is the case with *DPA*s in the **United Kingdom** where the written court judgment sets out clearly the amount of the financial penalty and that which has been imposed by way of disgorgement, which is expected to amount to the gross profits obtained as a result of the wrongful conduct. For example, in the ***Standard Bank case*** in the United Kingdom, a total of USD 25.2 million in financial penalties was imposed. The fine was USD 16.8 million and the confiscation USD 8.4 million. . In **Norway**, the fine and confiscation are also clearly distinguished. In the ***Yara International case,*** the fine imposed was NOK 270 million (EUR 27 million) and NOK 25 million (EUR 2.5 million) was ordered in confiscation.

Across the countries studied, five resolution systems (10%) for legal persons do not provide for confiscation to be imposed as part of the resolution including those in **Austria** and **Chile**. Separate confiscation proceedings not part of the resolution, however, are available in certain jurisdictions and under certain conditions. For example, in **Austria**, confiscation is not available in case of Diversion as confiscation under section 19a of the Criminal Code is designed as a penalty and as such requires that guilt be proven as a prerequisite. Conversely, in **Australia**, confiscation proceedings are civil in nature and cannot be settled as a result of *Plea Agreements* (which are criminal proceedings and involve a conviction). Nonetheless, under the Proceeds of Crime Act 2002, separate civil confiscation proceedings are possible following a conviction, whether obtained by trial or through a plea agreement.

Seven resolutions (13%) only allow confiscation but no monetary penalty. The most widely used is the **United States** *declination with disgorgement* in criminal matters. This takes the form of a decision not to criminally prosecute (the declination) but includes the confiscation of the proceeds from the bribery scheme.

One form of resolution for legal persons, the **Czech Republic**'s *Agreement on Guilt and Punishment*, only allows *either* a monetary penalty or confiscation. This is due to Czech criminal law prohibiting the simultaneous imposition of a monetary penalty and confiscation.[209]

For natural persons

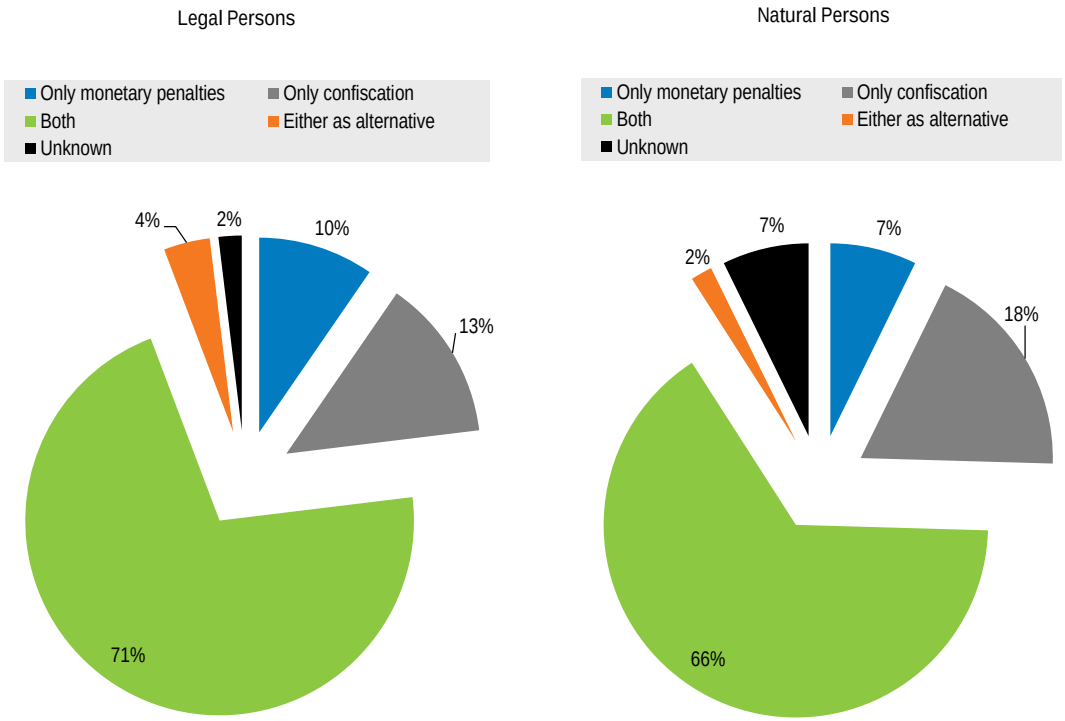
For natural persons, two-thirds of the resolution systems allow the imposition of both confiscation and fines (66%). In contrast, 7% of the resolution systems only provide for a

[208] This information is available in the country monitoring reports on implementation of the OECD Anti-Bribery Convention.

[209] Czech Republic's response to the questionnaire (Q25); see also CLLE Section 15 para 3.

financial penalty. A larger proportion (18%) can be used to impose confiscation. This is the case for **Costa Rica**, which has three types of resolution systems for natural persons but does not provide for criminal fines to be imposed on natural persons and would only be able to impose confiscation under these systems.[210] **Costa Rica** does not have any resolution systems for legal persons. Another example of a system only allowing confiscation is **Hungary**'s *Possibility of Avoidance of criminal liability* where disgorgement can be obligatory. Finally, as discussed above, the **Czech Republic**'s *Agreement on Guilt and Punishment* only allows the court to impose either a monetary penalty or confiscation.

Figure 40. Availability of monetary penalties and confiscation for resolutions.



Source: OECD data collection questionnaire results, Tables 47 and 48

4.3.2. Confiscation imposed in practice

With respect to legal persons, many of the resolutions concluded in prominent foreign bribery cases include large amounts of monies confiscated. As these sums are not always distinguished from the amount of the fine, it is difficult to establish exhaustive data on the respective proportion of fines and confiscation across countries and resolution systems. According to the OECD database of foreign bribery cases concluded with sanctions, however, at least 10 Parties have concluded 128 resolutions for which it is known that a confiscation measure was imposed. Based on those resolutions whose confiscation amounts are known, the enforcing Parties have collectively imposed at least USD 7 billion in confiscation. Confiscation from non-trial resolutions amounted to USD 6.3 billion in constant 2018 US Dollars, nearly 90% of the total. Non-trial resolutions imposing civil or non-criminal liability on legal persons were responsible for nearly 60% of the known

[210] Costa Rica Phase 1 Report, para. 34.

confiscation imposed, while *DPA*-like resolutions (Form 2) were responsible for nearly one-fifth (18.7%) of all confiscation.

For natural persons, the OECD database indicates that 7 Parties imposed confiscation in at least 59 resolutions. In total, they imposed at least USD 235 million in constant 2018 US Dollars million. Non-trial resolutions were responsible for over 96% of all confiscation, with resolutions akin to plea agreements (Form 5) responsible for 94% of the confiscation imposed. As with legal persons, non-trial resolutions were responsible for a larger share of confiscation than the frequency with which they are used to conclude foreign bribery matters (78% of all resolutions).

4.3.3. Confiscation scenarios in practice

This section focuses on the confiscation of the proceeds of bribery obtained by legal persons. It is far less common that natural persons have benefitted from the proceeds of bribery and, absent personal enrichment, confiscation is often not contemplated against them.

In practice, five scenarios can be drawn from recent resolutions concluded with legal persons across the Parties to the OECD Anti-Bribery Convention summarised in Annex B: resolutions where (i) both a fine and separate confiscation are imposed; (ii) confiscation is imposed separately in related civil proceedings; (iii) solely a monetary penalty is imposed, with no separate confiscation measure; (iv) solely confiscation measures are imposed; and (v) confiscation is imposed by at least one of the authorities involved in multi-jurisdictional cases.[211]

Imposition of both a fine and separate confiscation

In several cases, the resolutions concluded provide for the imposition of both a fine and confiscation, and the amount confiscated is clearly distinguished from the amount of the fine. In **Italy**'s 2014 ***Agusta Westland case*****,** one company, Agusta Westland Ltd, concluded a *Patteggiamento* providing for both a EUR 300 000 criminal fine and EUR 7.5 million in confiscation. In **the Netherlands**, in the ***SBM Offshore case***, the company received USD 200 million in confiscation in addition to a USD 40 million criminal fine as part of its *Transaction* with the Public Prosecutor's Office in 2014. Similarly, in the ***VimpelCom case***, the 2016 *Transaction* provided for the payment of a USD 100 million fine and USD 167.5 million in confiscation. In the **United Kingdom**, in the 2015 ***Standard Bank case,*** the *DPA* was conditioned on the payment of both a criminal fine of USD 16.8 million and USD 8.4 million in confiscation.[212] In **Israel**, in the 2016 ***Nikuv case***, the company received both a criminal fine of USD 550 000 and criminal forfeiture of USD 550 000 as part of its *Plea Agreement*.

A fine imposed in criminal proceeding and confiscation imposed in related civil proceedings

This second scenario is largely used in the **United States**, where a fine is imposed by the DOJ while disgorgement of profits is often ordered in related civil proceedings by the

[211] The details of the cases in the following subsections are based on the information compiled in the cases summaries in Annex B. Sources for these summaries are also referenced in Annex B.

[212] An additional USD 7 million was imposed as compensation to the Tanzanian government.

SEC.[213] This is for instance the feature of the enforcement action in the ***Biomet case,*** in 2012, whereby Biomet received a USD 17.3 million criminal fine with no criminal forfeiture as part of the *DPA* it concluded with the DOJ. Biomet was, however, also ordered to pay USD 4.4 million in disgorgement and USD 1.1 million in prejudgement interest by the SEC to resolve civil proceedings. The criminal resolution can expressly give credit to the related disgorgement in civil proceedings imposed by the SEC, as shown in the second *DPA* between Biomet and the DOJ in 2017. Similarly, in the ***Och-Ziff case,*** the company reached parallel resolutions with the DOJ and the SEC, in 2016, whereby Och-Ziff agreed to pay a USD 213 million in criminal penalties as part of *a DPA* concluded with the DOJ. In addition, Och-Ziff resolved civil actions with the SEC and was imposed USD 173 million in disgorgement. Similarly, in the ***Telia case***, the resolution with Telia Company AB, in 2017, features total monetary penalties of USD 548.6 million imposed by the DOJ and USD 457 million in civil disgorgement imposed by the SEC. This was part of a multi-jurisdictional resolution also involving **Sweden** and **the Netherlands**.

A fine imposed without separate confiscation measures

A third possibility is to resolve foreign bribery cases with the imposition of a fine, without confiscating the proceeds of foreign bribery. In **Italy**, in the ***Agusta Westland case,*** no confiscation was imposed as part of the *Patteggiamento* reached with Agusta Westland SPA. The company only received a EUR 80 000 fine.[214] Similarly, in **the Netherlands**, in the ***Ballast Nedam case***, in 2012, the *Transaction* between the prosecutors and Ballast Nedam provided no confiscation in addition to the criminal fine of EUR 5 million. More recently, in the ***Société Générale case*** (2018) in **France** and in **the United States**, the *CJIP* and the *DPA* concluded between Société Générale SA and the respective authorities do not contain separate confiscation measures in addition to the total penalties imposed of USD 585 million. However, Société Générale had agreed to resolve civil proceedings brought by the Lybian Investment Authority (LIA) in the **United Kingdom** over the bribery allegations prior to resolving the criminal proceedings with the French and American authorities. In 2017, Société Générale agreed to pay EUR 963 million in compensation to the LIA.

Confiscation measures only

Some resolution systems only allow for confiscation to be imposed, though other resolutions may still be available within the same Party to the Convention if a fine is also warranted. In the **United States**, the DOJ publishes *declinations* (decisions declining to prosecute a matter based on a number of specific conditions discussed in Chapter 2.1) in criminal FCPA matters on its website. Up to the cut-off date of the Study (30 June 2018), there had been five published declinations with disgorgement of profits. Of the four cases where the amount was specified in the resolution, the disgorgement was over USD 1 million in two of the cases, and over USD 10 million in one case.[215] In **Switzerland**,

[213] United States Phase 3 Report, paras. 148-152.

[214] In contrast, the second company from the same corporate group, Agusta Westland Ltd, received both a criminal fine and confiscation measures as part of the same *Patteggiamento.*

[215] HMT LLC (USD 2.79m), CDM Smith Inc. (USD 4m), Linde North America Inc. (USD 11.2m). In NCH Corporation, the disgorgement was USD 355 000. The amount was not published in the four other decisions, but the declination letter stated that all profits would be disgorged.

a comparable form of non-trial resolution was used to recover funds in high-profile cases. The system, called *Reparation*[216], is not covered in the Study because compensation paid in the context of this procedure does not equate to a sanction, and confiscation cannot be imposed. However, an equivalent claim can be made to recover the amount of the illicit gain.[217] Seven sets of proceedings associated with the ***Alstom case*** and two sets of proceedings associated with the ***Siemens case*** were closed by the Office of the Attorney General (OAG) under the *Reparation* procedure.[218] Switzerland recently made clear that it no longer intends to use *Reparation* in foreign bribery cases.[219] In November 2018, the Swiss Attorney General stated that Reparations have to be in the public interest and therefore, cannot justifiably be used in economic crime cases of a certain importance.[220]

Confiscation in multi-jurisdictional cases

In multi-jurisdictional cases, the resolution in at least one of the countries involved usually complements the confiscation measures imposed in another country, which are taken into account in setting the level of the respective penalties. As a result, one authority imposes solely a fine, and confiscation measures are part of the corporate entity's resolution with the authority of another jurisdiction. This scenario applied for instance in the ***Odebrecht case,*** in the global resolution between Odebrecht SA, **Brazil**, **Switzerland** and the **United States**. As part of its *Plea agreement* with the U.S DOJ, Odebrecht received a criminal fine of USD 93 million without separate criminal forfeiture or civil disgorgement. However, in **Brazil**, 97.5% of the civil penalty imposed corresponded to the share that was paid as restitution for damages. In **Switzerland**, the *summary punishment orders* imposed a joint USD 116 million in confiscation on Odebrecht SA and its subsidiary Constructora Noberto Odebrecht. Similarly, in the ***Rolls-Royce*** resolution, no confiscation was imposed as part of the criminal penalties in the **United States**' *DPA* but USD 335.3 million was confiscated as part of the *DPA* reached in the **United Kingdom**.

4.3.4. Proportion of amounts confiscated in overall amounts paid as a result of non-trial resolutions

The deterrent effect of imposing the payment of a monetary amount including no, or a limited, fine has been questioned by civil society.[221] Transparency International also noted the increasing use of resolution procedures that aim to contain the damage to the offending company.[222] This is particularly the case when confiscation can be set off against tax. In certain countries, for example, confiscation measures can be deducted from the taxable income base, whereas the regulatory fine cannot be deducted. Across the countries Party to

[216] The Reparation is regulated by Article 53 of the Swill Criminal Code.

[217] The Equivalent Claim is regulated by Article 71 of the Swiss Criminal Code.

[218] Switzerland Phase 4 Report, para 18.

[219] Switzerland Phase 3 Report, para. 84, and answers to the Data collection questionnaire.

[220] See GIR, Swiss Attorney General calls for DPAs, Waithera Junghae, 21 November 2018

[221] See for example Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?"

[222] Exporting Corruption – Progress Report 2018: Assessing enforcement of the OECD Anti-Bribery Convention, files.transparency.org/content/download/2318/14294/file/2018_Report_ExportingCorruption_English.pdf

the Convention, significant contrasts can be noted between the level of punitive fines imposed and confiscation.

In recent multi-jurisdictional cases, the amounts confiscated significantly outweigh the amount of the fine imposed. In the ***Odebrecht case***, the civil fine imposed in Brazil only corresponds to 2.5% of the USD 2.4 million Brazilian share of the global financial penalties. Similarly, the amount confiscated from Odebrecht SA and its subsidiary Construtora Noberto Odebrecht as part of the *Summary Punishment Order* concluded in **Switzerland** is of USD 116 million whereas no fine was imposed against Odebrecht SA and a CHF 4.5 million (approx. USD 4.7 million) was imposed against the subsidiary. In the ***SBM Offshore case***, the amount confiscated in the **Netherlands** as part of the resolution with the authorities was also significantly higher with USD 200 million paid as confiscation whereas the criminal fine was USD 40 million.

In other cases, the amount confiscated as part of the resolution is relatively close to the amount of the fine. In the ***Nikuv case***, the resolution with Israeli authorities provides for an even split between the amount allocated for confiscation and the criminal fine both of which amount to NIS 2.25 million (approx. USD 550 000). In the ***Rolls-Royce case***, the *DPA* with the **United Kingdom** includes a criminal fine that is relatively close to the sum disgorged with a GBP 239 million fine (approx. USD 310.6 million) and confiscation amounting to GBP 258 million (USD 335.3 million).

In contrast, the amount of the fine imposed has sometimes been higher than the amount confiscated. In the ***Och-Ziff case***, in the *DPA* concluded with the United States authorities, Och-Ziff agreed to a USD 213 million criminal fine whereas USD 173.1 million was disgorged in a civil action brought by the SEC. In the global resolution concluded in the ***Telia case***, the amount of the global fine imposed by the United States and the Dutch authorities is also larger with USD 548.6 million imposed as monetary penalties and USD 457 million in confiscation. In the United Kingdom, the *DPA* concluded in the ***Standard Bank case*** provides for a USD 16.8 million fine and USD 8.4 million as confiscation. In **Norway**, where there is no maximum fine in law, the fines imposed on companies through resolutions have been significantly higher than the amounts confiscated. For instance in the ***Yara International case***, in 2014, the company accepted an *Optional Penalty Writ* of NOK 270 000 000 (approx. EUR 27 000 000) in connection with two foreign bribery schemes and a third commercial bribery scheme, while the confiscation imposed for the commercial bribery scheme amounted to NOK 25 000 000 (approximately EUR 2 500 000).

4.3.5. Amounts confiscated and proceeds of bribery

Another aspect of confiscation that the Working Group is assessing in the context of its peer reviews is the extent to which the amounts confiscated correspond to the proceeds that have derived from the payment of the bribes and how this amount is calculated.[223] The identification and quantification of the proceeds of active bribery has given rise to an analysis jointly developed by the OECD and the World Bank-UNODC Stolen Assets Recovery Initiative (StAR) in order to support countries' efforts to confiscate the proceeds of active bribery, which is required of Parties to both the OECD Anti-Bribery Convention

[223] Article 3(3) of the Convention requires Parties to "take such measures as may be necessary to provide that the bribe and the proceeds of bribery (…) are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable".

and the 2005 UN Convention against Corruption (UNCAC).[224] The different elements to consider and methods of calculation are summarised in Box 13. This raises issues that are going beyond the specificities of non-trial resolutions, as establishing an effective system of confiscation of transnational proceeds of bribery is highly complex and requires the necessary expertise and legal infrastructure.

Box 13. The OECD/StAR report on "Identification and Quantification of the Proceeds of Bribery"

Main aspects relevant to calculating the proceeds of bribery

The report is intended to provide practitioners, legislators and policy makers with practical information on the technical issues of identification and quantification of proceeds of active bribery. It provides examples of how proceeds have been identified and quantified in different jurisdictions; It uses mostly examples from cases that have actually occurred.

Its Chapter 2 considers the different types of proceeds of active bribery, namely:

a. proceeds from contracts obtained through bribery;
b. business authorisations, permits or licenses to operate;
c. expenses or losses avoided;
d. expedition of delays; and
e. gains from using lax internal controls and inaccurate or incomplete books and records.

Each type of proceeds could be identified and quantified by using different methods depending on the legal framework, e.g. confiscation/disgorgement, damages or restitution.

For contracts, the methods analysed are as follows:

1. Identification and quantification of proceeds for confiscation and disgorgement
   a. The gross revenue method
   b. The net proceeds (also called net revenue, or net profits) method
   c. The additional profit method - What if the bribe had not been paid?

2. Identification and quantification for claims based on compensation for damages

3. Quantification for claims based on contractual restitution

The quantification methods are illustrated through case examples.

The report also discusses adjustments and other practical challenges posed by factors to consider in calculating proceeds including the time period and the interest rates used to calculate proceeds, agent fees, administrative costs, indirect benefits, partial transactions, and the bribe payment(s).

Source: OECD/The World Bank (2012), Identification and Quantification of the Proceeds of Bribery: Revised edition, February 2012

[224] OECD/The World Bank (2012), Identification and Quantification of the Proceeds of Bribery: Revised edition, February 2012, OECD Publishing. dx.doi.org/10.1787/9789264174801-en.

In general, this is the practice in the Parties where a clear distinction is made in the resolution between the criminal/administrative sanctions and confiscation. For instance, in its evaluation of the **United Kingdom**, the Working Group noted that in all five criminal cases against legal persons concluded since Phase 3, "the gross profit from the misconduct has been assessed and confiscated in addition to punitive or remedial sanctions".[225]

Some Parties also take into account the value of the proceeds gained through bribery when determining the level of the fine. In the **United States**, for instance, the alternative maximum criminal fine available to sanction legal persons is linked to the gross gain obtained through bribery and is capped to the greater of twice the gross gain or twice the gross loss. In practice, the criminal fines imposed on legal persons for violation of the anti-bribery provisions of the FCPA have often exceeded the maximum statutory fine of USD 2 million for FCPA violations. As a result, the proceeds gained have been taken into account to calculate the appropriate fine.

Sometimes, the amounts of the proceeds of foreign bribery are not indicated in the resolutions. In the absence of information on the proceeds of bribery, it is therefore difficult to reach a conclusive assessment of whether the amounts confiscated always fully cover the amounts of the proceeds gained as a result of foreign bribery. When the amount of ill-gotten gains obtained is mentioned, the practice among the Parties varies and the confiscation imposed does not always fully cover the benefits gained through the commission of the offence.

Box 14. Good Practices in Assessing Proceeds of Bribery and Confiscating Corresponding Amounts

Assess the proceeds of the bribery of a foreign official using the methodology adapted to the legal framework for the non-trial resolution and confiscate corresponding amount in addition to punitive or remedial sanctions: the methodology for such calculation is detailed in the OECD/StAR report on "Identification and Quantification of the Proceeds of Bribery" and summarised in Box 13.

In multi-jurisdictional cases where a global resolution is possible, determine where confiscation or disgorgement should take place to avoid unfair duplication: Where confiscation may take place in one jurisdiction only, cooperation should start early to determine: i. in which jurisdiction; and ii. the potential impact this may have on the calculation of the monetary sanction in the other jurisdictions. Indeed, depending on the rules applying in each system, the proceeds gained may be taken into account to calculate the appropriate fine or monetary sanction.

Ensure transparency in order to enhance trust in the resolution system: Indicate the amounts of the proceeds of foreign bribery in the resolution(s) and ensure that the amounts confiscated cover the amounts of the proceeds gained as a result of foreign bribery or provide a clear justification if another option was taken, including in cases where damages are paid. This transparency aspect of confiscation should be read in conjunction with the good practice about transparency under Box 19.

[225] United Kingdom Phase 3 Report, para. 165.

4.4. Are sanctions imposed through non-trial resolutions effective, proportionate and dissuasive?

4.4.1. Possibility of comparing trial and non-trial resolutions

As mentioned previously, Article 3 of the Anti-Bribery Convention requires the Parties to ensure that they can impose "effective, proportionate and dissuasive" sanctions on those who engage in foreign bribery. Non-trial resolutions have been criticised, however, for their presumed leniency compared with a conviction after a trial. Some perceive non-trial resolutions as creating an impression "that companies can buy themselves out of the justice system".[226]

While certain non-trial resolutions may enable companies to avoid the harshest consequences of a foreign bribery conviction (e.g. debarment, discussed in Chapter 4.6.1), usually in exchange for cooperation and under a number of conditions, it is also the case that the highest criminal sanctions have been imposed through non-trial resolutions. In fact, the number and size of cases resolved through non-trial resolutions, especially those involving legal persons, can make it difficult to compare with cases that proceed to trial. The highest total sanction imposed on a legal person after a full trial in any foreign bribery case was EUR 25.1 million in the 2016 ***Saipem case*** in **Italy**, which was related to the ***TSKJ Nigeria case***. The fine was EUR 600 000 and confiscation EUR 24.5 million.[227] The highest fine imposed on a legal person after a full trial came in the 2016 ***Smith and Ouzman*** case in the **United Kingdom**, which resulted in a fine of GBP 1.3 million (EUR 1.43 million) plus confiscation for a total financial penalty of GBP 2.2 million (EUR 2.42 million).[228]

It is only occasionally possible to say whether the sanction imposed through a given non-trial resolution would have been substantially greater if imposed after trial. In some countries, the discount that can be imposed when resolving a case without trial is calculated from the sanction that could have been imposed at trial. Examples include **Brazil** (where a reduction of up to 66% can be granted), **Estonia** (up to 33%) and **Italy** (also up to 33%). While providing a certain degree of transparency, the exact percentage of discount granted in a given case is not always disclosed to the public. In the **United Kingdom**, the Court judgment approving a *DPA* must set out in detail the steps that have been taken to calculate the reduction in fine. In the ***Standard Bank case***, the applicable sanction was reduced by a third to reflect the resolution. Thus, the Court found that the applicable sanction after trial would have been USD 25.2 million, but this was reduced to USD 16.8 million, because the case was resolved through a *DPA*.[229] It should be noted, however, that trial may unveil factual elements that could influence the level of sanction imposed. It is hence impossible to assess with certainty what sanction would have been imposed after trial.

[226] Corruption Watch (2016), "*Out of Court, Out of Mind – do Deferred Prosecution Agreements and Corporate Settlements deter overseas corruption*?"

[227] Database of concluded foreign bribery cases maintained by the OECD. See also: "Italy court upholds Saipem fine and seizure order in Nigeria case", Reuters, February 19, 2015.

[228] The database of concluded foreign bribery cases maintained by the OECD. See also: UK SFO, Case Information, Smith and Ouzman Ltd.

[229] See paragraphs 43-58 of the preliminary judgment.

One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty. This close coordination would not have been possible in cases involving trials. Examples include the ***Odebrecht/Braskem case*** (December 2016), the ***Rolls-Royce case*** (January 2017), and the ***Vimpelcom case*** (February 2016). Issues related to multi-jurisdictional resolutions are discussed in more detail in Chapters 1.4 and 6.2.

4.4.2. Non-trial resolutions can enable multiple jurisdictions to impose dissuasive but proportionate sanctions

Large multi-jurisdictional resolutions have to date permitted the highest global amount of combined financial penalties. This can be seen in Table 2, which shows that eight of the top ten largest foreign bribery enforcement actions involved coordinated or sequential non-trial resolutions with at least two Parties to the Convention. Furthermore, the multi-jurisdictional resolution in the ***Odebrecht case*** resulted in the highest amount of financial penalty imposed to one single company. Pursuant to the resolution in the respective countries, **Brazil** received 80% of the total fine (USD 2.8 billion), while the **United States** and **Switzerland** received 10% each.

Table 2. Ten Largest Foreign Bribery Enforcement Actions among the Parties to the Convention

Company	Countries	Total penalties	Year imposed
Odebrecht/Braskem	Brazil, Switzerland, United States	$3.5 billion	2016
Siemens	Germany, United States	$1.6 billion	2008
Telia Company AB	Netherlands, Sweden, United States	$965 m	2017
VimpelCom	Netherlands, United States	$835 m	2016
Rolls-Royce	Brazil, United Kingdom, United States	$800 m	2017
Alstom	United States	$772 m	2014
Société Générale	France, United States	$585 m	2018
KBR/Halliburton	United States	$579 m	2009
Teva Pharmaceutical	United States, Israel	$541 m	2016, 2018
Keppel Offshore & Marine Ltd	Brazil, Singapore, United States	$422 m	2017

Note: The table lists the ten largest enforcement actions for foreign bribery that the Parties to the Convention concluded with legal entities through June 2018. These enforcement actions have resulted in sanctions for anti-bribery violations (plus any other related offences) against at least one corporate defendant in at least one jurisdiction. For example, the ***Siemens*** and ***Alstom cases*** are included because their subsidiaries were charged with violating the FCPA's anti-bribery provisions in coordinated enforcement actions. Conversely, if a company (including its subsidiaries) resolved the enforcement action based solely on false accounting or other charges, it would not be included.

Where applicable, the total penalty for each enforcement action combines all criminal or non-criminal penalties (including confiscation) imposed in enforcement actions that were brought simultaneously or consecutively against related corporate entities (e.g. related subsidiaries) in relation to the same bribery scheme. The monetary penalties imposed in related enforcement actions against natural persons are not counted.

4.4.3. Effectiveness and dissuasiveness of sanctions in practice

To explore whether the different means for resolving foreign bribery cases have any impact on the level of monetary sanctions imposed, three samples of resolutions were identified among the foreign bribery cases that were concluded with sanctions between the Convention's entry into force in February 1999 and the Study's cut-off date at 30 June 2018.

The resolutions were extracted from the OECD database of concluded foreign bribery cases if they had information about the monetary assessment imposed (defined to include fines and confiscation, plus any orders to pay compensation or reimburse prosecution costs) as well as one of the following variables: the bribe amount, the illicit gross proceeds obtained, and the net proceeds earned as a result. A single resolution could be included in more than one sample if it met the relevant criteria:

- **Sample #1 (Bribe amount)**: The first sample consisted of 501 resolutions in which information was available for both the bribe amount and the monetary assessment. This sample contained 232 resolutions for legal persons and 269 resolutions for natural persons. To avoid double counting the bribe in schemes involving multiple participants, the total bribe was allocated equally between the participants.[230]
- **Sample #2 (Gross proceeds from the bribery scheme)**. The second sample consisted of 233 resolutions in which the amount of the unlawful gross proceeds obtained by the bribery scheme was known (e.g. the value of a contract obtained by bribery) in addition to the monetary assessment. This sample contained resolutions involving 116 legal persons and 117 natural persons. The same methodology was followed to allocate the gross proceeds obtained among the participants in the scheme.
- **Sample #3: (Net proceeds from the bribery scheme)**. The third sample consisted of 181 resolutions involving 115 legal persons and 66 natural persons for which information was reported on the net proceeds earned from the bribery scheme and the monetary assessment.

As a preliminary matter, the enforcing Parties have large variations in the number of enforcement actions brought against legal and natural persons as well as in the frequency in which they resort to trial or non-trial resolutions for each type of offender. In addition, they have different levels of transparency for reporting on concluded foreign bribery cases. While some provide press releases and even publicise the underlying resolution, other Parties do not. These differences inevitably affected the level of information available for a given resolution, thus indirectly influencing the composition of the samples. As these samples are not necessarily representative for the entire universe of concluded foreign bribery cases, the following analysis can only tentatively indicate whether any differences may exist between the trial and non-trial populations within these samples. Table 3 indicates how the total monetary assessment compares to the relevant variable for each sample using a weighted average to account for the varying levels of enforcement activity in each country. Values greater than 100% indicate that the total monetary assessment exceeded the amount of the variable in the sample.

[230] When both legal persons and natural persons were sanctioned as part of the same scheme, the entire amount of the bribe was allocated evenly between all legal persons involved and also allocated evenly between all natural persons involved. For this reason the statistics involving legal persons cannot be directly compared to natural persons, or vice-versa.

Table 3. Ratio of total monetary assessment versus bribery scheme variables in sampled resolutions

	Weighted average ratio for each sample *(sample size)*			
	Entire sample	Trial resolutions	Non-trial resolutions	Excluded non-trial resolutions
Bribe sample				
LP	157% *(232)*	133% *(18)*	163% *(211)*	39% *(3)*
NP	26% *(269)*	15% *(113)*	38% *(154)*	0% *(2)*
All	87% *(501)*	31% *(131)*	110% *(365)*	24% *(5)*
Gross proceeds sample				
LP	15% *(116)*	21% *(9)*	14% *(106)*	9% *(1)*
NP	0% *(117)*	0% *(32)*	0% *(84)*	0% *(1)*
All	7% *(233)*	4% *(41)*	8% *(190)*	4% *(2)*
Net proceeds sample				
LP	57% *(115)*	336% *(3)*	45% *(110)*	49% *(2)*
NP	2% *(66)*	6% *(12)*	3% *(54)*	N/A *(0)*
All	40% *(181)*	81% *(15)*	33% *(164)*	49% *(2)*

Note: Total monetary assessment over bribe scheme variable (weighted average). Values greater than 100% indicate that the assessment for sample was larger than the variable.
Source: OECD Database of concluded foreign bribery cases.

Legal persons

The sampled resolutions show that across all types of resolution methods, the ratio of the total monetary assessment exceeded the bribe amount, being roughly 157% of the bribe amount, 15% of the gross proceeds and 57% of the profit obtained. (See Table 3). For the bribery sample, the monetary assessment ratio for non-trial resolution systems covered in the Study was higher than that for trial resolutions (163% versus 133%); the situation, however, was reversed in the other two samples (14% versus 21% for the gross proceeds sample and 45% versus 336% for the profit sample). The sizeable differential between trial and non-trial resolutions in the profit sample may be influenced by the small sample size: information about the profit earned from the bribery scheme was available in only 3 of the 27 resolutions in which a legal person was convicted after trial. In comparison, the monetary assessment ratios for the non-trial resolutions covered in the Study were higher than those for non-trial resolutions excluded from the Study in all but the profit sample. Overall, this suggests that non-trial resolutions, at least for legal persons, can vary considerably from trial resolutions, but there is no clear indication that trial or non-trial resolutions necessarily result in higher sanctions.

Natural persons

The analysis of monetary sanctions and confiscation imposed on natural persons is less straightforward than for legal persons for several reasons. Significantly, natural persons,

unlike legal persons, also face the prospect of imprisonment. Even where fines are imposed along with prison sentences, it is possible that the monetary sanctions would be influenced by the sanction of imprisonment. As a separate matter, natural persons may not be subject to large monetary sanctions or confiscation either because they have limited resources or because they did not personally benefit from a bribery scheme conducted for the benefit of their employers. As seen in Table 3, the ratios of the monetary assessments imposed on natural persons as compared against each variable were far lower than for legal persons in the same sample. Comparing each method for resolving cases revealed that the monetary assessment constituted a larger percentage of the test variable in both the bribery and gross proceeds samples but not for the net proceeds sample. The differences between trial and non-trial resolutions for natural persons did not vary as much as it did for legal persons, perhaps reflecting the larger sub-set of natural person resolutions in those two-sub sets. The sub-set of non-trial resolutions in the Study had a higher ratio than the sub-set of excluded non-trial resolutions in the bribery sample (38% versus 0%). The ratio was either the same or could not be compared in the gross proceeds and net proceeds samples.

Given the diverging results of the samples, it is not possible to conclude that the monetary sanctions or other financial assessments imposed through non-trial resolutions are inherently less dissuasive than trial resolutions. On one hand, the OECD database of foreign bribery cases indicates that the average monetary sanctions for non-trial resolutions exceeds those for trial resolutions in every Party that has sanctioned legal persons and natural persons using both types of resolutions.[231] On the other, it is impossible to know how cases that were in fact resolved through non-trial resolutions would have been sanctioned had they gone to trial (assuming that they resulted in a conviction) given the various mitigating and aggravating factors that may be considered. Finally, it is difficult to argue that even a major international company will not be affected by penalties of the size and scale of many of the cases resolved through resolutions. For example, major multi-national corporations, such as Rolls-Royce and Odebrecht, arranged to have make payments to the authorities in the **United Kingdom** and **Brazil** in instalments over several years in order to ensure business continuity.

Furthermore, as a policy matter the question of effective, proportionate and dissuasive sanctions must also be considered holistically beyond individual resolutions to consider the general effort to reduce and punish foreign bribery. Arguably, without meaningful financial incentives for self-reporting available in many jurisdictions with non-trial resolutions, some of the foreign bribery cases would likely not have been discovered and much less prosecuted.[232] There is also a significant financial cost to prosecuting cases, particularly those of a large scale, to trial.[233] Overall, a balance must be found to ensure that foreign bribery cases are detected and prosecuted by incentivising self-reporting and cooperation, while at the same time ensuring that the punishments imposed on individuals and companies provide sufficient general and specific deterrence.

[231] For legal persons, these Parties are **France**, **Germany**, **Italy**, and the **United Kingdom**. For natural persons, the Parties are **France**, **Germany**, **Norway**, **Sweden**, the **United Kingdom**, and the **United States.**

[232] The Detection of Foreign Bribery (OECD, 2017) shows that 23% of all foreign bribery schemes were detected through a self-report.

[233] See for example UK SFO v Rolls-Royce (Jan 2017), paragraph 58.

4.5. Other terms of resolutions

4.5.1. Exclusion from public contracting

A foreign bribery resolution can provide for the offender's exclusion from public contracting, through suspension or debarment. Even if debarment is not imposed as part of a given resolution, it can still be a collateral consequence of the resolution. Either way, this consequence is reportedly possible in at least 31% (16 out 52) of systems that are used with legal persons, and 22% (12 out of 55) of those used with natural persons. Since exclusion is often conviction-based, it is typically a collateral consequence of resolutions that result in a conviction. In **Norway**, the *Optional Penalty Writ* amounts to a conviction[234], which triggers mandatory exclusion from public contracting.[235] By the same token, in resolutions where charges are dropped or deferred, the offender avoids a conviction and, often, exclusion from public contracting. This is the case for **France**'s *CJIP* and the **Netherland**'s *Conditional Dismissal*.

Yet, this rule is not absolute and offenders can sometimes be suspended or debarred even though they have escaped a conviction. In the **United States**, the *FCPA Guide* explains that a decision to debar is "not made by DOJ prosecutors or SEC staff, but instead by independent debarment authorities within each agency […]." Further, "although guilty pleas, DPAs, and NPAs do not result in mandatory debarment from U.S. government contracting, committing a federal crime and the factual admissions underlying a resolution are factors that the independent debarment authorities may consider. Moreover, indictment alone can lead to suspension of the right to do business with the government."[236]

As shown in Figure 41, in the 16 systems designed for legal persons and that result in exclusion, this consequence is mandatory in 17% of systems, and it is discretionary in 48% of them. This shows that overall, mandatory suspension is relatively rare. In particular, this is the case in the **United Kingdom** for defendants convicted of bribery under sections 1 and 6 of the UK Bribery Act as a result of a plea agreement.[237]

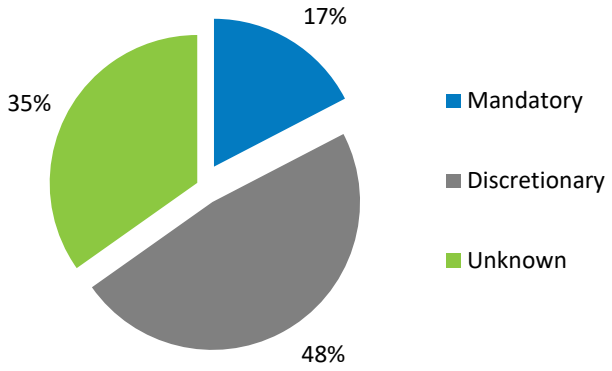
[234] Norway Phase 4 Report, para 83.

[235] The Norway Phase 4 Report (para. 177) provides that Norway has transposed EU Directive 2014/14/EU into Norwegian Law in 2017. "As a result, Norwegian law now provides for mandatory exclusion of economic operators from participation in a procurement procedure where the contracting authority has established that the tenderer has been the subject of a conviction for corruption by final judgment or an optional penalty writ."

[236] FCPA Guide, A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, page. 70.

[237] The United Kingdom Phase 3 Report (para. 207) provides that "A UK public contracting authority must permanently exclude an ―economic operator‖ from public procurement contracts if the authority knows that the economic operator (or its directors or representatives) has been convicted of offences relating to corruption, bribery, fraud or money laundering) Regulation 23 of the Public Contracts Regulations (2006) and Regulation 26 of the Utilities Contracts Regulations (2006)). […] Mandatory exclusion applies to companies convicted of bribery under Sections 1 and 6 of the Bribery Act, but not to those that reach civil settlements with the SFO."

Figure 41. Debarment as mandatory or discretionary term in resolutions with a legal person



Source: OECD data collection questionnaire results, Tables 40 and 42.

The length of exclusion varies from one system to another. Exclusion can last a maximum of two years under **Chile's** *Expedited Procedure*, and a maximum of 15 years under the **Spanish** *Conformidad*. The duration can also vary significantly within one system. Under the **Czech Republic** *Agreement on Guilt and Punishment*, exclusion can last from one to 20 years.

Finally, in some countries, the excluded person has the opportunity to challenge its suspension. In **Norway**, for example, mandatory exclusion can be reversed by the contracting authority if the excluded person takes appropriate "self-cleaning" measures, including remediation by the company and cooperation with authorities.[238] In the **United States**, "if a cause for debarment exists, the contractor has the burden of demonstrating to the satisfaction of the debarring official that it is presently responsible and that debarment is not necessary."[239] The deterrent effect of exclusion from public tendering is discussed in more detail in Chapter 4.6.1.

4.5.2. Development and control of an ethics/compliance programme

The existence of internal company controls and an appropriately implemented corporate compliance and ethics programme is broadly recognised as a factor which reduces the risk of occurrence of foreign bribery offences. A number of resolution procedures enable prosecutors or courts to impose terms requiring companies to implement a new compliance programme or strengthening an existing one. Of the 52 resolution systems studied, 28 (54%) enable the insertion of this term, and 21 (40%) enable the appointment of a compliance monitor. This latter appointment is discussed further in Chapter 4.7.

The imposition of these programmes as a term of a criminal resolution commenced in the **United States** in 1991 when the US Sentencing Council established its Sentencing Guidelines Manual, last updated in 2012.[240] In a 2014 speech at the Working Group on Bribery, Leslie Caldwell, the then Assistant Attorney General, explained that the possibility

[238] Norway Phase 4 Report, para. 177.

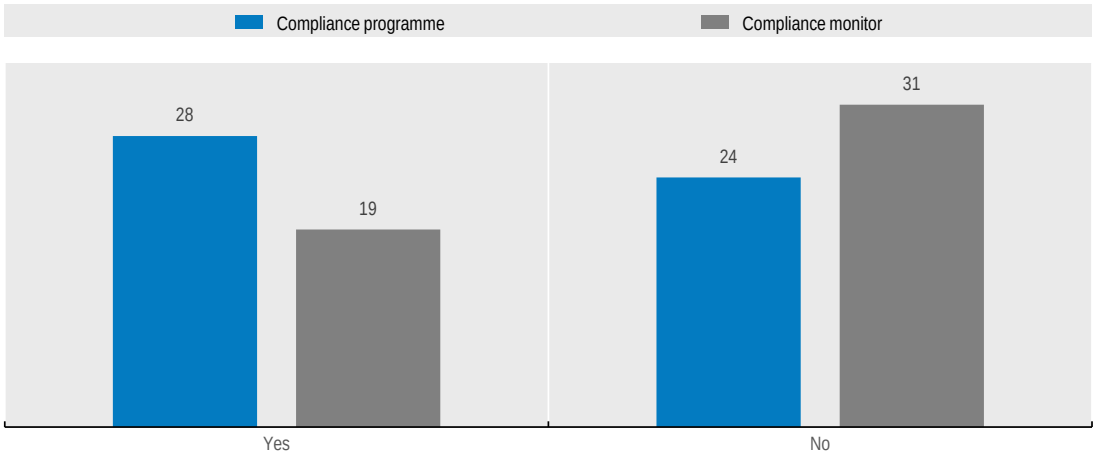
[239] FCPA Guide, A Resource Guide To The U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, page. 70.

[240] www.ussc.gov/guidelines/guidelines-archive/2012-federal-sentencing-guidelines-manual.

to impose such programs is a key benefit of resolution procedures, as prosecutors are able to "impose reforms, impose compliance controls, and impose all sorts of behavioural change that a court would never be able to impose following conviction at trial". Other jurisdictions, such as **Israel,** have also been imposing such programs in their resolutions. In the **United Kingdom**, a DPA can impose the implementation or improvement of a corporate compliance programme.[241] This power is not available to a court sentencing after a conviction at trial or through a guilty plea. In the ***Rolls-Royce case***, it was ordered notwithstanding steps of "real significance" the company took, including the appointment of experienced compliance personnel and the appointment of an independent compliance expert four years prior to the *DPA* (who was still in post at the time of the *DPA*), the court made an order that Rolls-Royce "continue to review its existing internal anti-bribery and corruption policies and procedures".[242] In the ***Nikuv Case*** in **Israel,** in addition to the financial penalties, Nikuv revised its internal compliance policies to prevent future cases of bribery.

In practice, of the 14 cases showcased by this Study, only the ***Agusta Westland case*** (**Italy**) did not include terms imposing improvements to the corporate compliance programme because the companies provided evidence of the adoption and implementation of adequate organisational models before the *Patteggiamento* was concluded.

Figure 42. Compliance measures available as a term of resolution



Source: OECD data collection questionnaire results, Tables 40 and 42.

4.5.3. Agreement to pay prosecution and investigative costs

The agreement to pay investigation or prosecution costs is a far less common term imposed in resolutions. So far, costs have at least been imposed in the **United Kingdom**. The power to order costs in the **United Kingdom** exists after conviction of the defendant, either at trial or following a guilty plea.[243] The Court can order the defendant to pay such costs as it thinks

[241] Crime and Courts Act 2013, Schedule 17, paragraph 5(3)(e)

[242] UK SFO v Rolls-Royce PLC, para. 130 of the Judgment, www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf

[243] The power depends on the Court hearing the case. In the Crown Court, where all first instance trials of foreign bribery will be heard, the power arises from the Prosecution of Offences Act 1985, Section 18.

"just and reasonable". Where the defendant has the means to pay, the Court should order costs.[244] The power is also available to the Crown Court on imposition of a *DPA*.[245]

It is notable that costs imposed through *DPA*s have in practice been much higher than those imposed after conviction at trial. In the ***Rolls-Royce case*** and the ***Standard Bank case***, the full investigation and prosecution costs of the US SFO were granted (amounting to GBP 13 million (EUR 14.4 million) in ***Rolls-Royce*** and GBP 330 000 (EUR 365 000) in ***Standard Bank***). In the ***Smith and Ouzman case*** that proceeded to trial, a lesser contribution of GBP 25 000 (EUR 27 750) was awarded against the company (with GBP 75 000 (EUR 83 000) being awarded against each convicted individual defendant).

4.5.4. Compensation to victims

Compensation to victims in the context of non-trial resolutions is viewed as a good practice by civil society. In the 2016 letter from Corruption Watch, Global Witness, Transparency International, and the UNCAC Coalition to the Working Group, the organisations called for "compensation to victims, based on the full harm caused by the corruption, must be an inherent part of a settlement".[246]

As discussed in Chapter 4. 1. on the baseline terms of a resolution, in a foreign bribery case, beyond competitors, victims are often difficult to identify and while it is not a victimless crime, determining who they are may depend on the facts of each case. The complexity also extends to the form that the compensation may take and the need to ensure that the money, if returned to the country where the bribe was paid, does not run the risk to be "re-corrupt".

Direct compensation is available for victims in 36 of the 52 resolution systems for legal persons, and 42 of the 55 resolution systems for natural persons (69%), as shown in Figures 31 and 32 (Chapter 4.1). Only 9 resolution systems for legal persons (17%) and 7 of the 55 resolution systems for natural persons (13%) allow payment to a domestic charity or NGO. Payments to a foreign charity or NGO are provided in four resolution systems that can be used with legal persons, and two that can be used with natural persons.

In practice, payments to a domestic charity have occasionally been used, for instance in **Germany** in resolutions with individuals instead of a payment to the treasury.[247] This however does not address civil society's call that resolutions "should provide for compensation to those harmed by the offence, including victims in other countries, wherever possible".[248]

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[244] Practice Direction (Costs in Criminal Proceedings) [2013] EWCA Crim 1632.

[245] Crime and Courts Act 2013, Schedule 17 paragraph 5(3)(g).

[246] See an article on this subject here: www.fcpablog.com/blog/2016/3/15/ngos-to-oecd-corporate-pretrial-agreements-can-work-but-we-s.html.

[247] See, for example, Case Bav 2011/1 (Siemens) where, under a *Negotiated Sentencing Agreement*, an individual was convicted and sentenced to a suspended prison sentence, probation being made conditional on a payment of EUR 130 000 to various charities.

[248] Transparency International, (2015) Policy Brief, "*Can Justice Be Achieved Through Settlements?"*

An example of where this occurred was in the **United Kingdom**'s ***Standard Bank case***, the first *DPA* concluded in the United Kingdom. As part of that resolution, the entire loss to the Tanzanian government from the bribery was compensated, including interest. Following this case, the United Kingdom adopted general principles with respect to providing compensation to victim governments or countries as part of the resolution of foreign bribery cases as detailed in Box 4.

Building on the **United Kingdom**'s initiative, the May 2016 UK Anti-Corruption Summit included commitments from nine countries to develop common principles governing the payment of compensation to countries affected by foreign bribery.[249] The United Kingdom's policy rationale for pursuing compensation payments is summarised in the summit's communique as "an important method to support those who have suffered from corruption."[250]

Non-trial resolutions can also leave the terms and conditions for the payment of damages to the victims to separate non-trial resolutions in the country where the bribes were paid (the country being considered as the victims of the bribery scheme). In such a case, one of the terms of the non-trial resolution is a commitment by the accused company to reach an agreement in the victims' country within a pre-determined amount of time. This is the option that **Brazil** has taken in the ***Odebrecht case***. In July 2018, Odebrecht also signed a leniency agreement with Brazil's CGU and AGU over facts covered by the 2016 agreement, particularly in relation to federal matters. This second agreement included an obligation that the company reach agreements in the victim countries within a period of 3 years, extendable for another 3 years if the company proves that it is making efforts to conclude the settlements. If agreements are not reached by that deadline, the 2018 agreement will have to be amended and the monetary sanctions increased to include compensation to the victims.

Another type of restitution to victims has emerged in recent foreign bribery cases, where compensation for damages and return of profits have been paid to a State-owned enterprise (SOE), which was considered as a victim of the bribery scheme on the bribe recipient side. In three prominent foreign bribery cases detailed in Box 5, the Brazilian SOE Petrobras received such compensation. However, in the past, in at least one other country, an SOE's claim for compensation as a victim was rejected. In the **United States**' ***Alcatel case***, the Costa Rican SOE sought to challenge the non-trial resolutions that the DOJ proposed for Alcatel and its subsidiaries. While these proposed resolutions provided that Alcatel and its subsidiaries would pay USD 92 million in fines, none provided for any compensation to be paid to the Costa Rican SOE for the damages it allegedly suffered as a result of the corrupt contracts. Ultimately, the US courts held that the Costa Rican SOE was actually a co-conspirator to the FCPA offence, rather than its victim, given the "pervasive, constant, and consistent illegal conduct" of its Board of Directors and management.[251]

[249] Afghanistan, Australia, Indonesia, Italy, Jordan, Mexico, Nigeria, Switzerland, and the United Kingdom. See Anti-Corruption Summit Country Statements at www.gov.uk/government/publications/anti-corruptionsummit-country-statements.

[250] Anti-Corruption Summit London, 12 May 2016, Communique, para. 21, www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL__AC_Summit_Communique_-_May_2016.pdf.

[251] See DOJ Press Release, "Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 million to Resolve Foreign Corrupt Practices Act Investigation" (27 Dec. 2010),

Box 15. Compensation to victim governments or countries as part of the resolution of foreign bribery cases in the United Kingdom

Following the resolution of the ***Standard Bank case*** by *DPA*, in November 2015 the SFO, the CPS and the National Crime Agency (NCA) adopted general principles with respect to providing compensation to victim governments or countries as part of the resolution of foreign bribery cases. Pursuant to these principles the agencies work collaboratively with the Department for International Development (DFID), the Foreign and Commonwealth Office (FCO), the Home Office and Her Majesty's Treasury to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is "transparent, accountable and fair", and identify means by which compensation can be paid to avoid the risk of further corruption.

In practice, in the **United Kingdom**, at the time of the Phase 4 evaluation in 2016, compensation had been provided to foreign countries or governments in four foreign bribery cases since Phase 3:

Smith & Ouzman – Compensation was not ordered by the court, but the SFO worked with DFID and FCO to organise GBP 395 000 compensation to Mauritania and Kenya through the exercise of executive power. For Mauritania, where the public official in question had remained in post since the corruption was discovered, the **United Kingdom** made a payment to the World Bank to fund infrastructure projects in the country. For Kenya, the **United Kingdom** agreed the funds would be spent on purchasing ambulances for the country.

Standard Bank – As part of the court-approved *DPA*, USD 7 million compensation was ordered to be paid directly to the Government of Tanzania. The amount corresponds to the total amount of the bribes plus interest. The United Kingdom explained that as the corporate benefit was shared between a UK and Tanzanian company, Tanzania had potential jurisdiction. The United Kingdom agreed with Tanzania that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation. In providing the payment to Tanzania, the SFO was assisted by the FCO and DFID working in collaboration with the Ministry of Finance of the Government of Tanzania.

Oxford Publishing Limited – In addition to the GBP 1.9m *Consent Order* for civil recovery, OPL unilaterally offered to contribute GBP 2m to not-for-profit organisations for teacher training and other educational purposes in sub-Saharan Africa. This benefit to the people of the affected region has been acknowledged and welcomed by the SFO, but the SFO decided that the offer should not be included in the terms of the court order, as the SFO considers it is not its function to become involved in voluntary payments such as this.

A fourth case for which reporting restrictions apply.

Source: United Kingdom 2016 Phase 4 report.

www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt. See also In re *Instituto Costarricense de Electricidad*, 11-12708 (11th Cir. 2011) (June 17), www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/28/2011-06-17-Mandamus-Order.pdf.

Box 16. Compensation to a State-Owned Enterprise – The example of Petrobras

Brazil's state-owned enterprise Petrobras was embroiled in one of the largest corruption schemes ever investigated and prosecuted by Parties to the Convention. The scheme involved corrupt dealings among companies and officials from Brazil as well as those from other countries, including certain Parties to the Convention. Brazil's investigation into the scheme, known as operation "Car Wash", has therefore given rise to a number of both separate and coordinated foreign bribery enforcement actions, including the following in which Petrobras' status as victim was recognised:

Rolls-Royce case

In 2017, in **Brazil**, Rolls-Royce signed a *Leniency Agreement* for conspiracy to commit domestic bribery to close civil proceedings with the Brazilian FPS and agreed to pay USD 25.5 million in compensation including a USD 5.1 million fine (BRL 20.7 million) to the Brazilian authorities. The full amount was subsequently paid to Petrobras as compensation for damages and return of profits. Although Petrobras is not party to the leniency agreement, the company is considered a victim of the bribery scheme.

SBM Offshore case

In 2018, SBM Offshore N.V. and SBM Holding Inc. S.A. signed a *Leniency Agreement* with **Brazil**'s AGU and CGU to resolve the allegations of bribery of employees of the Brazilian state-owned company Petrobras. In total, SBM Offshore agreed to pay USD 327 million of which USD 71 million is a civil fine and USD 256 million corresponds to compensation for alleged damages caused by the bribery scheme. SBM was also obliged to provide Petrobras with USD 179 million in anticipated damages connected with contracts. Petrobras is party to the 2018 *Leniency Agreement* and will receive the full amount SBM Offshore agreed to pay.

Odebrecht case

In 2016, Odebrecht agreed to pay a combined fine of at least USD 2.6 billion and up to USD 4.5 billion as part of a coordinated resolution between **Brazil**, **Switzerland** and the **United States**. The **United States** and **Switzerland** received 10% each of the total criminal fine and **Brazil** received the remaining 80%. Odebrecht S.A. also committed to make full restitution for the damages caused, amounting to 97.5% of the Brazilian share of the fine (the civil fine imposed was therefore of 2.5 % of the Brazilian share of the global fine). Pursuant the *Leniency Agreement* the restitution for damages was imposed "for compensation (…) to public entities, public agencies, public companies, public foundations and mixed capital companies that are the object of this Agreement." (Clause 7 para.3). Although the total amount of damages has not yet been ascertained, Petrobras has received USD 274 million in damages so far. The 2018 CGU-AGU's leniency agreement with Odebrecht has calculated over USD 1.05 billion to be reimbursed to Petrobras and USD 767 million to the Federal Treasury.

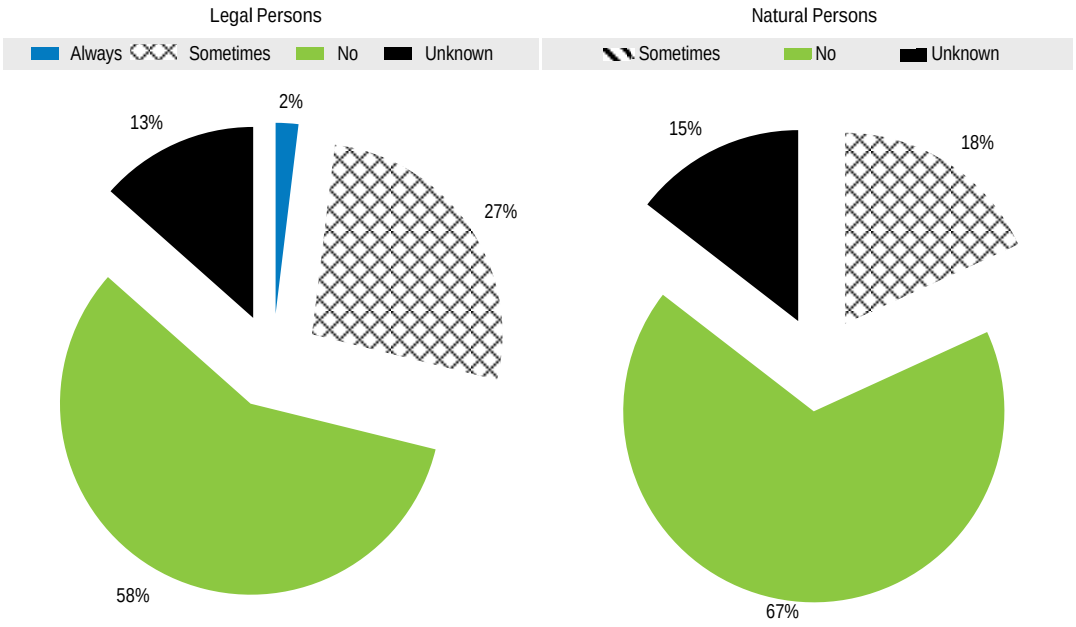
Source: Summaries of cases in Annex B. and *Petrobras recovers USD 274 million from corruption scandal*, AFP News, 9 August 2018, sg.news.yahoo.com/petrobras-recovers-274-million-corruption-scandal-145918662.html?guccounter=1

4.5.5. Secrecy or "muzzle" clauses

Two types of clauses can be inserted into a resolution to protect confidentiality. "Muzzle" clauses aim at preventing the defendant from making any public statement contradicting the matters described in the statement of facts. Secrecy clauses may be broader and cover other aspects or terms of the resolution. However, secrecy or confidentiality clauses can be used when the ongoing investigation of related persons, or safety of a witness would be impacted by publication of the resolution. In this case, the terms of the resolution can either fully or partially be kept confidential, usually for a set period of time. Secrecy clauses may apply to either or both the defendant and the authority with whom the resolution is concluded.

A number of resolution systems can include a secrecy clause or a muzzle clause. As shown in Figure 43, of the 52 resolution systems available for legal persons, 14 (27%) can include this type of clause. Of the 55 procedures for natural persons, 10 (18%) can include this type of clause. An automatic muzzle clause is imposed in 2% of the resolution systems available for legal persons, while it is never automatic in those available for natural persons.

Figure 43. Does a resolution contain a secrecy or muzzle clause?



Source: OECD data collection questionnaire results, Tables 49 and 50.

In practice, most of the resolutions concluded through *DPAs* in the **United States** include a muzzle clause whereby the company or its representatives and any other related entity commit to refrain from making any public statement. Other countries have also started to include similar clauses into their resolutions, for instance the **United Kingdom** in the ***Standard Bank case***.

In **Brazil,** the *Leniency Agreement* by the Federal Prosecution Service (FPS) in the ***Odebrecht case***, contained a confidentiality clause restricting access to the contents of the agreement itself, including its annexes and all statements and documents obtained as a

result of the agreement. The purpose of the clause is, according to Brazil, not to jeopardise the investigation and prosecutions of related natural or legal persons.[252] However, this clause can be waived by a court and does not prevent the prosecutors from making public the existence of the agreement and the amount of the fine. The clause also restricts the provision of information through MLA, as explained in Chapter 6.2. The annexes of the agreement containing the description of the facts of the case were kept confidential for a period of six months from the signature of the agreement. The confidentiality clause has since been extended.

4.6. Monitorships and other forms of control over the implementation of the terms of resolutions

In certain Parties to the Convention, non-trial resolutions provide a means to impose remedial measures designed to prevent future wrongdoing by corporate offenders, including the engagement of an external party to assess the state of the corporate compliance programme and monitor efforts to improve it.[253]

This last remedial measure, often referred to as a "monitorship", typically involves the appointment of an independent expert or consultant to assess whether the offending company fulfils its obligations under the resolution to improve its corporate compliance efforts. Different countries Party to the Convention refer to these experts or consultants using various labels. In the **United Kingdom**, the SFO may require the company to appoint a "monitor" as part of a *DPA*. In **Brazil**, *Leniency Agreements* concluded with the Federal Prosecution Service can require companies to appoint a "compliance monitor". In the **United States**, DOJ resolutions may call for an "independent corporate monitor" or "independent compliance monitor", while the SEC resolutions may require a company to engage an "independent consultant".

Furthermore, the expert may be an unaffiliated, independent individual knowledgeable in the fields of corporate governance and anti-bribery legislation. At other times, the offending company may engage a law firm, consulting company, or another entity to carry out the monitorship. Elsewhere, a government agency may be tasked with overseeing the company's efforts to improve compliance. This is the case in **France**, where a CJIP can mandate that the company develop a compliance programme under supervision of the AFA. Similarly, in **Brazil**, a department of compliance specialists within the CGU will monitor a legal entity's compliance programme if it concludes a Leniency Agreement with the CGU and the AGU. For the purposes of this Study, the label "monitor" is used to refer to any external individual or entity, whether from the private or public sector, tasked with overseeing a company's establishment or improvement of its compliance program. No matter how it is labelled or who conducts it, the monitorship will be designed to ascertain whether the company is living up to its corporate compliance obligations and/or the terms of the resolution.

[252] Clause 11.

[253] See, e.g. Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 The Business Lawyer 1, 52 (2014).

4.6.1. Appointing monitors

Where and when are monitors appointed?

Monitorships are not widely available as a remedy among the Parties to the Convention. Of the 27 countries covered in the Study, 8 countries (30%) report that they can, at least in theory, impose a monitorship through a non-trial resolution, while 15 countries (55%) definitely cannot. The remaining 4 countries (15%) did not have any non-trial resolutions available for legal persons. Focusing on the 23 countries with non-trial resolutions for legal persons, 8 countries (35%) could impose a monitorship.[254] In practice, at least 4 of the 8 countries (50%) that are, in theory, able to impose monitorships have done so through a non-trial resolution for foreign bribery: **Brazil**, **France**, the **United Kingdom**, and the **United States**.

Moreover, some Working Group on Bribery authorities with monitorships indicate that this remedy may only be used somewhat sparingly in practice, perhaps in recognition of financial and organisational burdens that monitors can entail. In the **United Kingdom**, for example, the DPA Code of Practice counsels that the "use of monitors should be approached with care".[255] On some occasions, an authority in one country Party to the OECD Anti-Bribery Convention may decide not to impose a monitorship because another country Party to the OECD Anti-Bribery Convention has already imposed its own. In the 2018 *DPA* with Société Générale S.A., the DOJ did not appoint a monitor in deference to the monitorship requirements under French law. Instead, it simply asked the company to make periodic reports to the DOJ.

How monitors are selected

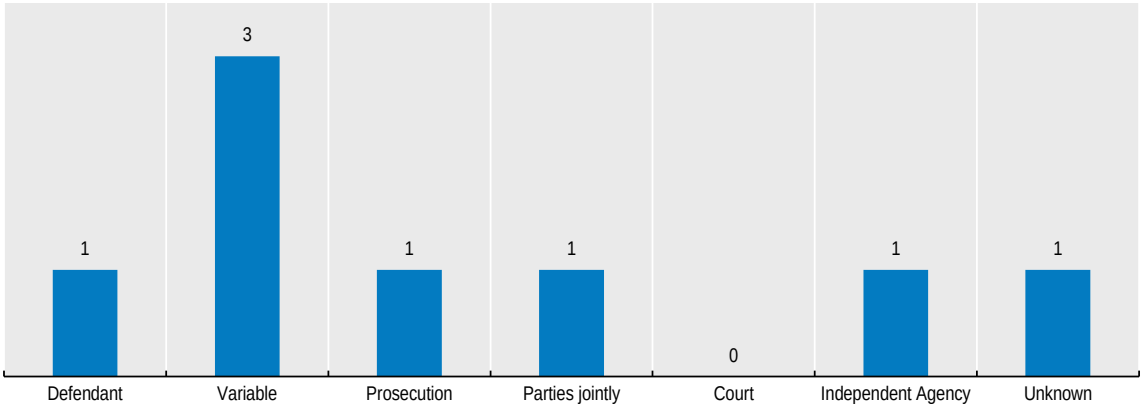
The countries Party to the Convention that can impose monitorships report various practices for selecting and appointing the monitor. Law enforcement agencies in two countries generally allow, either pursuant to practice or policy, the defendant company to select its monitor subject to the authorities' veto (**Brazil**'s Federal Prosecution Service (FPS) and the **United Kingdom**'s SFO). In **Israel**, the prosecution and the offending company are free to negotiate all the provisions contained in a plea deal, including those pertaining to a monitorship, subject to final court approval. In **Chile,** the defendant and the prosecution would jointly appoint a monitor. In contrast, **France's** AFA and **Brazil**'s CGU will act as monitor. In the **United States**, the prosecution or other enforcement agency, has the power to designate a monitorship. Finally, in Phase 3, the **Netherlands** reported that it may be possible to appoint a monitor in foreign bribery cases.[256]As it has not yet done so, however, there is not yet any established procedure in place to concerning how monitors should be selected.

[254] Answers to Question 31 of the Data collection questionnaire. See Table 51.

[255] UK SFO & CPS, Deferred Prosecution Agreements Code of Practice, section 7.11.

[256] Netherlands Phase 3 Report, para. 33.

Figure 44. Who appoints monitor according to Questionnaire responses



Source: OECD data collection questionnaire results, Table 51.

While responses to the OECD data collection questionnaire results reflect the primary approach for each Party to the Convention, the authorities may still have the flexibility to select a monitor in a different way, depending on the circumstances of a given non-trial resolution. In the **United States**, DOJ guidance recognises that "there is no one method [… for selecting a monitor] that should necessarily be used in every instance."[257] The US authorities have hence taken a variety of approaches for designating the monitor.

Most frequently, the US authorities invite the company to propose a monitor who, if deemed acceptable by the US authority, would be appointed. This was the appointment method specified in 41 of the 90 resolutions (48%) requiring monitorships.[258] More recently, however, the US authorities have invited the company to nominate three candidates for the enforcing authority's consideration. The US enforcement authority would appoint one of the candidates to be the monitor, provided that the nominees are deemed qualified for consideration. This approach was has occurred in 27 (or 32%) of the 90 resolutions in which monitorships were imposed.

Other countries have taken approaches that loosely resemble some of the US approaches. In the **United Kingdom**, for example, the DPA Code of Practice provides that the company must nominate three candidates. The company however is allowed to express its preference. A unique feature in this regard is that the prosecution "should ordinarily accept" the company's proposed choice of monitor.[259] The prosecution can still reject the proposed nominee, for example, when the nominee lacks the necessary experience or has a conflict of interest. Moreover, the court must also approve the entire *DPA*, including the terms of the monitorship before it becomes enforceable.

[257] Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Criminal Resources Manual 163 (7 Mar. 2008).

[258] The data in this section derive from the Secretariat's compilation of publicly available **US** non-trial resolutions derived from DOJ's FCPA enforcement page; SEC FCPA enforcement page; the University of Virginia's Corporate Prosecution Registry; and Shearman & Sterling's FCPA database.

[259] DPA Code of Practice, para. 7.17.

4.6.2. Monitor's mandate and powers

Length and scope of mandate

The corporate monitor's mandate is typically set for a fixed period of time. Only one country (**France**) imposes a maximum term for the length of the monitorship: a monitor appointed pursuant to a *CJIP* can receive, at most, one non-renewable three-year term. The other seven countries in which monitorships may be possible (89%) do not have any legal provisions establishing a maximum term for a monitorship. Presumably, these countries would set the length of the monitorship according to the size of the company and the severity of the problems that need correction. Furthermore, it appears that the monitorship can be renewed or extended in these countries, in at least some circumstances. In the **United States**, for example, over half the monitors were appointed for three-year terms. This was the case in 50 of the 90 resolutions (56%). A further 29 resolutions (32%) required monitorships lasting anywhere from one year to just under three years. The longest monitorship imposed was the four-year term imposed in the ***Siemens case***. In **Brazil**, monitors appointed through *Leniency Agreement* with the FPS, have in practice received an initial two-year term, which could be extended for one year.

The exact nature of the monitor's mandate often depends not only on the law of the prosecuting country, but also the terms negotiated by the prosecution and company. **Chile** and **Israel**, for example, report that the monitors' duties vary depending on the agreement reached by the authorities and the offending company. In some cases, these terms are also subject to court approval as with the *DPA* in the **United Kingdom** as well as *Plea Agreements* in **Israel** and the **United States**.

In the **United States**, DOJ guidance defines the monitor as an "independent third party" whose "primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct".[260] In the 2016 ***VimpelCom case***, the monitor was required to assess the company's efforts to develop a compliance programme and to make recommendations on how this could be achieved.[261] Monitors appointed by **Brazil**'s Federal Prosecution Service and the **United Kingdom**'s SFO follow similar approaches. Brazil's CGU, however, will conduct an evaluation of the company's compliance program during the negotiation of the Leniency Agreement. The evaluation will both help determine whether the sanction should be reduced in recognition of the company's compliance efforts and also define the obligations that the company must undertake as part of the Leniency Agreement to improve its compliance programme. The CGU would then monitor the implementation of those obligations once the agreement is concluded. Finally, In **France**, the AFA will oversee and audit the company's efforts to develop or improve its compliance

[260] Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Criminal Resources Manual 163 (7 Mar. 2008).

[261] See Deferred Prosecution Agreement between U.S. Department of Justice and VimpelCom Ltd. (10 Feb. 2016), Attachment D, para. 2 ("Monitor's Mandate") & Attachment C (obligations for corporate compliance programme).

programme after the CJIP is concluded. It will present a final report to the prosecutors providing a final assessment of the company's efforts to fulfil its obligations.[262]

As the scope of the mandate will impact the expenses associated with performing the monitorship, some Parties have expressly regulated who is responsible for paying for the monitorship or related costs. In the **United Kingdom**, the offending company will bear "all the costs of the selection, appointment, remuneration of the monitor" as well as the "reasonable costs of the prosecutor associated with the monitorship".[263] In **France**, the company will be expected to pay for the costs of a monitorship imposed through a *CJIP*, up to the amount specified in the concluded resolution.[264] In the **United States**, the company is implicitly required to pay for the monitor's expenses even when the resolution is silent given that the monitor is engaged directly by the company. In October 2018, the DOJ issued further guidance to ensure that the scope and cost of any monitorship imposed are narrowly tailored to avoid burdening the company's business operations.

Monitor's duties and powers

During the monitorship, the monitor will (i) make periodic reports assessing the state of the company's compliance programme, (ii) identify shortcomings in the company's policies and procedures that should be improved in light of the past wrongdoing or the company's ongoing operations, and (iii) observe how the company implements the monitor's recommendations. In the process, the monitor may, for instance, review corporate documents, interview staff, observe procedures, conduct analysis, or rely on analysis or other information provided by the company. Based on these findings, the monitor will then make recommendations that the company can implement to improve compliance with its legal obligations.[265] These recommendations could range from suggesting how the company can adopt ethics programme, improve training, adopt adequate controls, or even calling to remove management or board members. Finally, the authorities may ask the monitor to deliver a report to the company and the authorities providing a global assessment of the company's implementation of the monitor's recommendations.

In carrying out this mandate, the monitor may come across further evidence of wrongdoing. In such cases, the monitor will typically need to disclose this information to the authorities unless prohibited by any mandatory laws of another country (e.g. so-called "blocking statutes") or any applicable privilege. To avoid the privilege limitation, *DPA* and *NPA* resolutions in the **United States**, often mandate that "no attorney-client relationship shall be formed" between the company and the monitor. This would thus enable the monitor to report to authorities without violating any privilege. In the **United Kingdom**, the monitor also has the duty to "report specified misconduct to the prosecutor".[266] Nonetheless, the DPA Code of Practice provides that "[a]ny legal professional privilege that may exist in

[262] See Michael Griffiths, *French compliance monitorships a "work in progress"*, Global Investigations Review (9 July 2018).

[263] DPA Code of Practice, Sections 7.12-7.13.

[264] See French Code of Criminal Procedure, art. 41-1-2-I alinéa 2.

[265] See Vikramaditya Khanna & Timothy Dickenson, *The corporate monitor: The new corporate czar?*, 105 Mich. L. Rev. 1713, 1714 (2007).

[266] DPA Code of Practice, section 7.12.

respect of investigating compliance issues that arise during the monitorship is unaffected by the Act, this DPA Code or a DPA".[267] Unlike the US practice described earlier, the United Kingdom reports that the monitor's interactions with the company is covered by legal professional privilege.

For *Leniency Agreements* concluded by **Brazil**'s CGU and AGU, the CGU's compliance department will evaluate the company's compliance programme based on (i) a self-report, in accordance with Ordinance 909, in which the company describes its organisation, size, business areas, and reliance on government permits, authorisations, or public procurement; (ii) a conformity report, also drafted by the company in accordance with Ordinance 909, providing required details about its compliance programme; (iii) copies of company policies, codes, training materials and other records; and (iv) interviews with the company's counsel and compliance officials concerning its implementation of its compliance programme and its remedial efforts following the offence. Eventually, CGU's compliance department will assess whether the compliance programme corresponds to the company's risk profile, whether it has remediated the misconduct, and whether it has put into place the necessary measures to prevent any misconduct involving the public administration. Once the monitorship begins, the company must develop an "improvement plan" for addressing its obligations. The CGU will then have time to review the plan and, if necessary, request amendments. Once the CGU approves the plan, the company will report semi-annually on its efforts to implement its compliance obligations, while the CGU can make on-site inspections, conduct interviews and obtain additional information to verify the effectiveness of the compliance programme.

In **France**, the AFA has the power to perform an initial audit of the offending company's compliance system. It will also review and, if needed, revise the company's proposed strategy for improving its compliance system. Once the company begins implementing the strategy, the AFA will make quarterly audits and make annual reports to the prosecution about the company's progress in fulfilling its obligations. At the end of the monitorship, the AFA will make a final assessment to the prosecutors.[268]

4.6.3. Oversight for monitors

Complex and potentially burdensome remedies such as monitorships require oversight throughout their lifecycle. The decision to require a company to engage a monitor deserves scrutiny both to ensure that it is applied in appropriate cases and that it advances its intended goals. During the monitorship, there may be a need to resolve disputes between the company and the monitor concerning the scope of the monitor's work or the amount of access that the company must provide to documents or employees to enable the monitor can carry out the mandate. At the conclusion of the monitorship, the authorities will need to determine whether the company has complied with the terms of the non-trial resolution. Finally, the authorities and the public would also have an interest in ascertaining whether the monitorship had any real impact on the company's compliance programme.

[267] DPA Code of Practice, section 7.14.

[268] See Michael Griffiths, *French compliance monitorships a "work in progress"*, GIR(9 July 2018).

Oversight over the decision to impose a monitorship

The Working Group on Bribery has called on countries to clarify when companies can be required to engage a monitor in order to resolve a foreign bribery case. In its Phase 3 evaluation of the **United Kingdom**, the Working Group on Bribery observed that the monitors should be used in a "transparent and accountable manner".[269] Thus, it recommended that the United Kingdom provide "guidance on when and on what terms the UK authorities would seek a monitor and to "make public where appropriate the monitoring agreement, the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring".[270] The Working Group on Bribery found that the United Kingdom fully implemented this recommendation, in part by publishing the DPA Code of Practice in February 2014. It recognises that the need for a monitorship requires a fact-specific evaluation. It also requires that the decision must be "fair, reasonable and proportionate".[271] **Israel** reported that in the absence of set criteria for deciding when to appoint a monitor, it requires the agreement of both parties and the approval of a court in a specific case.

Once the terms of the monitorship have been drafted, countries Party to the OECD Anti-Bribery Convention typically arrange for some form of review of the decision to resort to a monitorship and/or the terms of the monitorship. In several countries, the court must review and approve the terms, if only as part of approving the entire resolution. This is the case in **France, Israel** and the **United Kingdom**.

In the **United States**, the courts typically are not involved in reviewing the terms of a monitorship. While the courts may modify the terms of a proposed plea agreement before approving it, they have no substantive role in reviewing the terms of NPAs or DPAs, including any monitorship provisions. Internal DOJ review is, therefore, essential to ensure that monitorships are imposed in an appropriate manner and that their terms are consistent from one resolution to another. Accordingly, DOJ guidance provides that prosecutors "shall […] notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor".[272] The DOJ guidance also requires the Government to comply with conflict-of-interest guidelines and to follow a documented procedure when selecting the monitor who should be appointed.

Oversight during monitorship

The monitor will have to report periodically to the prosecution about the company's progress over the course of the monitorship. This gives the enforcement authorities an opportunity to gauge whether the offending company is performing the terms of the resolution in good faith. According to the OECD data collection questionnaire results, the Parties to the Convention with monitorships most frequently require the monitor to report to the prosecution. As shown in Figure 45, two of the eight countries require the monitor to report to the prosecution. In the United Kingdom, the monitor simultaneously report to both the prosecution and the defendant company.

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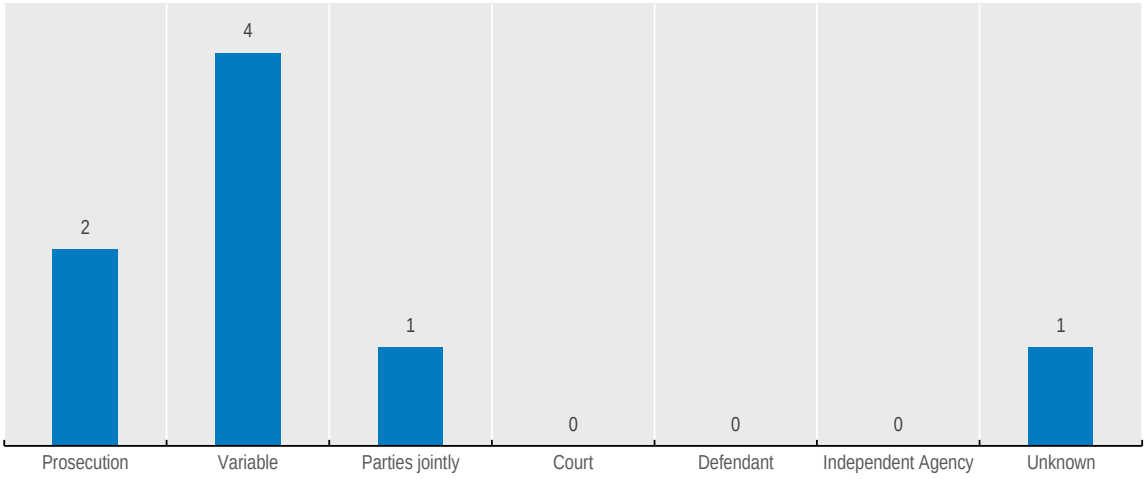
[269] United Kingdom Phase 3 Report, Commentary at page 26.

[270] United Kingdom Phase 3 Report, Recommendation 6(a).

[271] DPA Code of Practice, Section 7.11.

[272] Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Criminal Resources Manual 163 (7 Mar. 2008).

Figure 45. To whom monitor reports?



Source: OECD data collection questionnaire results, Table 51

Disputes can arise between the offending company and the monitor concerning the exact scope of the monitor's mandate, the types of documents, access, or other information that the company must provide to the monitor, and whether the company must implement a particular recommendation issued by the monitor. [273] To address these possible issues, the **United States** DOJ has issued guidance encouraging its criminal prosecutors to clarify in the non-trial resolution the exact role that the DOJ can play in resolving any disputes that may arise between the offending company and the monitor.[274]

While the **United Kingdom**'s DPA Code of Practice does not directly deal with disputes concerning the implementation of the monitorship *per se*, it does envision that the monitor (if satisfied that the company's compliance programme is "functioning properly" may inform the prosecution). If the prosecution finds the monitor to be reasonable, it can terminate or suspend the monitorship.[275] If the prosecution believes that the company has breached the terms of the *DPA* (including any obligations concerning the monitorship or its compliance programme) then it can seek to either vary the terms of the DPA or to have the court declare a breach. This could thus give the prosecution an avenue to ensure oversight over the company's behaviour during the course of the monitorship.

[273] Statement of Eileen R. Larence, U.S. GAO, Director, Homeland Security and Justice, *Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Beer Communicate Its Role in Resolving Conflicts* (19 Nov. 2009) at page 11 (citing feedback from non-representative sample of 13 companies).

[274] Grindler Memorandum, *Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, Criminal Resource Manual 101-166 (25 May 2010).

[275] DPA Code of Practice, Section 7.19.

Assessing Monitorships

The Working Group has recognised that corporate monitorships are a potentially powerful tool for helping companies that have previously engaged in foreign bribery avoid committing the same mistakes in the future.[276] Insofar as monitorships prevent recidivism, they will advance the interests of the company as well as its employees, shareholders, and the general public.[277] Scholars have further argued that the use of monitors can help "leverage enforcement resources" by delegating oversight to a monitor with more expertise on corporate compliance challenges than prosecutors. This leverage is particularly enhanced when the company, rather than the government, must bear the cost of the monitorship. Eventually, this frees up government resources to enhance deterrence of corporate crime by investigating and prosecution other offenders.[278]

In terms of impact on the companies themselves, some scholars have concluded that remedial measures in non-prosecution and DPA have in fact imposed "broad and far-reaching corporate governance changes".[279] At the same time, the increased emphasis on using prosecutorial power to reform as well as (or instead of) punishing companies has generated a lively academic debate over the limits of prosecutors' authority and ability to supervise such structural reforms.[280]

Box 17. Good Practices in publishing guidance on monitorship

Monitorships can benefit a company by providing "expertise in the area of corporate compliance from an independent third party". The Working Group has recognised that corporate monitorships are a "potentially powerful tool for helping companies that have previously engaged in foreign bribery avoid committing the same mistakes in the future." However, monitorship can be burdensome for companies in terms of time and resources. Countries should therefore ensure that monitors are used in a transparent and accountable manner. In particular:

- The decision to appoint a monitor should be made with due consideration for the scope of the wrongdoing and the situation of the company, including whether it has implemented a corporate compliance programme;
- Authorities should have guidance to ensure equal treatment and consistency in the decisions to appoint monitors;

[276] See United Kingdom Phase 3 Report, page 26 (Commentary) ("Corporate monitors can be helpful in fighting foreign bribery when used in a transparent and accountable manner.").

[277] See Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, Criminal Resources Manual 163 (7 Mar. 2008).

[278] Vikramaditya Khanna & Timothy Dickenson, *The corporate monitor: The new corporate czar?*, 105 Mich. L. Rev. 1713, 1721 & 1730 (2007).

[279] Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 The Business Lawyer 1, 52 (2014).

[280] For an overview of the various positions, see, e.g. Alexander & Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 Am. Crim. L. Rev. 357 (2015).

- Guidance should be published to explain when and on what terms the authorities would seek a monitor;
- The monitor should be well-qualified and independent from the company. Procedures should be in place to ensure that potential candidates are properly vetted. Furthermore, the terms of reference of the monitorship can specify that the monitor cannot be employed by, or otherwise affiliated with, the company for a period of time after completing the monitorship;
- Rules regarding financing of the monitorship should be clear and transparent;
- The monitoring agreement, as well as the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring should be made public;
- The monitor should report periodically to the prosecution or another authority about the company's progress over the course of the monitorship, thus giving authorities an opportunity to gauge whether the offending company is performing the terms of the resolution in good faith.
- The nominating authority should have some rules in place regarding disputes arising under the monistorship;
- Any breach in the monitoring agreements should result in effective sanctions.

Several countries Party to the Convention have adopted guidance on the use of monitorship and are observing these practices. In the United States, guidance can be found in the Morford Memo and other policy guidance memoranda. In the United Kingdom, guidance on Monitors is included in the DPA Code of Practice. In Canada, the Criminal Code provides rules to be applied when monitorship is included as a term of a Remedial Agreement.

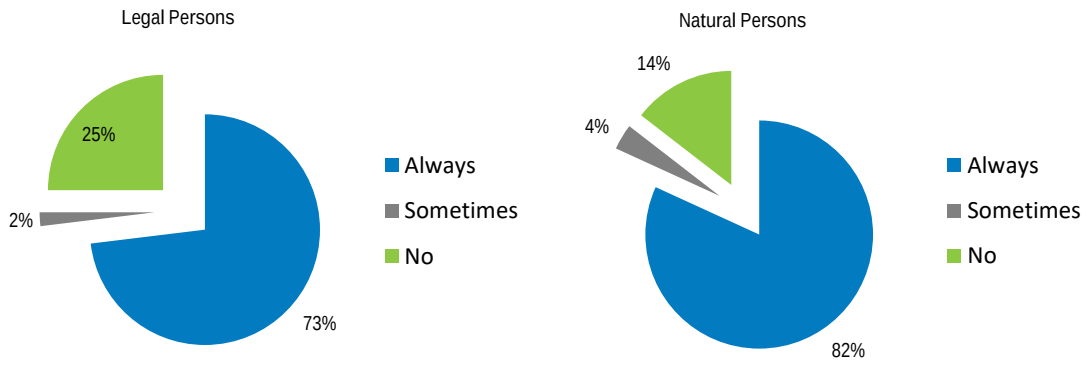
Chapter 5. Oversight and public access

5.1. The extent of judicial and other oversight over each type of resolution

The Parties to the Convention take various approaches to whether a court or other authority should have any oversight role over the conclusion or execution of non-trial resolutions. At one extreme, certain non-trial resolutions are never reviewed by a court or other authority before they are concluded, and the prosecution itself will assess whether the accused has complied with its terms. Other resolutions must be approved by a court before they are concluded – or, in some cases, even before they are proposed. Even if non-trial resolutions are subjected to some form of review, the Parties still diverge both in terms of who should review and approve the non-trial resolution as well as in defining the scope of review. Similar differences exist concerning whether and how the authorities should oversee the implementation of the non-trial resolution's terms.

As shown in Figure 46, the vast majority of non-trial resolutions are subject to some external review (either by a court or by some other authority) before they are finally concluded. This is the case for both legal and natural persons, though such review appears to be somewhat more likely with non-trial resolutions applicable to natural persons. For legal persons, 38 of the 52 available non-trial resolutions (73%) are always subject to review before they are concluded. Of the 55 available systems, 45 (82%) are always subject to review. In contrast, some non-trial resolutions are only subject to court review in certain circumstances. For example, **Austria**'s *Diversion* system for both legal and natural persons is only subject to court review if it is made after indictment. The court is not involved when the prosecutor and the accused resort to *Diversion* before the indictment.

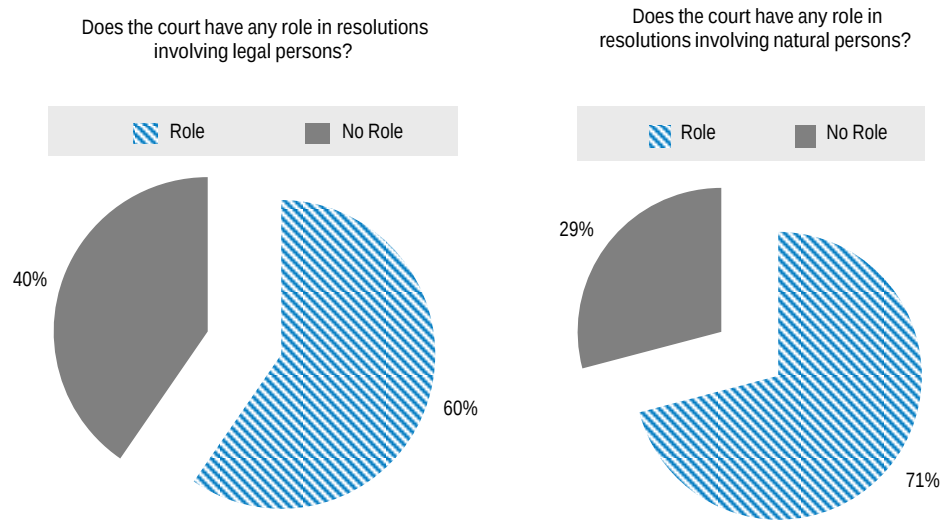
Figure 46. Must resolution be approved by court or other authority? (by resolution)



Source: OECD data collection questionnaire results, Tables 52 and 53.

When non-trial resolutions are subjected to scrutiny before approval, the countries Party to the Convention typically have a court conduct the review. As seen in Figure 47, courts play at least some role in 60% and 71% of all non-trial resolutions available for legal and natural persons, respectively. The exact nature of the role, however, varies considerably across the different non-trial resolution systems used in the countries Party to the Convention.

Figure 47. Does court have role in concluding resolution?



Source: OECD data collection questionnaire results, Tables 54 and 55.

5.1.1. Resolutions concluded without any or only minimal court involvement

In several Parties to the Convention, prosecutors or other law enforcement authorities can conclude a non-trial resolution for foreign bribery without seeking judicial approval. Some resolution mechanisms are concluded without ever being brought before the courts. This possibility can arise early in the proceedings. In **Hungary**, for example, the police can conclude a resolution with natural persons under article 219 of the new Criminal Procedure Code. This resolution, which is known as the *Possibility of Avoidance of Criminal Liability*, is subject to the approval of the prosecutors. In **Austria**, the prosecutor can resort to the *Diversion* resolution before indictment without seeking the court's approval.[281] In the **United States**, the DOJ can decide to resolve foreign bribery allegations without bringing formal changes to court either by using the *Declination with disgorgement* resolution or an *NPA*. Under both resolutions, the accused agrees to fulfil certain conditions in exchange for not bringing formal charges in court.

In other instances, the resolution is not brought to court because it is used in a purely administrative proceeding. In **Colombia**, the Superintendence of Corporations may grant *Benefits for Collaboration* to a company under Law 1778 of 2016 in recognition of various factors, including its cooperation in providing information about the offence. This can result in the company's obtaining a partial exemption from liability.[282] In **Brazil**, where

[281] Austria Phase 3 Report, para. 60; Austria Phase 2 Report, para. 79.

[282] Colombia Phase 2 Follow-up Report, pages 57-58.

corporate liability for foreign bribery is administrative, the Phase 3 evaluation found the administrative authorities can conclude a *Leniency Agreement* with a legal person in exchange for cooperation. The actual terms of the resolution would be concluded with the committee of administrative officials from the CGU who work together with attorneys from the Attorney General's Office. If a *Leniency Agreement* is pursued, the relevant Ministers for the CGU and the AGU must approve resolution before it becomes final. The Ministers would also assess whether the company has complied with the terms of the Leniency Agreement. Thus, the entire process would normally unfold without any judicial review.[283] The court would only become involved if a lawsuit were pending on the same facts covered by the Leniency Agreement. In such cases, the court's oversight is restricted to the formal aspects of the agreement, namely whether the legislative requirements have been fulfilled.

Notably, some of these out-of-court resolutions result in convictions or have the same effect as a conviction. In **Norway**, for example, prosecutors can resort to an *Optional Penalty Writ* to resolve foreign bribery case when no term of imprisonment is sought. As Norway's aggravated corruption offence, which is used to prosecute foreign bribery cases, provides for a term of imprisonment, this resolution is typically reserved for corporate entities. In practice, if the prosecution determines that foreign bribery charges can be filed against a company, it can decide to issue an *Optional Penalty Writ* setting forth the charges while proposing a fine to resolve the case. The acceptance of the proposed fine is tantamount to a conviction, though the accused does not formally admit guilt. If the accused rejects the proposed fine, the *Optional Penalty Writ* will constitute the indictment used to initiate criminal proceedings. **Latvia**, the **Netherlands** and **Switzerland** also have non-trial resolutions that either result in a conviction or are tantamount to a conviction without court involvement.

Finally, a handful of resolutions are merely filed in court with only a modicum of review.[284] In the **United States**, for example, when the DOJ concludes a *DPA*, it will file charges in court, submit the *DPA*, and seek leave to suspend the trial proceedings for the time period in which the defendant has agreed to fulfil the conditions set forth in the resolution. This has the effect of ensuring the charges will remain pending until all the *DPA* conditions are fulfilled. If the defendant satisfies all the conditions, the court can grant leave to dismiss the charges entirely. If instead the defendant does not comply with the DPA's terms, the prosecution can resume the proceedings. Another resolution that is filed in court with only minimal formalities is the **United Kingdom**'s *Consent Order,* which can be used for civil recoveries under the Proceeds of Crime Act 2002. Once the prosecution and the accused have agreed on the terms of the Order, it will be signed by a High Court judge and entered into the court registry. The judge, however, does not exercise any judicial review of the Order.[285]

Even when non-trial resolutions are not submitted for substantive judicial approval or review, the law enforcement agencies in the Parties to the Convention typically have some form of internal review process in order to ensure that the procedure is applied consistently. While monitoring the **United States**, the Working Group on Bribery found that the decision to resort to a DPA or NPA in criminal matters must be approved by more senior

[283] Brazil Phase 3 Report, paras. 103-104.

[284] OECD data collection questionnaire results, Tables 54 and 55.

[285] United Kingdom Phase 3 Report, para. 65.

prosecutors, such as the Chief of the Fraud Section or even the Assistant Attorney General of the Criminal Division.[286] **Latvia** reports that in cases of serious crimes, a prosecutor may only issue a *Prosecutor's Penal Order* if a more senior prosecutor agrees that the required conditions have been fulfilled.[287] In the **Netherlands**, the prosecutors must obtain the approval of the Minister of Justice and Security before resolving a case through a "*Transaction*", in special circumstances, for example, if the fine exceeds EUR 50 000.

In addition, these sort of internal review mechanisms can also provide a form of oversight, even when the courts are involved in a particular resolution. In **Chile**, for example, the prosecutors must first obtain approval from a superior to use the Conditional Suspension system in complex bribery cases. If approved, the prosecutor would then apply to the court to conclude the resolution.[288] In **South Africa**, a proposed Plea Agreement must be approved by a court. During the Phase 2 evaluation, the Working Group observed that under prosecutorial guidelines it was necessary to obtain authorisation from the National Director or another designated senior prosecutor before making a plea agreement.[289] Furthermore, prosecutors and law enforcement agencies have developed guidance to ensure that non-trial resolution mechanisms are applied appropriately and consistently. For example, **Chile**'s National Prosecutor has issued instructions carefully prescribing the circumstances when prosecutors can use *Conditional Suspensions* in foreign bribery cases involving natural persons.[290]

5.1.2. Resolutions concluded with court involvement

Court involvement before resolution's terms are agreed

In some Parties to the Convention, a court must first decide that it would be appropriate for the prosecution to resort to a non-trial resolution even before its terms have been established. This is the case for the *DPA* in the **United Kingdom**. Once the prosecutor begins negotiating with a company about the possibility of concluding a *DPA*, the Crown Court must determine that (1) such an agreement "is likely to be in the interests of justice" and (2) its terms are "fair, reasonable and proportionate".[291] These determinations will be made in private. Once the *DPA*'s terms are agreed, the prosecution must seek the Crown Court's approval that the proposed DPA in fact meets both standards.[292]

Court involvement in approving the resolution

The scope of review undertaken by the court after the decision to resort to a non-trial resolution, varies across resolutions and countries. As seen in Figure 48, the courts review the terms and conditions of the resolution for 28 non-trial resolution systems for legal persons, representing 54% of the available 52 resolution systems and 90% of all those

[286] United States Phase 3 Report, para. 115.

[287] Latvia Questionnaire Response, Question 5.

[288] Chile Phase 3 Report, para. 90.

[289] South Africa Phase 2 Report, para. 155-156.

[290] Chile Phase 3 Report, para. 90, and Chile Phase 1ter Report, para. 40.

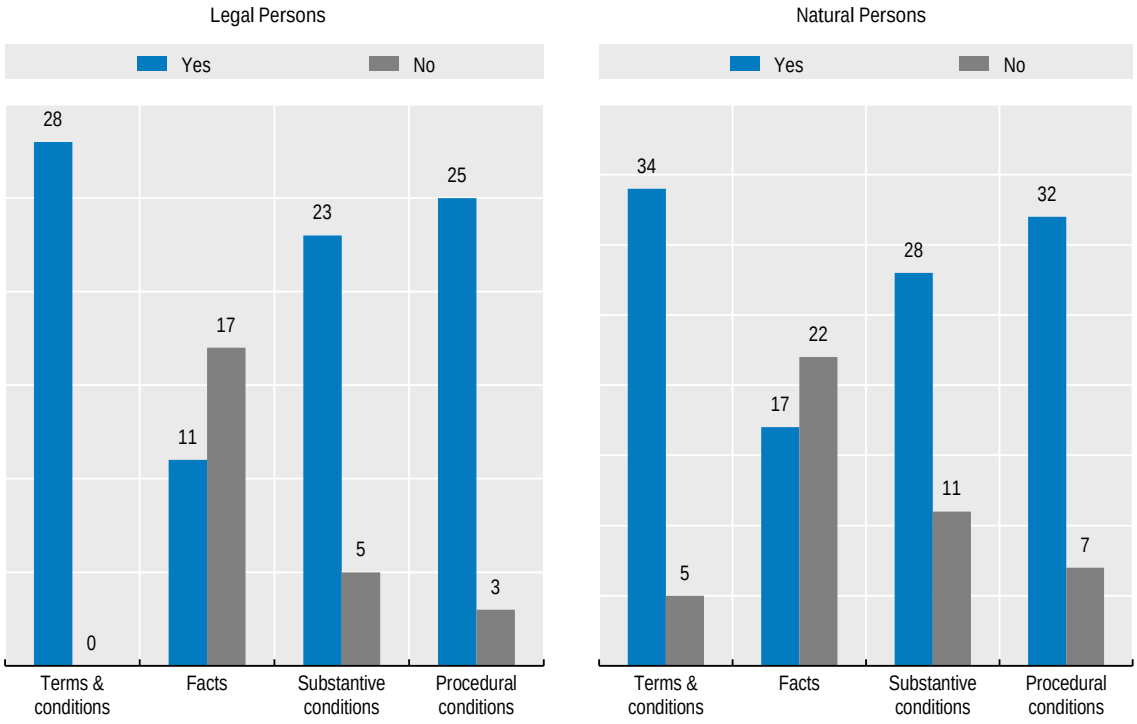
[291] UK Crime and Courts Act 2013, Schedule 17, para. 7.

[292] UK Crime and Courts Act 2013, Schedule 17, para. 8.

subject to some form of court review (31 resolution systems). For natural persons, courts review the terms and conditions of the resolution for 34 resolution systems, representing 62% of the available 55 non-trial resolution systems and 87% of the 39 resolutions subject to some form of court review.

The courts, however, are less likely to verify the underlying facts associated with the offence. For legal persons, courts will only review the underlying facts for 11 resolution systems, representing only 21% of all resolutions available for legal persons and 35% of those subject to court review. For natural persons, the courts play a somewhat more active role, but only for 17 resolution systems, representing 31% of all resolutions for natural persons and 44% of those subject to some form of court review.

Figure 48. If court has a role in approving resolution, what does it examine?



Note: The legal person graph excludes 21 resolutions where the court does not have any role; the natural person graph excludes 16 resolutions for the same reason.
Source: OECD data collection questionnaire results, Tables 54 and 55.

After examining the terms and conditions of the resolution, the courts are most likely to examine whether the required procedural conditions to conclude a resolution are satisfied. This is true for both legal and natural persons. Thus, the courts will review the procedural conditions in 25 resolutions for legal persons, representing 48% of all applicable resolutions and 81% of those reviewed by courts. Similarly, the courts will review the conditions for 32 resolutions for natural persons, representing 58% of all applicable resolutions and 82% of those reviewed by courts. This suggests that procedures designed for natural persons have somewhat more robust procedural protections, presumably to ensure that individual rights, including due process norms are respected.

These procedural conditions could include: whether the accused's consent to the resolution is voluntary and informed[293] or whether the accused is represented by counsel.[294] In **Chile**, for example, the court must assess whether the defendant's procedural rights have not been violated before approving a *Conditional Suspension of Proceedings*. The court also assesses whether the accused is eligible for the resolution (e.g. the offence can be resolved through the resolution, the offender is not a recidivist, etc.). Significantly, the court does not review the merits of the case or the appropriateness of the sanction to be imposed. Chilean courts also conduct a procedural review for non-trial resolutions concluded through the *Expedited or Summary Procedure*. For this type of resolution, however, the court will verify different conditions, including a general review to ensure that the agreement respects the defendant's "fundamental liberties" or if the negotiations otherwise violated the rights of the accused, as is the case with **Colombia**'s *Preliminary Agreement* or the **Czech Republic**'s *Agreement on Guilt and Punishment*.

To a somewhat lesser degree, courts are also likely to review the substantive terms and conditions for the non-trial resolutions. Here again, courts are more likely to conduct a substantive review for non-trial resolutions available for natural persons as compared with those for legal persons. As shown in Figure 48, across the Working Group on Bribery, the courts take a variety of approaches when conducting such substantive reviews. In **Argentina**, when the prosecution and the accused reach a resolution through the *Abbreviated Procedure* mechanism, the court will review the proposed resolution to ensure that it is supported by an adequate factual and legal basis. If not, the court will reject the agreement outright. The court, however, can neither reject the proposed resolution on the grounds that the sentence is not sufficient nor approve the resolution with a more stringent sentence.[295] Likewise, the courts in **Latvia** have the power to reject a plea agreement to reflect the court's assessment of the facts or if the plea agreement is not consistent with the Criminal Law. In the **Czech Republic**, the court cannot approve the *Agreement on Guilt and Punishment* if the agreement is inaccurate in respect to the facts of the case or imposes an inadequate punishment. The court will also ensure that the defendant's procedural rights were respected. For the *CJIP* in **France**, the court will review the legality of the proposed fine and assesses whether it is proportionate. **Italian** and **Spanish** courts take a similar approach for the *Patteggiamento* and *Conformidad* systems, respectively.

In **Israel**, while the court is empowered to approve or reject a *Plea Agreement*, the judges tend to defer to the prosecution both because of respect for prosecutorial discretion as well as out of a recognition that the prosecution has better access to the underlying facts of the case. Nonetheless, during the Phase 3 on-site visit, the judges maintained that any *Plea Agreement* contrary to the public interest would be overruled.[296]

[293] The court will verify whether the accused's consent is voluntary and informed, for example, in **Argentina** (*Cooperation Agreement*), **Chile** (*Expedited Procedure*), **Finland** (*Plea Agreement*), **France** (*CJIP*), **Italy** (*Patteggiamento*), **South Africa** (*Plea Agreement*), **Spain** (*Conformidad*), **United Kingdom** (*Plea Agreement*), and the **United States** (*Plea Agreement*).

[294] The court will verify whether the accused is represented by counsel in, for example, **Argentina** (*Abbreviated Procedure*) and **Chile** (*Conditional Suspension of Proceedings*).

[295] Argentina Phase 3bis Report, para. 76; Argentina Phase 3 Report, para. 80.

[296] Israel Phase 3 Report, para. 84.

Court involvement in setting sanctions pursuant to a concluded resolution

Even if the conclusion of a resolution is not subject to prior review and approval, there still may be a review on the sanction that should be imposed. This is frequently the case for plea deals. **Australia** reports that in the case of *Plea Agreements,* the court will not examine the decision to resolve the case through a plea deal but has the authority for setting the sanction that it will impose. For *Plea Agreements* in both the **United Kingdom** and the **United States**, the courts must have the final say on the criminal sentence imposed.

In certain countries, the court will be bound to impose either the exact sanction agreed by the parties or any amount below the agreed sum. For example, in **Chile**, when the accused and the prosecutor reach an agreement on the relevant facts and the applicable sentence, the Court must approve or reject the resolution. If the resolution is accepted, however, the court can only impose a sanction equal to, or less than, the sanction agreed by the prosecution and the accused. The court can even suspend the sanction.[297]

5.1.3. Consequences if court does not approve resolution

When courts refuse to approve a proposed non-trial resolution, complex questions arise about the consequences that follow from the failed effort to resolve the matter consensually. In such cases, the court would have to approve or reject the entire resolution as a whole. For some resolution systems, however, the court can approve a modified resolution.

If the court rejects the resolution, the prosecution would be free to commence or resume an enforcement action against the accused. This option was reported for a majority of the non-trial resolutions against both legal and natural persons (53% and 57%, respectively).[298] As discussed in Chapter 6.1.1, there may be limits on whether information obtained during the resolution negotiations can still be used to further the investigation or prosecution of the accused. This is for instance the case in **France** when the proposed *CJIP* is not validated by the court. In such circumstances, neither the statements nor the documents obtained in the course of the *CJIP* procedure can be used in the prosecution proceedings or in court.[299] In an effort to mitigate any potential bias that might arise, some Parties to the Convention may assign a different judge to preside over any further proceedings.[300] In some systems, the court can simply approve a modified resolution after eliminating or revising unacceptable terms.[301]

5.1.4. Appealing or challenging a non-trial resolution after it is concluded

Figure 49 shows how many resolutions across the Parties to the Convention can be appealed or otherwise challenged. Once again, the rules governing non-trial resolutions differentiate

[297] Chile Phase 1ter Report, para. 41.

[298] OECD data collection questionnaire results, Tables 58 and 59.

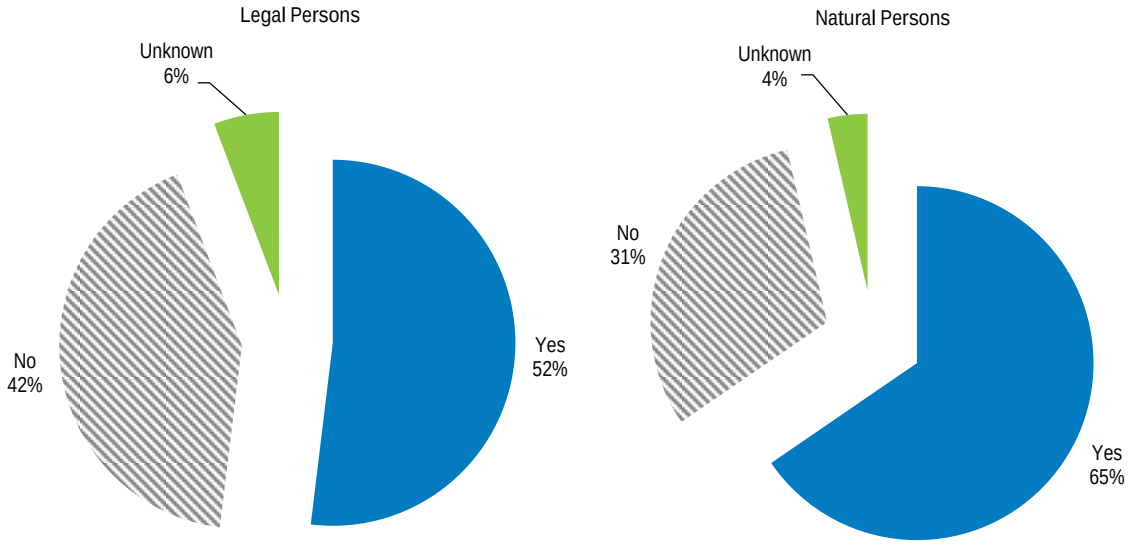
[299] French Code of Criminal Procedure, Article 41-1-2 (enacted by Article 22 of Law 2016-1691 of 9 December 2016.

[300] See, e.g. Israel Phase 3 Report, para. 85.

[301] *US v. ZTE Corporation*, 3:2017-cr-00120 (N.D. Tex. 2017); see also Andrew M. Levin et al., "Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?", NYU Program on Corporate Compliance and Enforcement (Blog Post, 22 June 2017), wp.nyu.edu/compliance_enforcement/2017/06/22/judicial-scrutiny-of-corporate-monitors-additional-uncertainty-for-fcpa-settlements/#_ftn2

between those intended for legal and natural persons. Among the 52 resolutions available for legal persons, at least 27 resolutions (52%) can be challenged and at least 22 resolutions (42%) may not be challenged at all. It is not known whether 3 resolutions can be challenged (6%). Resolutions with natural persons can be challenged or appealed more frequently: in at least 36 of the 55 resolutions (65%). At least 17 resolutions (31%) cannot be challenged or appealed. It is not clear whether 2 resolutions with natural persons (4%) can be challenged. Some countries have indeed deliberately opted for non-appealable resolutions for legal persons and appealable resolutions for natural persons. This is for instance the case in **France** where a *CJIP* agreed by a legal person may not be appealed but a *CRPC* (either with a natural or a legal person) may be appealed.

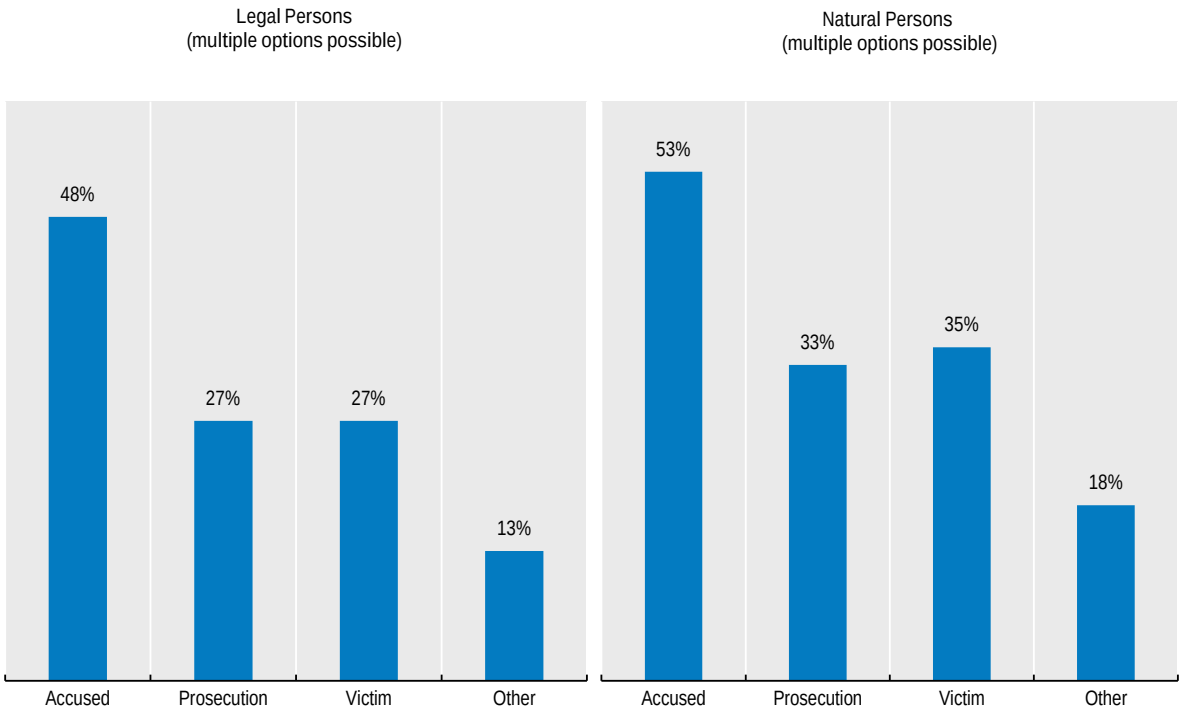
Figure 49. Can a resolution be challenged?



Source: OECD data collection questionnaire results, Tables 29 and 30.

Figure 50 breaks down who can challenge the resolutions that are actually subject to appeal or other challenge. Most notably, the accused can challenge 25 resolutions with legal persons (48% of all resolutions and 93% of resolutions that can be challenged). For natural persons, 29 resolutions can be challenged (53% of the total and 81% of those that can be challenged). Such challenges are less frequently available to the prosecution, which can challenge or appeal only 14 resolutions with legal persons (27% of total and 52% of those that can be challenged) and 18 resolutions with natural persons (33% of total and 50% of those that can be challenged). Victims can also challenge 14 resolutions with legal persons (27% of total and 52% of those that can be challenged) and 19 resolutions with natural persons (35% of total and 53% of those that can be challenged. To date, appeals by victims remain very rare in foreign bribery cases.

Figure 50. If a resolution can be challenged, who can challenge it?



Source: OECD data collection questionnaire results, Tables 20 and 30.

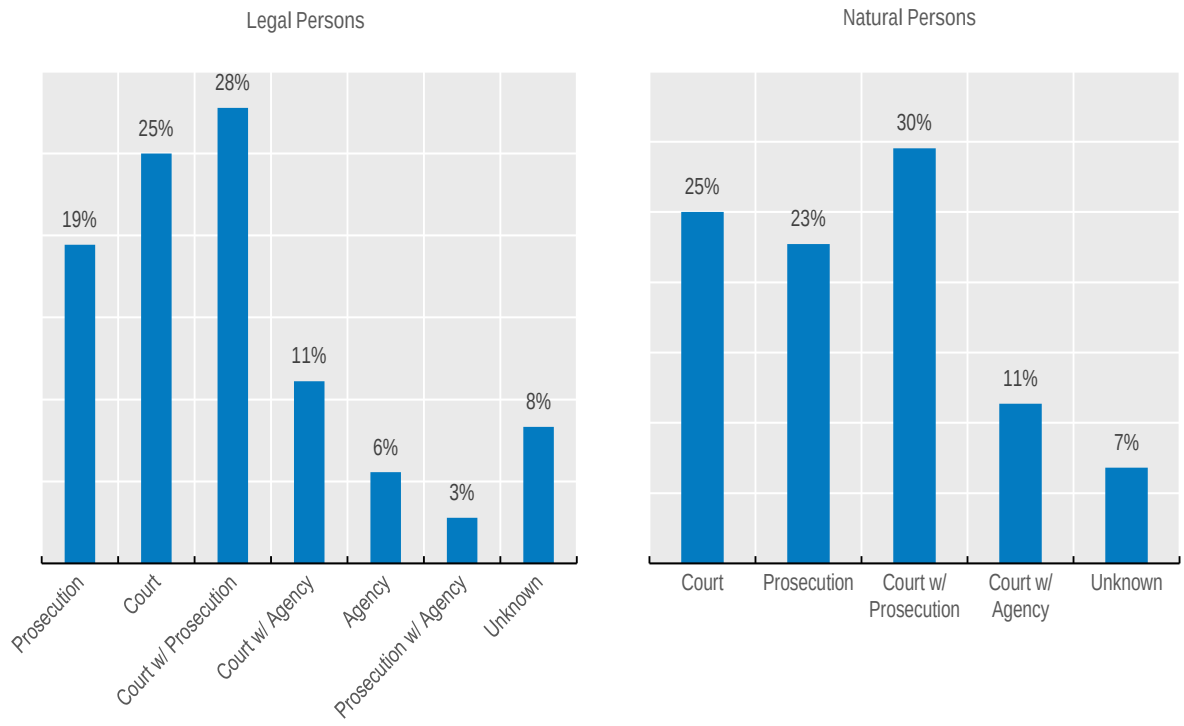
5.1.5. Oversight over compliance with the terms of the non-trial resolution

Given how different the various types of non-trial resolution systems are across the Parties to the Convention, it comes as no surprise that the countries take different approaches to supervising their implementation. On one extreme, non-trial resolutions may not require much oversight because their terms are principally to pay a fine. This is the case, for instance, with **Norway**'s *Optional Penalty Writ,* as well as the **United Kingdom**'s *Administrative Order* and the *Civil Resolution* in Scotland. Other resolutions have far more complex provisions, which may require the accused to fulfil obligations over several years. In certain countries (such as **Argentina**, **Brazil**, **Colombia**, and the **United States)**, the non-trial resolution can require the accused to cooperate with ongoing or future investigations or to testify at trial. Certain Parties to the Convention may also impose a probationary period during which the accused must not violate the law or complete other obligations. Finally, non-trial resolutions may require companies to undergo governance reforms or even to develop a compliance programme under the supervision of a monitor, as discussed in Chapter 4.6.2 and Chapter 4.7.

The Parties to the Convention typically have some form of oversight over the implementation of the terms of their non-trial resolutions. For legal persons, 33 of the 52 resolutions (63%) are known to have some form of oversight over their performance, while this is true for 41 of 55 resolutions for natural persons (75%). Among these relevant resolutions, the Parties to the Convention typically have either the courts, the prosecution or both supervise the implementation of the non-trial resolution. As shown in Figure 51, the court is slightly more likely to have exclusive oversight over the implementation of

non-trial resolutions with legal persons than the prosecution (24% versus 19% of the applicable resolutions). The same is true for natural persons, with courts exercising exclusive oversight over 24% of those resolutions versus 22% for the prosecution. In addition, the implementation of approximately one quarter of resolutions for either legal or natural persons will be overseen by both the courts and the prosecution. Administrative or other governmental agencies only have exclusive authority over a handful of resolutions involving legal persons, but they do assist courts in overseeing certain resolutions with natural persons.

Figure 51. Authority overseeing compliance with terms of resolutions



Source: OECD data collection questionnaire results, Tables 60 and 61.

The following examples give a flavour of the various oversight arrangements among the Parties to the Convention. **Brazil**, for example, reports that the implementation of a *Leniency Agreement* concluded by its administrative enforcement body with a legal person will be monitored by auditors from the administrative agency. In **Israel**, the *Plea Agreement* can be made contingent on completion of probation under the supervision of Israel's Probationary Authority. **Norway** reports that the National Collection Agency is responsible for collecting the fine imposed through an *Optional Penalty Writ*. Finally, in the **United States**, *NPA* and *DPA* resolutions give the law enforcement agency sole discretion to determine whether the company has breached the terms of the agreement. A few isolated agreements, however, have provided that either a judge or a judicial adjunct known as a "Special Master" will adjudicate whether the company in fact breached the agreement.[302]

[302] *See* Brandon Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 919 (2007).

5.1.6. Oversight upon completion of monitorship

At the end of the monitorship, the monitor will make a final report to the relevant authorities. This report will provide an overall assessment of the company's efforts to comply with its obligations and to strengthen its compliance programme. If the prosecution determines that the company has not fulfilled the terms of the monitorship, then the company may face further consequences.

In those countries where the monitorship can be extended, the authorities may consider this option. Alternatively, the authorities could also seek to commence or resume a prosecution predicated on the original charges underlying the non-trial resolution and potentially other violations. In some countries, such as the **United States**, the resolutions may give the prosecution the sole discretion to decide whether the offending company fully complied with the terms of the monitorship. In other countries (e.g. the **United Kingdom**), the prosecutor may be able to negotiate directly with the offending company to vary the *DPA*'s terms, including the length of the monitorship. The proposed variation of the DPA's terms will only go into effect if the court declares that the variation is in the "interests of justice" and that the terms of the DPA as varied are "fair, reasonable and proportionate". Alternatively, the prosecution may also apply directly to court to modify the *DPA*'s terms or to even have the resolution terminated.

Box 18. Judicial oversight over a CJIP in France

Under a CJIP, once the legal person has agreed to the CJIP's terms, the prosecutor requests its validation from the presiding judge of the Court of First Instance who will, following a public hearing, decide whether to approve the proposed CJIP. To this end, the presiding judge will verify whether entering into a CJIP is grounded (based on both the merits of the case and the legality of the procedure), and whether the measures imposed under the CJIP are proportionate to the benefits gained by the company as a result of the alleged offence. The decision of the presiding judge cannot be appealed. However, the legal person has 10 days to withdraw its consent.

Consequences of a non-validated CJIP

If the CJIP is not validated by the judge or the legal person withdraw its consent, the prosecutor cannot use the declarations or documents obtained in the context of the CJIP in further judicial proceedings.

Consequences of a validated CJIP

Should the presiding judge issue an approval order, it will not be tantamount to an admission of guilt and will not equate to a conviction and does not carry the same consequences. In particular, the CJIP is not registered in the legal person judicial record ("casier judiciaire"). However, the judge's decision to validate the CJIP, the amount validation of the CJIP is followed by a publication of a press release from the prosecutor office and of the amount of the public interest fine and the CJIP itself are published on the website of the AFA.

Source: French Code of Criminal Procedure, Article 41-1-2

5.2. Transparency and accessibility of concluded resolutions

5.2.1. Making resolutions public and accessible

Publication of concluded resolutions is generally considered a key practice to achieve transparency, accountability, and consistency of resolution systems. In a 2015 Policy Brief, Transparency International lays out recommendations pertaining to transparency, accountability, due process and victims' compensation in the context of non-trial resolutions. Publication of resolutions is the main measure recommended to achieve transparency.[303] In March 2016, Corruption Watch, Global Witness, Transparency International, and the UNCAC Coalition wrote a letter to the Working Group, calling for the adoption of global standards on resolutions. The letter put forward six recommendations, including making resolutions accessible to the public.[304] The Natural Resource Governance Institute considers that making resolutions public and accessible also "provide[s] journalists and civil society activists with highly valuable information that they can use to demand accountability, particularly in the country where the corruption took place. For instance, recent documents related to the DOJ's anti-kleptocracy action relating to funds in 1Malaysia Development Berhad (1MDB) have been used extensively by Malaysian activists and journalists to push for a stronger domestic response to the corruption".[305]

In line with these considerations, the Working Group has routinely recommended that countries make information on concluded resolutions public. Throughout its different phases of countries' evaluations, the Working Group has consistently made recommendations pertaining to the publication of concluded resolutions. These recommendations have focused on two elements in particular: the terms of the agreement, and the reasons for resorting to a resolution (as further examined under subsection 5.2.2).

More generally, the Working Group has always considered that publishing information on concluded resolutions helps ensuring transparency and consistency in enforcement practices. In the Phase 3 evaluation of **Brazil** the Working Group stated that a "lack of guidance, coupled with the lack of publication of cooperation agreements, creates a risk that cooperation agreements may be applied in an inconsistent manner, including in foreign bribery cases."[306] By bringing visibility to a country's enforcement practices, publication of concluded resolutions also contributes to raising awareness and provides guidance to practitioners. In other Phase 3 evaluations, the Working Group noted that where a foreign bribery case is concluded by a resolution, the most important elements of the resolution should be disclosed, to ensure greater transparency, raise awareness and increase confidence in enforcement of the foreign bribery offence.

[303] Transparency International, (2015) Policy Brief, "*Can Justice Be Achieved Through Settlements?"*

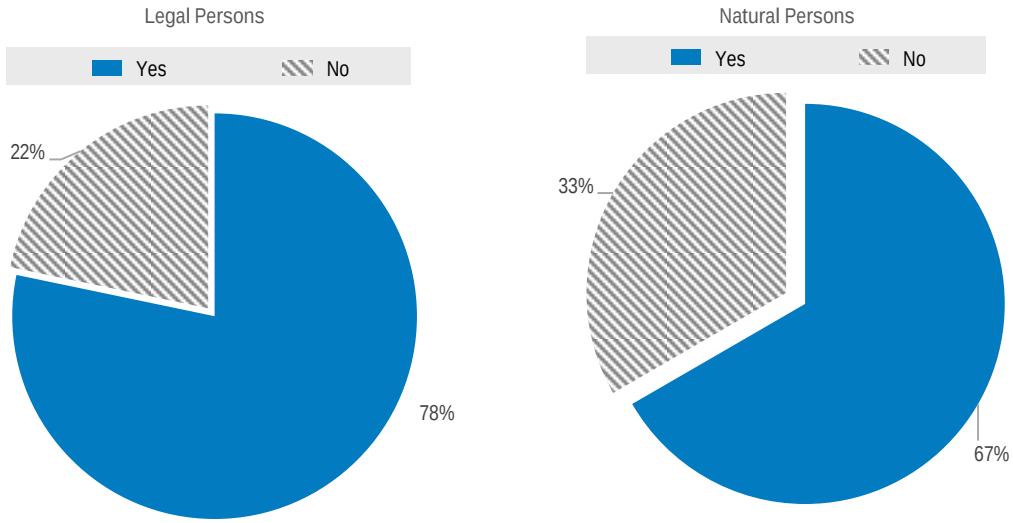
[304] See an article on this subject here: www.fcpablog.com/blog/2016/3/15/ngos-to-oecd-corporate-pretrial-agreements-can-work-but-we-s.html.

[305] Submission from the Natural Resource Governance Institute in response to the consultation for the Resolution Study.

[306] Brazil Phase 3 Report, para 101.

Figure 52 shows that a majority of the countries covered in this Study publish at least one type of resolution used with legal persons and one type of resolution used with natural persons.

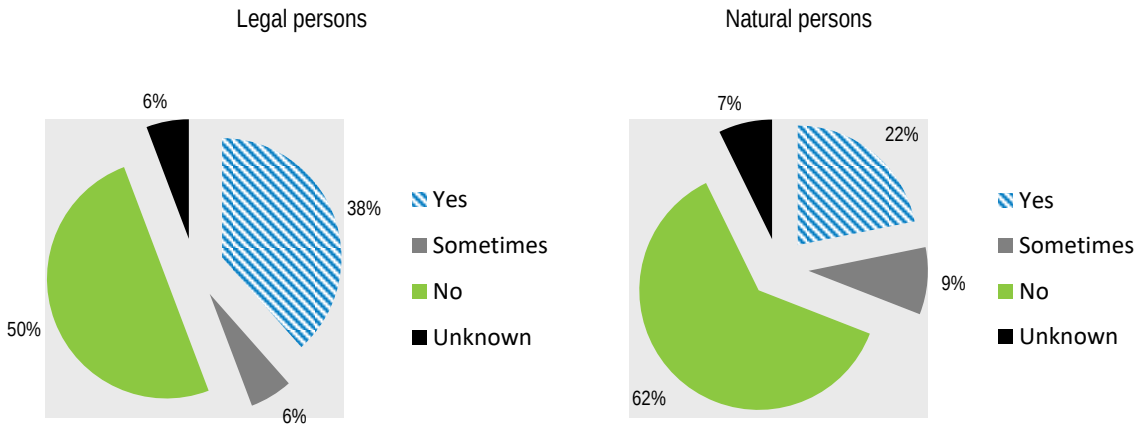
Figure 52. Do countries publicise at least one non-trial resolution?



Source: OECD data collection questionnaire results, Tables 66 and 67.

Press releases can be a useful tool to advertise a resolution. This is particularly true where the media monitors law enforcement authorities' websites and relays the information in the press. In such cases, issuing a press release can increase the visibility of a case and serve a deterrence purpose. Figure 53 shows the number of resolution systems under which concluded resolutions are subject to a press release. This said, a press release cannot be a substitute from making at least certain elements of a resolution public.

Figure 53. Are resolutions concluded subject to a press release?

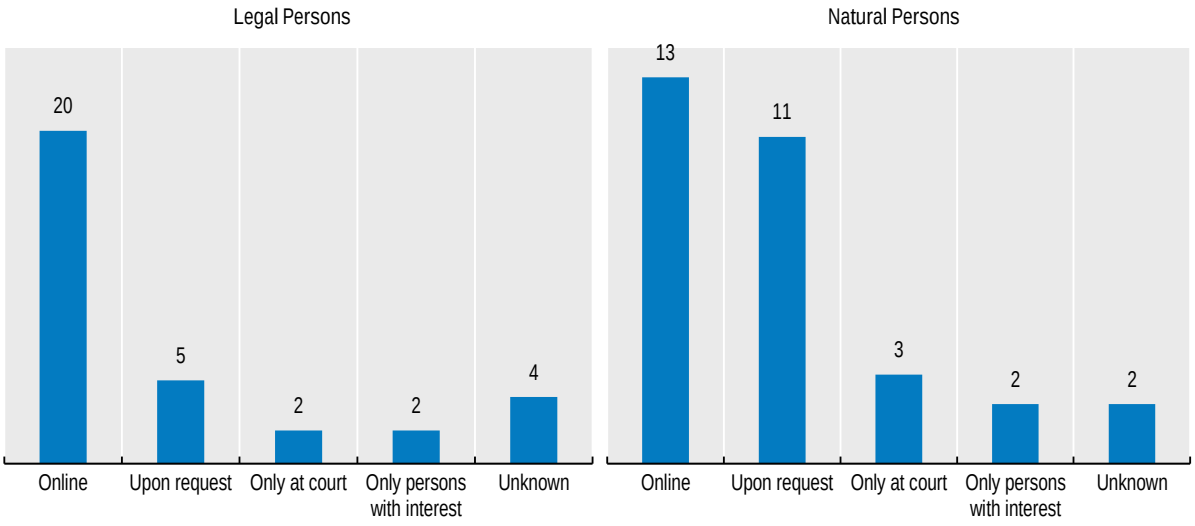


Source: OECD data collection questionnaire results, Tables 64 and 65.

Out of 32 systems used with legal persons and under which concluded resolutions are either always or sometimes public, the resolution is also subject to a press release in 15 of them. Out of 32 systems used with natural persons and under which concluded resolutions are public, the resolution is also subject to a press release in 9 of them. In a few instances, resolutions are not public but authorities issue a press release when they are concluded. This is the case for the **Netherlands'** *transaction*, at least when the fine is more than EUR 50 000, and for the **United Kingdom's** *Consent Order* under Section 276 of the Proceeds of Crime Act 2002. Similarly, **Norway**'s *Optional Penalty Writ* and the **United Kingdom** *Plea Agreement* are accessible on demand, but law enforcement authorities issue a press release when they are concluded.[307] However, in Norway, a press release would only be issued if the case is known to the public and the decision has public interest. A similar approach is taken in Germany where the decision is left the *Länder* prosecutors in charge of the case.

Public accessibility does not only mean that resolutions are public. It also includes the qualitative component of ease of access. Figure 54 shows that resolutions concluded with legal persons are generally easier to access than those concluded with natural persons. Online publication of concluded resolutions, which facilitates access, is more frequent for resolutions concluded with a legal person than with a natural person. It concerns 20 resolutions used with legal persons (38%), and 13 resolutions used with natural persons (24%). By the same token, concluded resolutions that are public but only available on request are more frequent in systems used with natural persons (34 %) than in those used with legal persons (12%). Rules pertaining to confidentiality or *ad hoc* confidentiality clauses explain these variations in a majority of cases. In some cases publication may also be delayed in order to preserve ongoing investigations against third parties.

Figure 54. How are resolutions concluded with legal and natural persons made available?



Source: OECD data collection questionnaire results, Table 66.

[307] Responses to the Data collection questionnaire.

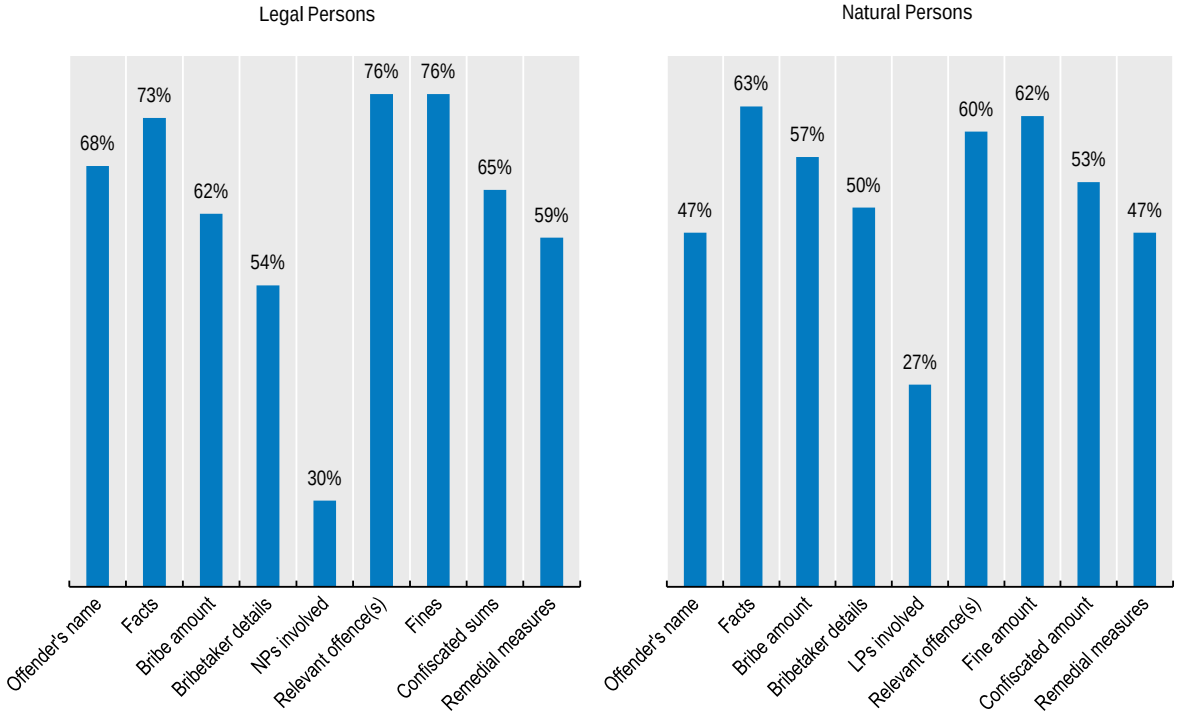
Figure 54 also shows that a few resolutions are accessible only to persons who demonstrate interest. This is the case in **Switzerland**, where *Summary punishment orders* are "only accessible to 'interested persons' (Article 69(2) CPC) or, according to [Federal Criminal Court] case law, […] to interested persons, where 'the requesting party proves an interest in the information which is worthy of protection and no overriding public or private interest precludes the consultation requested'".[308]

5.2.2. What information is made public?

The value of publication is largely contingent on the type and extent of information made available. The information can provide detail the terms of the resolution, and why authorities resorted to a resolution and how they determined its terms, as well as information on the case itself.

As a general observation, and as shown in Figure 55, published resolutions concluded with legal persons contain more detail than those concluded with natural persons. The facts of the case and the amount of the fine are the only two elements that are published in a majority of resolutions concluded with natural persons. These two key elements of a resolution can indeed easily be published without divulging confidential information. In contrast, almost all the elements measured are published in a majority of resolutions concluded with legal persons. The only element that is usually not published is the name of the natural person(s) who committed the underlying offence.

Figure 55. What information is made public in resolutions with legal and natural persons?



Source: OECD data collection questionnaire results, Tables 66 and 67.

[308] Switzerland Phase 4 Report, para 116.

Terms of the resolution and reasons for resorting to a resolution

The Working Group has consistently recommended that Parties to the Convention publish the terms of resolutions and the reasons for resorting to a resolution rather than a full court procedure. In the Phase 3 evaluation of **Brazil**, for instance, it recommended that the country "make public, where appropriate, certain elements of leniency and cooperation agreements concluded in foreign bribery cases, such as the reasons why an agreement was deemed appropriate in a specific case and the terms of the arrangement."[309] Similarly, in the Phase 3 evaluation of Germany, it recommended that Germany make public "certain elements of the arrangements under section 153a CCP, such as the reasons why they were used in a specific case and the arrangements".[310]

Regarding the terms of resolutions, the Working Group on Bribery has at times recommended that countries publish as many elements as possible. In the Phase 3 evaluation of **Denmark**, the Working Group recommended that the country "[…] make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible".[311] It made a similar recommendation to the **United Kingdom** in 2012, during its Phase 3 evaluation.[312]

In other countries, the Working Group has insisted on one specific term, which is the sanction imposed. In the Phase 3 evaluation of **France**, while noting that the approval hearing is held in open court,[313] the Working Group on Bribery recommended that "certain elements of the *CRPC*, such as the terms of the agreement, especially the approved penalty or penalties" be made public.[314] Information on the sanction is particularly important, as it enables the public to assess whether or not sanctions imposed through resolutions are "effective, proportionate and dissuasive", in line with the criteria in Article 3 of the Anti-bribery Convention. This practice also increases accountability and can alleviate concerns that resolutions offer an "easy way out" to offenders. As shown in Figure 55, the amount of the fine is provided in 76% of published resolutions concluded with legal persons, and the amount of confiscation in 65% of them. The amount of the fine is provided in 63% of published resolutions concluded with natural persons, and the amount of confiscation in 55% of them.

It should however be noted that assessing whether a sanction is "effective, proportionate and dissuasive" often requires more information that the type and amount of sanctions. In the Phase 3 evaluation of the United Kingdom, the Working Group, noted the following: "The low level of information on settlements made publicly available by UK authorities often does not permit a proper assessment of whether the sanctions imposed are effective, proportionate and dissuasive."[315] In particular, information on the amount of the bribe is important to make such assessment. It is provided in 62% of published resolutions

[309] Brazil Phase 3 Report, recommendation 6(i).

[310] Germany Phase 3 Report , recommendation 3.c.

[311] Denmark Phase 3 Report , recommendation 3(c).

[312] United Kingdom Phase 3 Report, recommendation 4(c).

[313] French Code of Criminal Procedure, art. 495-9.

[314] France Phase 3 Report, p. p.39-41 and recommendation 4 (c).

[315] United Kingdom Phase 3 Report, Executive Summary.

concluded with legal persons, and 57% of published resolutions concluded with natural persons.

The elements considered by authorities to determine the level and nature of sanctions may also provide useful guidance for practitioners. The Working Group noted for instance that in Norway, in order to respond to the lack of guidance concerning the *Optional Penalty Writ*, ØKOKRIM started "including more information in press releases to inform the public about the factors that it considers when determining the sanctions imposed" through this mechanism.[316] (Sanctions that have been imposed by countries Party to the Convention in practice are discussed in Chapter 4.2.4.)

On par with the terms of the concluded resolution, the Working Group has consistently recommended that countries publish the reason why the case was disposed by way of a resolution. Making this information public contributes to enhancing public trust in the resolution system. This allows the public and civil society to assess whether the conditions and criteria provided in the law have been respected and to verify that a resolution is not the result of an arbitrary decision. This publicity contributes to making the resolution system more accountable. In the Phase 4 evaluation of Germany, the Working Group recommended that for each concluded resolution, Germany "ensure, through any appropriate means, that certain elements of the resolutions under section 153a CCP, such as the legal basis for the choice of procedure, the facts of the case, the natural persons sanctioned (anonymised if necessary), and the sanctions imposed, are made public where appropriate and in line with Germany's data protection rules and the provisions of its Constitution."[317]

Details of the case

Information on the facts of the case can bring clarity on what constitutes foreign bribery, and how the law is being interpreted and applied. Unlike the terms of the agreement and reasons for resorting to a resolution, the Working Group has not consistently required publication of details on cases concluded with a resolution. An exception is the Phase 3 report of Belgium where the Working Group recommended that the country "make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of settlements concluded in foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, the approved sanctions and the assets that are surrendered voluntarily."[318]

In practice, and as shown in Figure 55, facts of the case are the most common element that one can find in the publication of a resolution. They are provided in 73% of published resolutions concluded with legal persons, and 63% of published resolutions concluded with natural persons. Finally, details on the bribe taker can provide valuable insight to businesses in the context of their risk assessment efforts. This information is provided in 54% of published resolutions concluded with legal persons, and 50% of published resolutions concluded with natural persons.

Publishing the name of the offender both increases the reputational risk for possible offenders, and enhances the deterring effect of publication. The name of the offender is

[316] Norway Phase 4 Report, para 85.

[317] Germany Phase 4 Report, recommendation 3 (b).

[318] Belgium Phase 3 Report, recommendation 5.

provided in 68% of published resolutions concluded with a legal person. In 30% of them, the name of the natural person who committed the offence is also provided. However, the name of the offender is made public in 47% of the published resolutions concluded with a natural person. The gap in the percent for legal and natural persons can be explained by the privacy or data protection considerations. These rules are common among countries Party to the OECD Anti-Bribery Convention and explain why the Working Group systematically specifies that publication of resolutions should be made in accordance to the relevant rules in place. As mentioned above, in Germany, the Working Group recommended that information regarding "the natural persons sanctioned (anonymised if necessary)"should be made public."[319]

Box 19. Good Practices in Making Information on Concluded Non-Trial Resolutions Public

Once a non-trial resolution is concluded, make public, where appropriate, and in conformity with each country's applicable rules (e.g. Constitution and Data protection rules):

1. The facts of the case bring in order to raise awareness on what constitutes foreign bribery;
2. The persons sanctioned (anonymised if necessary in the case of individuals) to enhances the deterring effect of publication;
3. The reasons for resorting to a resolution rather than a full court procedure in a specific case in order to enhance accountability and public trust in the resolution system;
4. The legal basis for the resolution system chosen;
5. The terms of non-trial resolutions or as many elements as possible, including possible conditions; and
6. The sanctions imposed to enhance transparency regarding whether sanctions imposed through resolutions are "effective, proportionate and dissuasive", in line with the criteria in Article 3 of the Anti-bribery Convention.

Information on sanctions should include: the amount of the monetary sanction, the amount of confiscation, the amount of the bribe, additional civil and/or administrative sanctions including debarment from public tenders (in cases involving legal persons), compensation to victims, agreement to pay prosecution fees; and the oversight measures, including monitorship where relevant.

Source: OECD Working Group Monitoring Reports

[319] Germany Phase 4 Report, recommendation 3 (b).

Chapter 6. Resolutions and related proceedings

6.1. Impact of resolutions on related domestic proceedings

The decision to conclude proceedings against a legal or natural person by way of a resolution can affect other proceedings in the same jurisdiction. This is a particularly important consideration in the context of major cases against multiple defendants. Concluding proceedings against a defendant by way of a resolution can have a positive outcome for prosecuting authorities, in that in some jurisdictions a resolution concluded against one legal or natural person can be used to assist prosecution against other defendants in the proceedings. In other countries such a course of action could weaken the case against the remaining defendant(s). Resolutions may affect related proceedings in three main ways, which deserve further analysis.

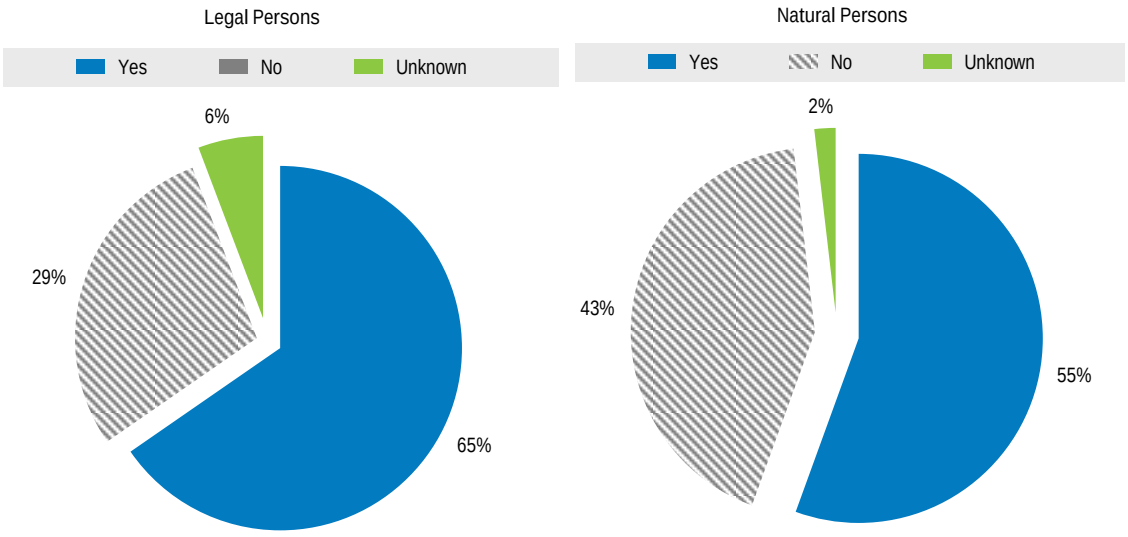
First, can evidence gathered through un-concluded resolutions be used against the same natural or legal persons? Second, can concluded resolutions be used against other natural or legal persons domestically? Third, will a refusal by one (or more) defendants to enter into a resolution impact the potential resolution proceedings against other defendants?

6.1.1. Can evidence or materials obtained in situations in which no resolution is reached be used in separate investigations or trial?

If a discussion has begun between the prosecutor and the accused person but no resolution is reached, it is important to both the accused and the prosecution (or other relevant agency) to know whether evidence and material provided can be used in a subsequent investigation or at trial to help resolve the case against the accused or related legal or natural persons in another proceeding. Countries' answers, as reflected in Figure 56, show that evidence and material can be used in some way in over half of the resolution systems (65% for legal persons and 55% for natural persons).

On the other hand, either information or evidence (or both) obtained during the course of an unsuccessful attempt to conclude at least one resolution cannot be used against either legal or natural persons in several Parties, including **France**, **Germany, Israel**, **Switzerland**, and the **United Kingdom**. The main policy justification for this limitation is to facilitate the full cooperation of the accused. For instance, in **France**, if a *CJIP* is not validated by a judge or the legal person exercises its right of withdrawal, statements and documents obtained in the course of the procedure cannot be used at trial. In **Argentina**, neither the *Penalty Exemption* nor the *Effective Cooperation Agreement* allow the use of the evidence. In **Switzerland**, the statements made by the parties may not be used in any subsequent trial proceeding, but other evidence possibly could be used.

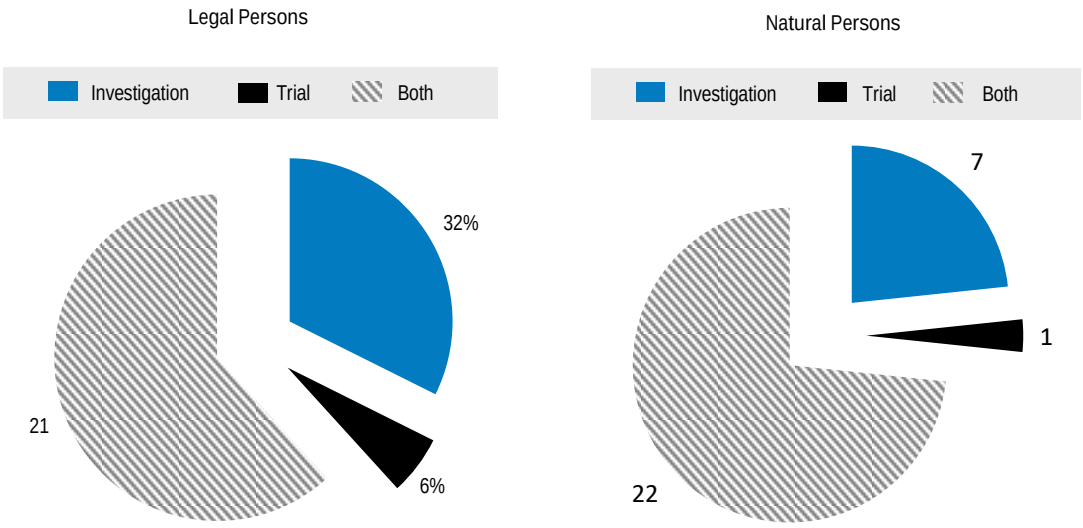
Figure 56. If discussions do not lead to resolution, can evidence and material be used in investigation or trial?



Source: OECD data collection questionnaire results, Tables 27 and 28.

If information from an unsuccessful resolution may be used in a subsequent investigation or trial, Figure 57 shows that it may be used in both investigation and trial in just less than two third (62 %) of the resolution systems for legal persons, and 73% of resolution systems for natural persons . It may be used only in investigations but not in trial in between a third and a quarter of the resolution systems, 32% and 23% for legal and natural persons, respectively. Conversely, information may only be used in trial but not investigation in respectively 6 and 4% of the resolution systems that allow for such subsequent use.

Figure 57. If any information may be used from unsuccessful resolution, for what purpose can it be used?



Source: OECD data collection questionnaire results, Tables 27 and 28.

Ultimately, the situation depends on the country where the accused initiates discussions on a non-trial resolution. In **Spain**, for example, the evidence gathered in the context of negotiating a *Conformidad* can be used in both the investigation and trial. Likewise, in **Colombia,** evidence gathered in the context of considering whether to resolve a matter through its *Declination with Confiscation* or the possibility of concluding a *Preliminary Agreement* can be used during the investigation and at trial. In other countries, such as **Estonia**, evidence gathered can be used in the investigation but not at trial. Similarly, in **Australia**, material gathered in the context of a *Plea Agreement* can be used in the investigation but Australia indicated that it is "extremely unlikely" that information shared in that context could be used in a trial".[320]

The use that can be made of evidence and documents can vary even in the same country, depending on the type of resolution or the nature of the proceedings. For example in **Chile**, information gathered in the context of negotiating a *Conditional Suspension of Proceedings* may be used subsequently in another proceeding, while any information obtained in the context of Chile's *Expedited Proceeding* may not be used. In the **United States**, it may depend, under the Federal Rules of Evidence, on whether the information obtained in negotiations would be used in a subsequent criminal or non-criminal proceeding.[321]

6.1.2. Can concluded resolutions be used against other natural or legal persons?

As shown in Figure 58, an admission by one defendant through a resolution can, in the majority of cases, be used by the prosecuting authorities against other defendants. The percentages of resolutions where this is a possibility are similar for legal persons (36 out of 52 resolution systems - 69%) and natural persons (39 out of 55 resolution systems - 71%). This is even the main purpose of many resolutions which aim at rewarding cooperation with the investigation and the prosecution in order to obtain information on other natural and/or legal persons and hence resolve complex foreign bribery cases against multiple defendants.

These forms of cooperation may be required as a condition to conclude a non-trial resolution. The accused may also obtain a discount or an exemption from a monetary penalty if the cooperation provided is fulsome and useful for building a case against other wrongdoers. (The number of resolutions requiring this form of cooperation is discussed in Chapter 3.2) The current Study only covers the types of non-trial resolutions that impose either a sanction or a confiscation. It excludes regimes that grant immunity for cooperation, as found in "effective regret" provisions, which the Working Group has generally deemed incompatible with the implementation of the Convention and the enforcement of foreign bribery laws.

The extension of the investigation and non-trial resolution to another legal person involved in the unlawful scheme is for instance illustrated by the **Netherlands' *Ballast Nedam/KPMG cases***, where the Dutch Fiscal Intelligence and Investigation Service

[320] Source, Australia's response to the Data collection questionnaire.

[321] This is based on the Federal Rule of Evidence 408(a) which provides that "Conduct or a statement made during compromise negotiations about the claim" is generally not admissible as evidence to prove or disprove a claim, "except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority".

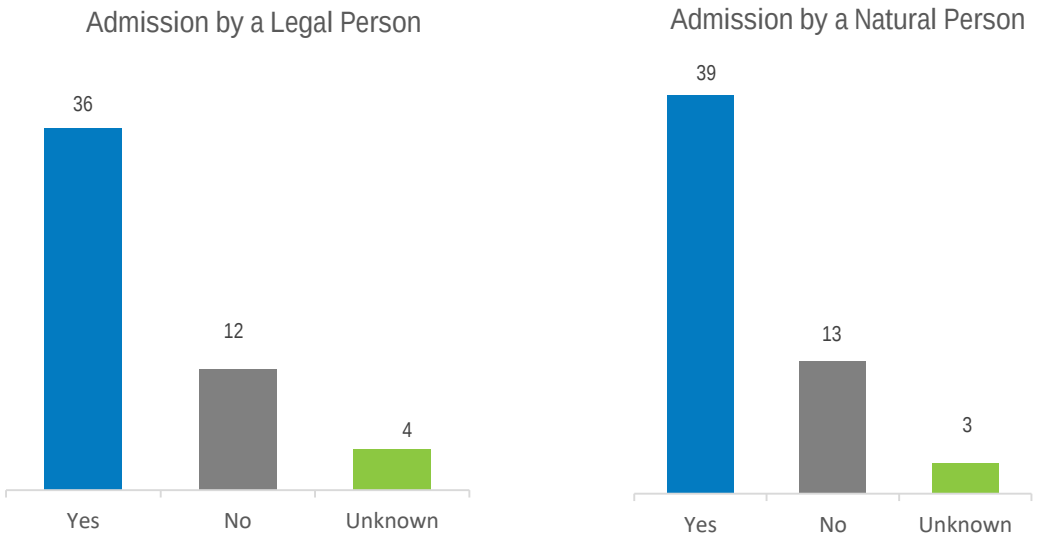
(FIOD) and the Public Prosecution Service also investigated KPMG and three former audit partners, for their role in the audits of Ballast Nedam for the financial years 2000-2003. In 2013, partly based on evidence gathered for the Ballast Nedam case, KPMG reached an out-of-court resolution with the Dutch Public Prosecution Service based on the fact that KMPG's audit helped conceal Ballast Nedam's bribe payments to foreign public officials. KPMG agreed to pay EUR 3.5 million in criminal fine and EUR 3.5 million as confiscation.[322] This was the first case where an auditing firm was sanctioned for its active role in a foreign bribery scheme. (See Annex B for more details on these cases.)

In **Brazil**, the ***Odebrecht case*** shows how evidence obtained from one or more defendants can be used to investigate related natural and legal persons and ultimately conclude multiple resolutions, some of which were agreed by a large number of persons. This is further detailed in Box 20.

Whether evidence and material obtained through a non-trial resolution can be used in court is more complex, given the variety of rules that countries have on the relevance and admissibility of evidence generally. In addition, courts have also raised other obstacles to launching a trial after concluding a non-trial resolution with other participants.

For instance, in the ***KPMG case***, the proceedings against the three KPMG former audit partners were discontinued after a court denied the Public Prosecution Service's right to prosecute them for their role in the bribery scheme. The court's decision was partly grounded on the fact that prosecution would be disproportionate, considering *inter alia* that the other parties involved had reached out-of-court resolutions. For that reason, the Public Prosecution Service could not prosecute the three audits partners for laundering the proceeds of bribery. (See Annex B for more details on these cases.)

Figure 58. Can an admission be used against other defendants?



Source: OECD data collection questionnaire results, Tables 68 and 69.

[322] Open Baar Ministerie (30 December 2013), "*KPMG treft schikking voor haar rol bij het verhullen van betalingen aan buitenlandse agenten*", www.om.nl/vaste-onderdelen/zoeken/@32396/kpmg-treft-schikking/.

Box 20. Use of evidence against other natural and legal persons in the *Odebrecht case* in Brazil

Odebrecht S.A. signed a *leniency agreement* in the course of civil proceedings with the Federal Prosecution Service (FPS - Ministerio Publico Federal) on 1 December 2016, based on a systemic interpretation of Brazil's legislation (notably, of the Corporate Liability Law, Law No. 12,846/2013) and internal prosecutorial resolutions. All related companies of the Odebrecht Group are also Parties to the agreement as well as adherents who are employees of Odebrecht who agreed to provide evidence. As part of the leniency agreement, these adherents are granted immunity from prosecution, provided that the FPS finds their testimonies relevant in the proceedings against third parties. The prosecutors decided that the *leniency agreement* satisfied the public interest test because "an agreement would contribute to the investigation of other suspect individuals and legal entities".

Proceedings also unfolded against natural persons involved. In March 2016, Marcelo Odebrecht, the former CEO of Odebrecht, and two former executives of the company, were sentenced to 19 years and 4 months in prison in **Brazil**. In parallel to the corporate leniency agreement, 77 current and former Odebrecht executives signed cooperation agreements with the Brazilian authorities in December 2016 to resolve domestic and foreign bribery charges. The Federal Prosecution Service (FPS) reports that it used the information obtained through these agreements to file nearly 300 petitions for investigating potential bribery of politicians and public employees across Brazil and in 11 other countries in connection with infrastructure projects.

In July 2018, Odebrecht also signed a *leniency agreement* with Brazil's AGU and CGU in relation to wrongdoing connected with federal contracts as well as foreign bribery. This new resolution builds on the 2016 agreement reached with the FPS and includes a fine with a projected value of USD 2.2 billion over the 22-year repayment period. The portion attributable to foreign bribery amounts to a projected value of approximately USD 32 million. The July 2018 agreement permits Odebrecht to offset the fines already paid pursuant to the December 2016 resolution, but provides that the CGU and AGU may impose additional fines on the company unless Odebrecht concludes agreements in all the foreign countries where the wrongdoing occurred within a three-year term. (The term can be extended by another three years). The Brazilian authorities wanted to encourage other countries to have the chance to enforce their own anti-corruption laws and obtain compensation for the losses that they incurred as a result of Odebrecht's corrupt schemes.

Sources: Official and Media Sources

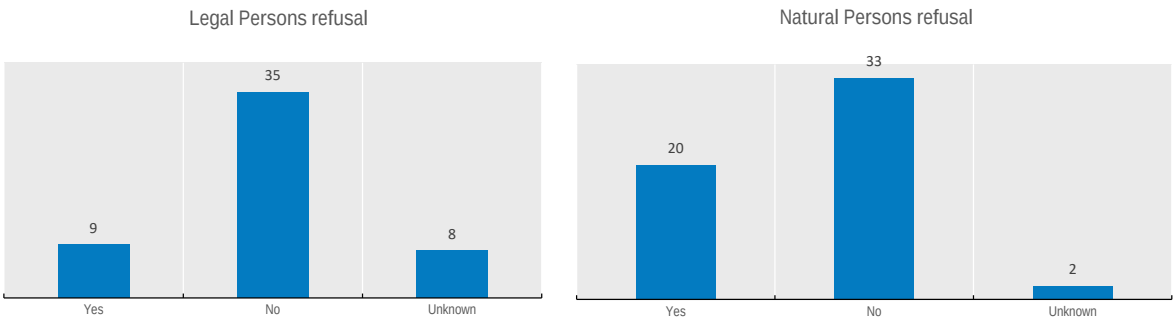
6.1.3. Will a refusal by one (or more) defendant(s) to enter into a resolution impact the potential resolution proceedings against other defendants?

As shown in Figure 59, in some jurisdictions, a refusal by a legal or natural person to accept a resolution system can impact the possibility for other defendants to obtain resolutions themselves. Here, the number of resolution systems that can be affected is much lower for legal persons (9 of the 52 resolution systems, i.e. 17%) than natural persons (20 of 55 resolution systems, i.e. 36%). For legal persons, only three countries Party to the OECD Anti-Bribery Convention have this potential issue - **Estonia** (6 systems), **Latvia** (2 systems) and **the United Kingdom** (1 system). Prosecutors in the **United Kingdom** can

try a legal person on indictment at the same time as a related natural person, and, in practice, "package" plea agreements are often utilised.[323] A package plea deal occurs when the prosecution indicates to the various defendants what pleas would be acceptable from each defendant (e.g. to a lesser charge, or deciding not to proceed to trial against certain defendants). However the resolution of the case depends on each defendant in the "package" accepting their part of the resolution, otherwise the case would normally proceed to trial for all defendants who have not pleaded guilty to the full indictment. Such deals are also commonplace in criminal proceedings against natural persons in the **United States**, and have been found to be constitutional (in a case not involving foreign bribery), notwithstanding the "special risk" of defendants entering pleas of guilty under improper influence, either of the prosecutor or a co-defendant.[324]

However, in the majority of resolution systems (35 of 52 for legal persons, or 67%, and 33 of 55 for natural persons, or 60%) each defendant is entitled to conclude its own resolution with prosecutors without impacting proceedings against other persons involved in the case. These resolution systems include for example the resolution proceedings in the **Netherlands** as well as **Germany**'s *penal order* and *section 153a CCP*. **Spain** reports that in a *Conformidad,* where the defendant is a legal person, the resolution can take place independently of the position adopted by other accused.[325] However for natural persons, refusal of one or more persons to enter into such a resolution may mean that a trial needs to take place for all defendants. Notwithstanding this, "for those defendants who have collaborated, the reduced penalty agreed with the prosecution would be respected".

Figure 59. Can a refusal by one defendant have an impact on the resolutions of others?



Source: OECD data collection questionnaire results, Tables 68 and 69.

[323] By "package" plea agreements, we are referring to instances where the prosecution offers a defendant a plea agreement on the condition that other co-defendant(s) also plead guilty. For a discussion of the phenomenon in US court practice, *see United States v. Hodge*, 412 F.3d 479 (3rd Cir. 2005).

[324] *Ibid*

[325] Section 787(8) CCP

6.2. Impact of resolutions on related foreign proceedings

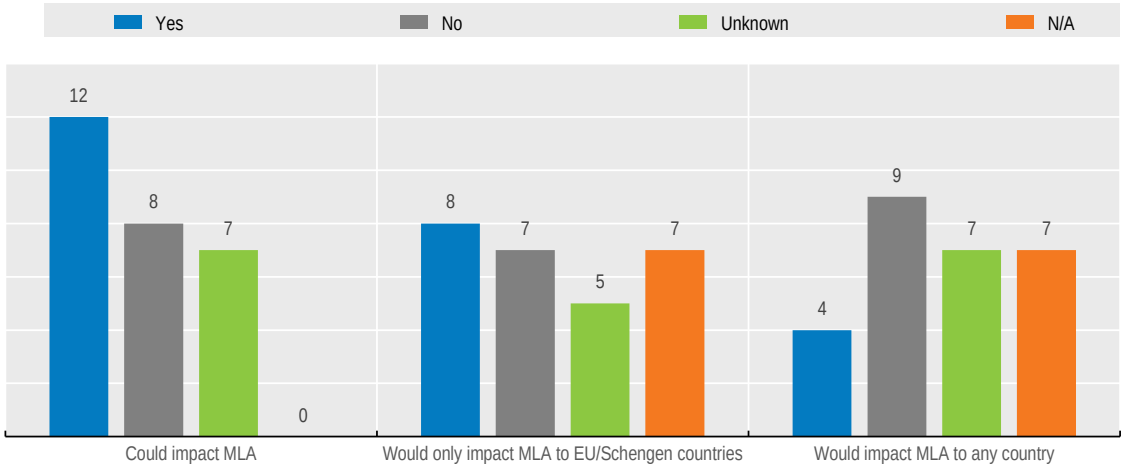
6.2.1. Impact of resolutions on the possibility to provide MLA in foreign proceedings against the same or other legal and/or natural persons in consecutive proceedings

Impact of concluded resolutions on the decision or process to grant MLA

Given the multi-jurisdictional nature of the foreign bribery offence, it is important to assess whether concluded non-trial resolutions may limit the ability of countries Party to the Convention to grant Mutual Legal Assistance (MLA) in foreign proceedings.

Figure 60 shows that concluded non-trial resolutions can limit the ability to provide MLA in at least some circumstances in 12 of the 21 countries that responded. Four countries (**Australia**, **Brazil**, **Norway**, **Switzerland**) indicated that a non-trial resolution could (in some cases) prevent them from providing MLA to any country. In addition, 8 countries (**Austria**, **Germany**, **Hungary**, **Italy**, **Latvia**, **Slovenia**, **Spain**, **United Kingdom**) indicated that a concluded non-trial resolution could potentially affect the decision or process to grant MLA inside EU and/or Schengen Area, but would not affect their ability to provide MLA to countries outside the EU and/or Schengen Area. Only 8 countries (**Argentina**, **Chile**, **Colombia**, **Israel**, **Japan**, **Mexico**, **South Africa** and the **United States**) asserted that it does not impact the decision or process to grant MLA. Seven countries (**Canada, Costa Rica,** the **Czech Republic**, **Estonia, Finland**, **France,** and the **Netherlands**) are listed as "Unknown**".**

Figure 60. Could non-trial resolution impact ability to provide mutual legal assistance to another country Party to the Convention?



Source: OECD data collection questionnaire results, Table 72.

The countries which indicated that a non-trial resolution could prevent them from providing MLA in some circumstances have provided different explanations.

In **Australia**, domestic legislation provides discretionary grounds for refusing to provide MLA, including whether "the request relates to the prosecution or punishment of a person

in respect of an act or omission where, if it had occurred in Australia at the same time and had constituted an offence against Australian law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason".[326] As certain non-trial resolutions in Australia would prevent prosecution for the same offence in Australia, the authorities indicate that this ground may limit Australia's ability to provide MLA following a non-trial resolution.

In **Brazil**, evidence produced by an accused legal or natural person in connection with a non-trial resolution can be shared with foreign jurisdictions for use against third parties (for instance, the corrupt official). Any evidence obtained, however, will be shared with the limitation that it cannot be used against the persons who entered into resolutions, which is in line with Article 37 of the United Nations Convention Against Corruption (UNCAC) as well as internal Federal Prosecution Service regulations. This is a consequence of the fact that these persons waived their right not to produce evidence against themselves in exchange for a limitation of their liabilities, which were established in the resolutions. If Brazil has evidence that was not gathered in connection with a resolution, it can share it without restrictions with both domestic and foreign counterparts. This approach has been confirmed by practice with the foreign bribery resolutions Brazil has concluded to date (e.g. in the ***Odebrecht, Rolls-Royce*** and ***SBM Offshore*** cases).

In **Norway**, a concluded resolution will impact the decision or process to grant MLA to the same extent as it would prevent prosecutions under the principle of *ne bis in idem*. In **Switzerland**, a concluded resolution may impact the decision or process to grant MLA in the same way as a court decision.

The potential limit for Member states of the European Union (EU) and states Party to the Schengen Agreement to grant MLA inside EU and/or Schengen Area is based on the following ground: Member states of the EU grant MLA based on the Directive 2014/41/EU regarding the European Investigation Order (hereafter "EIO") in criminal matters. According to Article 11(1)(d) of the Directive 2014/41/EU regarding the EIO in criminal matters the execution of an EIO can be refused if its execution would be contrary to the principle of *ne bis in idem*. The principle of *ne bis in idem* also applies to states Parties to the Schengen Agreement (Article 54). This would, however, not affect their ability to provide MLA to countries outside the EU and/or Schengen Area.

In the **United Kingdom**, the Working Group on Bribery Phase 4 report notes that the United Kingdom's ability to provide MLA after settling a foreign bribery enforcement action has come into question. During the evaluation, the SFO stated that the resolution agreements in the ***M.W. Kellogg and Macmillan*** cases specifically provided that the SFO could conduct further investigations if it receives requests under MLA treaties. There was no corresponding provision in the plea agreement in the ***BAE Tanzania*** case, but the SFO clarified during the Phase 4 evaluation that the plea agreement does not preclude MLA even if it provides that the SFO shall forthwith terminate all its investigations into the BAE Systems Group. On this basis, the UK authorities were able to provide MLA to the **Czech Republic** and expressed their willingness to assist Tanzanian authorities if requested.

[326] Mutual Assistance in Criminal Matters Act 1987, paragraph 8(2)(c); see also id. at paragraph 8(2)(g) (""). – Similar provisions are also contained in many of Australia's bilateral MLA Treaties.

Impact of confidentiality and muzzle clauses on the possibility to grant MLA

The effect of concluded resolutions on foreign investigations and possible resolutions on the same legal and/or natural persons also depends on other clauses that may be included in the resolution, such as confidentiality clauses and/or "muzzle" clauses. These clauses may affect whether evidence and material acquired in the context of a concluded resolution can be shared with foreign authorities through informal and formal MLA (confidentiality clauses) and whether a company or an individual is prohibited, directly or indirectly through others, from making any public statements contradicting the acceptance of responsibility. ("public statements" clauses or "muzzle" clauses). This is discussed in Chapter 4.6.5.

6.2.2. Impact of resolutions in countries where the "ne bis in idem" principle (or "Double Jeopardy") may be recognised at international level

Potential impact of the "ne bis in idem" principle on the non-trial resolutions of foreign bribery cases

The effect of concluded resolutions on foreign investigations and possible resolutions on the same legal and/or natural persons is often presented as largely depending on the existence of rules on *ne bis in idem*, a principle also known as "double jeopardy". The recognition of a foreign *ne bis is idem* is questioned by many countries, lawyers and academics (see discussion and references below), but in the countries where this principle may apply to foreign resolutions, it could prevent subsequent investigation and/or prosecution based on the same facts. The Anti-Bribery Convention does not cover this principle *per se*, but includes a provision which aims at preventing such situations from arising, providing: "when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution" (Article 4.3). The implementation of this provision is progressing together with the number of foreign bribery multi-jurisdiction cases which investigation and resolution is coordinated among a growing number of countries Parties to the Convention. This is discussed in Chapter 1.4.

The *ne bis in idem* principle may be perceived as affording some protection to companies and individuals against multiple investigations, prosecutions and resolutions whether or not through trial. Its recognition at the international level varies from one country to the other and is still evolving, in particular with case law, in many countries.[327] It may also be based on treaties as in the European Union (see below).[328] In countries with no such treaty basis,

[327] See for instance : Vers une reconnaissance internationale du principe non bis in idem, Astrid Mignon Colombet Avocat au barreau de Paris, associé Soulez Larivière & Associés - La Semaine Juridique - Entreprise et affaires - n° 36 - 3 septembre 2015, convention-s.fr/wp-content/uploads/2016/04/NONBISINIDEM-AMC-2015.pdf

[328] Notably, Article 54 of the Convention implementing the Schengen Agreement (CISA) and Article 50 of the Charter of the Fundamental Rights of the European Union.

the application of this principle is far from being generally recognised and "many technical difficulties arise when transnational *ne bis in idem* is applied in practice".[329]

For large companies, which may be subject to the jurisdiction of multiple countries in foreign bribery cases, the recognition of the *ne bis in idem* principle could be an incentive to enter into a resolution as promptly as possible. It may also contribute to a high level of cooperation with the investigating authorities. As a downside, it may also lead to some form of forum shopping with companies choosing to self-report to the country where sanctions are likely to be the less severe in terms of costs (amount of sanctions and length of procedures for instance) and consequences (lack of debarment from public tenders).[330] The risk also exists that certain countries impose low sanctions to their own companies to protect them from the jurisdiction and more stringent consequences they would encounter if sanctioned by other countries. This risk was considered under the Convention from the outset. Two safeguards were put into place with the requirements that sanctions be effective, proportionate and dissuasive (Article 3 of the Convention) and that investigation and prosecution should not be influenced by considerations of national economic interest, or the identity of the natural or legal persons involved (Article 5 of the Convention). However, in spite of record fines imposed through non-trial resolutions in prominent cases as the ***Siemens case*** and more recently, the ***Odebrecht case***, a recurrent criticism from civil society is that non-trial resolutions let companies and corporate defendants off too easily in a number of ways including by imposing fines that are too low (as discussed in Chapter 4.5).[331]

Different positions regarding the "ne bis in idem" principle in the Parties to the Convention and their impact on parallel or consecutive investigations in their country

Pursuant to the countries' questionnaire responses provided for the present Study, there is no material difference in the approach towards *ne bis in idem* between the situation of legal and natural persons as, in most countries, the same general legal principles logically apply to both. As shown in Figure 61, 33% of the countries where at least one resolution system is available emphasised that there is no international *ne bis in idem*. Nonetheless, a non-trial resolution would give rise to *ne bis in idem* in respectively 59% and 63% of the countries with a resolution system (for legal and natural persons, respectively). Among these countries, 33% indicated that the *ne bis in idem* principle would apply just as a court judgement, while and 26% to 30% indicated that it would apply in a different manner.

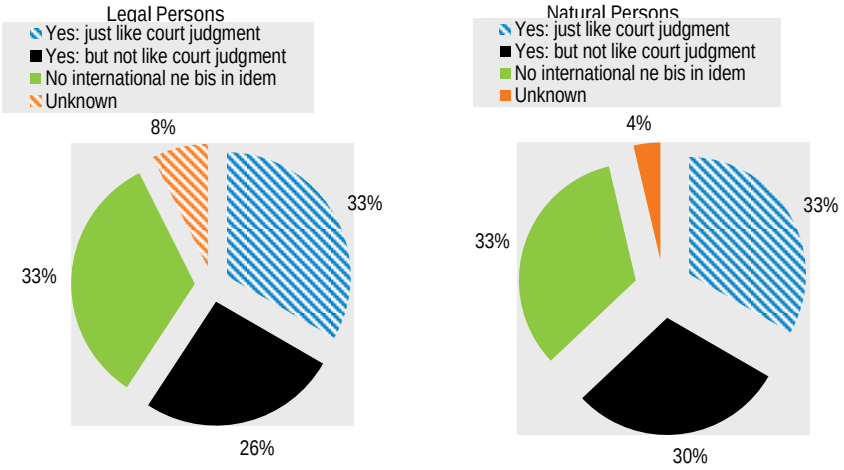
[329] 'Transnationalising' *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty, Juliette Lelieur, Utrecht Law Review, www.utrechtlawreview.org | Volume 9, Issue 4 (September) 2013 | urn:nbn:nl:ui:10-1-112943|. *See also* GAB | The Global Anticorruption Blog Law, Social Science, and Policy, Guest Post: Does international law require an international double jeopardy bar? By Frederick Davis, Posted on October 18, 2016 by Matthew Stephenson as well as other related posts by the same author, globalanticorruptionblog.com/2016/10/18/guest-post-does-international-law-require-an-international-double-jeopardy-bar/#more-6991.

[330] Moran, J. (2015). Why International Double Jeopardy Is a Bad Idea. The Global Anticorruption Blog, globalanticorruptionblog.com/2015/03/09/whyinternational-double-jeopardy-is-a-bad-idea/.

[331] See for example: Transparency International, (2015) Policy Brief, "*Can Justice Be Achieved Through Settlements?"*

The **United States** as well as other countries, including **Israel** and **Brazil**, indicate that there is no foreign *ne bis in idem* prohibition. This does not, however, prevent these countries from taking into account foreign resolutions, depending on the circumstances. (This issue is discussed in more detail in Chapter 1.4.)

Figure 61. Does a foreign non-trial resolution give rise to ne bis in idem?



Source: OECD data collection questionnaire results, Table 71.

Brazil specified in its response that the resolution of a case through a resolution in another jurisdiction does not prevent subsequent investigation, prosecution or resolution for foreign bribery. Nonetheless, Brazilian authorities would take into account the terms of the resolution signed abroad whenever possible.

In the **United Kingdom**, the *ne bis in idem* principle would be recognised in case of a foreign non-trial resolution, but with a different extent. The Phase 4 report notes that the doctrine of double jeopardy prevents a criminal prosecution in at least two situations. First, a person may not be convicted twice of the same offence based on substantially the same facts. Second, barring special circumstances, a person should not be tried for an offence based on facts that are the same, or substantially the same, as those in a previous trial where that person was acquitted. These principles apply equally if the earlier conviction or trial occurred in a foreign jurisdiction. However, a prior criminal conviction or trial would not bar subsequently civil proceedings. In some jurisdictions, a defendant may enter into a deferred prosecution or non-prosecution agreement (*DPA* or *NPA*), which results in sanctions without a formal conviction. The report notes that according to the SFO, such agreements are tantamount to convictions for the purpose of double jeopardy.[332]

In **Germany**, the German Constitutional Court has ruled that under German law, in principle, foreign decisions do not bar German proceedings, including a conviction, as no such general principle of *ne bis in idem* exists in international law.[333] Section 51, sub-section 3, of the German Criminal Code merely provides that any sanction imposed by a foreign sentence, to the extent it has been served or executed, shall be credited towards the new sentence by a German court. In derogation of that rule, Germany is bound by bilateral

[332] United Kingdom Phase 4 Report, para. 123.

[333] German Constitutional Court, decision of 31 March 1987, case no. 2 BvM 2/86, BVerfGE 75, 1.

and multilateral agreements that include a bar of double jeopardy as is notably the case in the context of the EU.[334] Germany could thus not conduct investigations and/or prosecutions "for the same acts"/"the offence", as defined by the case law of the European Court of Justice, that underlie a foreign resolution, if the latter amounts to a "penalty" or "conviction". This depends on whether the respective national law views the resolution as a final judicial decision, as long as it is based on a detailed investigation and an examination of the merits of the case.[335] No similar derogation applies to the Parties to the Convention that are not members of the EU.

Countries' position in this regard is also susceptible to changes over time. In **France**, a judgment of January 17th, 2018, the Court of Cassation (*Cour de Cassation*) reversed a decision of the Paris Court of Appeal ascertaining the extinction of the public action by application of the rule of *ne bis in idem*.[336]

In a rare number of cases, countries have concluded a resolution with a company for the same facts as those for which the company had already concluded a resolution with another Party to the Convention. A recent example arose in **Israel** with ***Teva Pharmaceutical Industries Ltd.,*** which agreed, on 15 January 2018, to pay NIS 75 million (USD 22.1 million) in fines to Israeli authorities as part of a non-trial resolution in which the company admitted to making corrupt payments in Russia and Ukraine as well as improper payments in Mexico to increase sales (the resolution itself was based on a violation of Israel's Securities Law for false accounting). The resolution came after the company agreed to pay more than USD 519 million to settle the same charges with US authorities in 2016. In deciding, that a non-trial resolution was appropriate, the authorities took into account the pharmaceutical company's cooperation with the investigation, its implementation of a comprehensive compliance programme, and the fact that it had already been sanctioned by the United States for the bribery schemes.[337]

Discussions on the *ne bis in idem* principle tend in practice to be superseded with the growing number of prominent multi-jurisdictional cases that have been resolved with coordinated non-trial resolutions. In these cases, MLA appears to have been granted in a very practical and efficient manner as illustrated for instance the coordinated resolution reached by the **United States**, **Brazil** and **Switzerland** in the ***Odebrecht case***.

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[334] Notably, Article 54 of the Convention implementing the Schengen Agreement (CISA) and Article 50 of the Charter of the Fundamental Rights of the European Union apply to Germany vis-à-vis judicial decisions from other Schengen/European Union Member States. Germany could thus not conduct investigations and/or prosecutions "for the same acts"/"the offence", as defined by the case law of the European Court of Justice, that underlie the foreign resolution, if the latter amounts to a "penalty [that] has been enforced, is actually in the process of being enforced or can no longer be enforced under the law of the sentencing Contracting Party"/"[final] conviction".

[335] European Court of Justice, Judgement of 29 June 2016, Case C 486/14 - Kossowski

[336] Cass.Crim., 17 January 2018, 16-86.491. See also GAB | The Global Anticorruption Blog Law, Social Science, and Policy, Guest Post: Guest Post: Further Developments on French Law Regarding Anti-Bribery Prosecutions by Multiple States By Frederick Davis, Posted on April 19, 2018 by Matthew Stephenson, globalanticorruptionblog.com/2018/04/19/guest-post-further-developments-on-french-law-regarding-anti-bribery-prosecutions-by-multiple-states/

[337] Teva to pay NIS 75 million to Israel authorities to settle foreign bribe claims, by Shoshanna Solomon, The Times of Israel, 15 January 2018, www.timesofisrael.com/teva-to-pay-nis-75-million-to-israel-authorities-to-settle-foreign-bribe-claims/

6.3. Resolutions in the context of non-coordinated multi-jurisdictional cases

Cooperation on multi-jurisdictional resolutions can become complicated, in part because domestic laws or procedures have different requirements. Also, prosecutorial equities and priorities may differ across jurisdictions. Authorities that investigate and prosecute defendants for foreign bribery do so within their own domestic legal and institutional framework, and authorities are not obligated to coordinate across jurisdictions when resolving cases.

Furthermore, a multi-jurisdictional resolution may not put an end to all jurisdictions investigating the conduct. For example, in the ***Odebrecht case***, even after a major resolution with the **United States**, **Switzerland**, and **Brazil**, several other jurisdictions initiated their own investigations, with which Odebrecht agreed to cooperate in the terms of the resolutions it had already reached. Similarly, in the ***Saipem S.p.A case***, the corporation was convicted and sanctioned by the **Italian** authorities, although it and its wholly owned subsidiary Snamprogetti Netherlands B.V. had already entered into a DPA with the **US** authorities, and Snamprogetti Netherlands B.V. had already entered into a settlement with the Nigerian authorities. Even in the absence of a simultaneous multi-jurisdictional resolution, a resolution may obligate defendants to cooperate with other jurisdictions that may resolve later in time. For example, in the ***Nikuv case***, the company agreed in its plea agreement with the **Israeli** authorities to cooperate with Lesotho's domestic prosecution of the public officials who accepted bribes.

In the absence of a coordinated multi-jurisdictional resolution, a prosecuting authority that resolves a case with a defendant may effectively (and perhaps unwittingly) disallow another jurisdiction from bringing the same case based on the legal principles of *ne bis in idem* or double jeopardy. Double jeopardy was cited by the **United Kingdom** as the reason for not opening an investigation in the case involving ***AgustaWestland S.p.A***. and AgustaWestland Ltd. which had entered into a *Patteggiamento* in **Italy**.[338] Conversely, in the ***Vitol case***, although the company entered into a plea agreement with the **US** authorities, **French** courts have ruled that the proceedings in the **United States** do not preclude legal actions in the **French** criminal justice system, provided that the illegal acts occurred in France.

When multiple jurisdictions are attempting to resolve a matter with the same defendant for similar conduct, the lack of cooperation by the defendant or early coordination between authorities may pose significant challenges. For example, in the ***SBM case***, rather than a coordinated resolution, the **Netherlands**, the **United States** and **Brazil** entered into consecutive resolutions with the company. Cooperation between the three countries started well after they initiated their own investigations. In 2014, the **Dutch** authorities concluded a resolution with SBM Offshore N.V. and the **US** authorities closed their investigation due to a lack of jurisdiction. The DOJ reopened their investigation in 2016, based on additional information and in 2017, resolved the case with a DPA for the parent and guilty plea for the US subsidiary. In **Brazil**, although an initial 2016 leniency agreement was rejected by the review board of the Federal Prosecution Service (FPS), new agreements were signed in 2018 . While the **United States** took into account the other two resolutions, the net results in this case were protracted investigation and resolution phases that may have taken a longer time than a coordinated resolution.

[338] United Kingdom Phase 4 Report, para. 124.

Box 21. Examples of non-coordinated multi-jurisdictional cases

Vitol – Between 1996 and 2003, Vitol, a Swiss oil trader, paid approximately USD 780.000 in bribes to the government of Iraq to obtain oil under the United Nations' Oil-for-Food programme. In November 2007, Vitol entered into a plea agreement with the **US** authorities for grand larceny and agreed to pay USD 17.5 million in fines. In 2013, in **France**, the First Instance Court acquitted Vitol, in part applying the *ne bis in idem* principle. In 2016, the Appeal Court overturned the judgement and ruled that the proceedings in the **United States** do not preclude legal actions in the **French** criminal justice system, provided that the illegal acts occurred in France, a ruling that the **French** Court of Cassation affirmed.

AgustaWestland – In **Italy**, AgustaWestland S.p.A. and AgustaWestland Ltd (two former companies of the Finmeccanica group[339]) requested to enter into a *Patteggiamento.* The alleged bribery scheme involved payments funnelled through several foreign companies, including one **Swiss** company controlled by two AgustaWestland consultants. Double jeopardy was cited by the **United Kingdom** as the reason for not opening an investigation in the case involving AgustaWestland S.p.A. and AgustaWestland Ltd, which had entered into a *Patteggiamento* in **Italy**.[340] In addition, since the *Patteggiamento* equates to a conviction, even though it does not constitute a judicial finding of criminal liability, the resolution may allow the two companies to avoid being prosecuted for the same facts in foreign countries insofar as these may recognise some form of *ne bis in idem*.

Saipem S.p.A. – In **Italy**, Saipem S.p.A. was sanctioned to the payment of EUR 600.000 and to the seizure of EUR 24.5 million for having paid bribes for approximately USD 187 million in favour of **Nigerian** officials to build a liquefaction plant for natural gas. The bribery scheme involved the activity of a joint venture of corporations from the **United States**, **Japan**, **France** and **Italy,** including Snamprogetti Netherlands B.V., a wholly owned subsidiary of Saipem S.p.A. In particular, the Italian Supreme Court of Cassation stated that the settlements Snamprogetti Netherlands B.V. and Saipem S.p.A. already entered into with the US and Nigerian authorities do not preclude a new conviction before the Italian authorities, since the international conventions between Italy and respectively the United States and Nigeria do no acknowledge the *ne bis in idem* principle.

Nikuv – During 2012, Nikuv International Projects Ltd. (Nikuv), an Israeli information technology company, paid bribes of more than USD 500.000 to government officials in Lesotho. In plea negotiations, the **Israeli** authorities asserted that any resolution would have to include an independent obligation on the company and its officers to cooperate with the prosecution in Lesotho. This term was incorporated in the signed plea agreement as one of Nikuv's obligations. In determining whether Nikuv provides sufficient cooperation, the **Israeli** authorities will take into account the position of Lesotho authorities.

SBM – Between 1996 and 2012, SBM Offshore N.V., a **Dutch** company, together with its **US**-based subsidiary SBM Offshore USA, paid a total of approximately USD 180 million in commission payments, a portion of which was used to pay bribes to government and public officials in **Brazil**, Angola, Equatorial Guinea, Kazakhstan and Iraq. Rather than a coordinated resolution, the **Netherlands**, the **United States** and **Brazil** entered into

[339] Finmeccanica was renamed Leonardo in 2016.

[340] United Kingdom Phase 4 Report, para. 124.

consecutive resolutions with the company. Cooperation between the three countries started approximately a year after they had started their own investigations. In November 2014, the **Dutch** authorities concluded a resolution with SBM Offshore N.V. At the same time, the **US** authorities initially declined to continue investigating the company due to a lack of jurisdiction. However, in 2016, the DOJ reopened the investigation based on additional information and in November 2017, the DOJ and the company resolved the case with a DPA for the parent and guilty plea for the **US** subsidiary. In **Brazil**, an initial 2016 leniency agreement was rejected by the review board of the FPS, and new agreements were signed with the Brazilian authorities in 2018. The resolutions were consecutive and not simultaneous to the resolution in the **Netherlands**. Nonetheless, the **United States** resolutions credited the resolution already reached with the Dutch authorities and took into account the proceedings in Brazil that were ongoing at the time.

Source: Summaries of cases in Annex B.

Annex A. List of Abbreviations, terms and acronyms

AFA	French Anti-Corruption Agency (*Agence Française Anticorruption* – France)
AFM	Authority for the Financial Markets (The Netherlands)
AGU	Attorney General's Office (*Advocacia-Geral da União* – Brazil)
BRL	Brazilian Real (currency)
CCP	Code of Criminal Procedure
CGU	Ministry of Transparency and Office of the Comptroller General (*Ministério da Transparência e Controladoria-Geral da União* – Brazil)
CISA	Convention Implementing the Schengen Agreement
CJIP	*Convention Judicaire d'Intérêt Public* (France)
CLL	Corporate Liability Law (Brazil)
CPS	Crown Prosecution Service (United Kingdom)
CRPC	*Comparution Immediate sur Reconnaissance Préalable de Culpabilité* (France)
DFID	Department for International Development (United Kingdom)
DOJ	Department of Justice (United States)
DPA	Deferred Prosecution Agreement
EIO	European Investigation Order
EU	European Union
EUR	Euro (currency)
FCO	Foreign & Commonwealth Office (United Kingdom)
FCPA	Foreign Corrupt Practices Act (United States)
FIOD	Fiscal Intelligence and Investigation Service (The Netherlands)

FPS	Federal Prosecution Service (*Ministerio Publico Federal* – Brazil)
GBP	Pound Sterling (currency)
LP	Legal Persons
MDB	Multilateral Development Bank
MLA	Mutual Legal Assistance
MROS	Money Laundering Reporting Office (Switzerland)
NCA	National Crime Agency (United Kingdom)
NGO	Non-Governmental Organization
NOK	Norwegian Krona (currency)
NP	Natural Persons
NPA	Non-Prosecution Agreement
OAG	Office of the Attorney General (*Ministère public de la Confédération* – Switzerland)
OECD	Organisation for Economic Co-operation and Development
ØKOKRIM	Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime
OWiG	Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten* – Germany)
PNF	*Parquet national financier* (France)
SEC	Securities and Exchange Commission (United States)
SFO	Serious Fraud Office (United Kingdom)
SOE	State-owned enterprise
UKBA	UK Bribery Act (United Kingdom)
UNODC	United Nations Office on Drugs and Crime
USD	US Dollar (currency)
USSG	United States Sentencing Guidelines
WGB	Working Group on Bribery in International Business Transactions

Annex B. Case studies

The case studies in this annex are mainly based on primary sources (DPA, Plea agreements, Patteggiamento etc.), information available in open sources (such as official press releases on the resolutions and press articles), and in consultation with the countries Party to the OECD Anti-Bribery Convention concerned.

1. AgustaWestland S.p.A. and AgustaWestland Ltd (India) - 2014

Description of the facts

Between 2004 and 2011, AgustaWestland S.p.A. and AgustaWestland Ltd, two former companies of the Finmeccanica group operating in the aerospace, defence and security sectors, allegedly paid at least EUR 7.5 million in bribes through intermediaries to the former Chief of the Indian Air Force and three of his close relatives. The bribe payments were made to secure the companies's participation in a call for tenders and ultimately obtain a EUR 556 million contract for twelve helicopters provided to the Indian Ministry of Defence. The case was uncovered in the course of another foreign bribery investigation by the Italian authorities involving Finmeccanica.[341] AgustaWestland **S**.p.A. and AgustaWestland Ltd approached the Italian authorities at the preliminary investigation stage, and the prosecutor accepted their request to enter into a *Patteggiamento* and the terms of such resolution*s*.[342]

Resolution for failure to have adequate corporate internal measures to prevent and detect bribery

Scope of the judicial review

The terms of the *Patteggiamento* were subject to judicial review to assess: (*i*) whether there was no ground for an acquittal based on the elements of proof in the file (*prima facie* evidence of exclusion of criminal liability); (*ii*) whether the legal qualification of the facts, as well as the application and balancing of the mitigating and aggravating factors were correct; and (*iii*) whether the proposed sentence was adequate.[343]

[341] Information on the other investigation can be found in the first instance judgment in the proceedings against the two defendant executives (Sentenza, Tribunale di Busto Arsizio – Sezione Penale, 09.10.2014). See also Corruption Watch UK, Report: "*The Anglo-Italian Job: Leonardo, AgustaWestland and Corruption Around the World*" (2018), p. 9, www.cw-uk.org/angloitalianjob

[342] As allowed by articles 444 and 447 of the Italian Code of Criminal Procedure.

[343] See article 444, para 2, Italian Code of Criminal Procedure.

Terms and obligations of the resolution

The Busto Arsizio Court approved the proposed *Patteggiamento* in August 2014. As part of the resolution, AgustaWestland S.p.A agreed to pay a EUR 80°000 fine and AgustaWestland Ltd agreed to pay a EUR 300°000 fine and EUR 7.5 million confiscation corresponding to the amount of the bribe allegedly paid. The Court found that the two companies did not put into place nor did they implement organisational models adequately preventing foreign bribery before the alleged offences were committed. This could otherwise have been considered as a ground for excluding administrative liability.[344] The companies' *Patteggiamento* is "equated to a conviction" (unless otherwise provided by statute),[345] but does not constitute a judicial finding of criminal liability.[346] The *Patteggiamento* does not imply admission of the facts or recognition of guilt by AgustaWestland S.p.A. and AgustaWestland Ltd, an aspect that was stressed by the companies' parent, Finmeccanica, in its press release announcing the resolution.[347]

When approving the fines proposed for the *Patteggiamento*, the Court considered a number of mitigating factors put forward by the defence of the two companies. In particular, before the opening of the trial, the companies: (*i*) had compensated the damages or eliminated the negative consequences of the crime, or had endeavoured to do so, and (*ii*) provided evidence of the adoption and implementation of adequate organisational models.[348] Whether the companies cooperated with the investigation is not a condition to enter into a *Patteggiamento*. Neither was this taken into account in this case when determining the level of the corporate fines. The Court also found that AgustaWestland Ltd had already made EUR 7.5 million available to the authorities for seizure and confiscation corresponding to the value of the instrument of the crime (i.e. the bribe). The two companies also benefitted from the reduction always applicable in case of *Patteggiamento*, capped to a maximum of a third. This reduction was applied to the baseline fine, once reduced in consideration of the above mentioned mitigating factors.

As a result, AgustaWestland S.p.A. received a 50% reduction of the baseline fine (initially estimated at EUR 240°000) based on the aforementioned mitigating factors. In addition, the fine was reduced by one third because it was imposed through a *Patteggiamento*. Similarly, AgustaWestland Ltd, received a 1/3 reduction of the baseline fine (estimated at

[344] On the operation of article 6 Legislative Decree 231/2001 as a cause for excluding liability and, more specifically, on all the conditions to which the application of the exemption is subject, see OECD (2004) Italy Phase 2 Report, para 28-29 and 176-180. This provision was applied in relation to Finmeccanica, AgustaWestland's parent company. Finmeccanica was also under investigation but not charged because the Court found that the company had implemented an organisational model fit for adequately preventing foreign bribery before the alleged offences. Moreover, the court noted the lack of evidence linking it to the alleged bribery scheme..

[345] See article 445, para 1-bis, Italian Code of Criminal Procedure.

[346] See, e.g. Alessandra Sanna, "Effetti penali della sentenza a pena concordata: il peso insostenibile di una condanna senza giudizio di colpevolezza" in *Cassazione penale* n. 12/2013, p. 4535, flore.unifi.it/retrieve/handle/2158/865499/28790/Effetti penali della sentenza di patteggiamento.pdf

[347] See Finmeccanica, Press Release 29.07.2014, "*Finmeccanica: Investigations into the Company relating to the AW101 helicopters contract with the Indian Ministry of Defence discontinued*", www.leonardocompany.com/en/-/finmeccanica-archiviata-posizione-societa-fornitura_aw101_india

[348] Mitigating factors provided for in article 12, para 2(a) and (b), Legislative Decree 231/2001.

EUR 540°000) based on the mitigating factors, and an additional 1/6 reduction for the *Patteggiamento*. Except for mentioning that AgustaWestland Ltd's higher fine reflected its greater involvement, the decision to approve the *Patteggiamento* does not provide for separate reasons explaining why the proposed reductions were considered appropriate for each company.

Use of evidence and documents covered by the Patteggiamento in related domestic proceedings

Regarding the natural persons involved, one of the alleged intermediaries also concluded a *Patteggiamento* in 2014 at the preliminary investigation stage. He was sentenced to one year and ten months imprisonment for foreign bribery.[349] Two executives were also prosecuted for foreign bribery and false accounting before the companies entered into a *Patteggiamento* with the Italian authorities. The Milan Court of appeal finally acquitted both executives for lack of evidence in January 2018,[350] after the case had been appealed before the Italian Supreme Court.[351] In first instance, both executives had been convicted of false accounting offences but acquitted of the foreign bribery charges.[352] The court found that evidence in the intermediary's *Patteggiamento* was, by nature, not sufficient to secure a conviction. [353] Indeed a *Patteggiamento* does not require a recognition of guilt nor an admission of the facts. No other resolutions or convictions have been decided in connection to this case.

Impact of the corporate resolution on related foreign proceedings

The alleged bribery scheme involved payments funnelled through several foreign companies, including one Swiss company controlled by two AgustaWestland's consultants. Switzerland initiated a separate investigation for money laundering and foreign bribery on one of the two consultants who was later extradited to Italy and entered into a *Patteggiamento*.[354] The second consultant involved was never arrested in Switzerland.[355] The *Patteggiamento* concluded by the legal entities reportedly had no direct influence of the proceedings in Switzerland. However, double jeopardy was cited by the United Kingdom as the reason for not opening an investigation in the case involving

[349] Reuters (April 2014), "*Finmeccanica, accordo Haschke-pm per patteggiamento a 1 anno e 10 mesi*", it.reuters.com/article/topNews/idITMIEA3100U20140402

[350] Sentenza, Corte d'appello di Milano, Sezione III Penale, 08.01.2018.

[351] See Corte di Cassazione, Sezione III Penale, sentenza n. 1464/2017.

[352] Sentenza, Tribunale di Busto Arsizio, Sezione Penale, 09.10.2014.

[353] *Ibid.*

[354]. La Repubblica (October 2012), "*Arrestato in Svizzera Guido Haschke intermediario di Finmeccanica in India*"; Ticinonline (February 2013), www.repubblica.it/economia/2012/10/19/news/arrestato_in_svizzera_haschke_intermediario_di_finmeccanica-44873502/, "*Tangenti in cambio di elicotteri, le indagini portano in Ticino*", www.tio.ch/ticino/cronaca/721309/tangenti-in-cambio-di-elicotteri--le-indagini-portano-in-ticino.

[355] Lettera43 (October 2017), "*Leonardo-Finmeccanica, l'arresto-lampo che riapre il caso della tangente indiana*", www.lettera43.it/it/articoli/cronaca/2017/10/04/leonardo-finmeccanica-larresto-lampo-che-riapre-il-caso-della-tangente-indiana/214230/.

AgustaWestland S.p.A. and AgustaWestland Ltd which had both entered into a *Patteggiamento* in Italy.[356]

On the demand side, the Indian Central Bureau of Investigation (CBI) and Enforcement Directorate (ED) filed charges for both bribery and money laundering against several natural and legal persons allegedly involved both on the supply and demand sides of the bribery scheme.[357] Arrest warrants were issued against alleged intermediaries, and requests sent to the Italian authorities to summon the two Italian former executives acquitted in January 2018 as well as the legal entity Leonardo, to testify at trial in India.[358] The requests are still pending and were reportedly challenged by the defendants before the Italian administrative courts on the ground that a trial in India would constitute a violation of the *ne bis in idem* principle.[359] Moreover, Italy had previously refused to extradite one of AgustaWestland's consultants to India on the ground of nationality combined with the lack of a general extradition treaty between India and Italy.[360] Italy did not confirm whether proceedings have been initiated in Italy following its denial of the extradition request.

Incentives for the two companies to enter into a Patteggiamento

Among the main incentives for choosing to enter into a *Patteggiamento* is the reduction "up to one third" of the final sanction, as well as the benefits of a quick resolution, notably allowing companies to avoid the reputational and economic consequences of a long trial. Unlike under a full trial resolution, debarment from public tender is not automatic but discretionary under a *Patteggiamento*. In addition, since the *Patteggiamento* equates to a conviction, even though it does not constitute a judicial finding of criminal liability, the resolution may allow the two companies to avoid being prosecuted for the same facts in foreign countries insofar as these may recognise some form of *ne bis in idem*.

[356] See United Kingdom Phase 4 Report (2017), para 124.

[357] The Hindu (September 2017), "*AgustaWestland chopper scam: CBI files charge sheet against ex-IAF Chief Tyagi*"; The Hindu (July 2018), http://www.thehindu.com/news/national/agustawestland-chopper-scam-cbi-files-charge-sheet-against-ex-iaf-chief-tyagi/article19603564.ece, "*ED files charge sheet in AgustaWestland chopper scam case*", http://www.thehindu.com/news/national/ed-files-charge-sheet-in-agustawestland-chopper-scam-case/article24451514.ece

[358] Reuters (June 2018), "*Elicotteri AgustaWestland, Consiglio Stato nega sospensiva, India ricita Orsi, Spagnolini e Leonardo*"; India (July 2018), it.reuters.com/article/foreignNews/idITL8N1TN63I "*Delhi court summons ex-AgustaWestland, Finmeccanica directors*", www.india.com/news/agencies/delhi-court-summons-ex-agustawestland-finmeccanica-directors-3184860/

[359] Reuters (June 2018), "*Elicotteri AgustaWestland, Consiglio Stato nega sospensiva, India ricita Orsi, Spagnolini e Leonardo*", http://it.reuters.com/article/foreignNews/idITL8N1TN63I

[360] The Times of India (June 2018), "*VVIP chopper scam: Italy refuses to extradite middleman Carlo Gerosa*", https://timesofindia.indiatimes.com/india/vvip-chopper-scam-italy-refuses-to-extradite-middleman-carlo-gerosa/articleshow/64700847.cms

2. Biomet (Argentina, Brazil, China and Mexico) - 2012/2017

Description of the facts covered under the initial 2012 resolutions with the DOJ and the SEC

From 2000 through August 2008, Biomet, a US medical device manufacturer, together with four subsidiaries[361], paid more than USD 1.5 million in direct and indirect corrupt payments to publicly employed health care providers in Argentina, Brazil, and China in exchange for sales of Biomet's medical device products. The public officials were paid kickbacks of 10% to 25% of the value of the medical devices purchased. The largest bribery schemes involved the payment of USD 1.1 million in bribes by Biomet for the sales of medical devices in Brazil through its US subsidiary, Biomet International.

Parallel resolutions reached with the US Department of Justice (DOJ) and the Security and Exchange Commission (SEC) in 2012

In March 2012, Biomet entered into parallel resolutions with both the DOJ and the SEC to sanction repeated violations of the FCPA. Some of the facts were voluntarily disclosed to the DOJ by the company. Biomet concluded a three-year *DPA* with the DOJ for conspiracy to violate the anti-bribery as well as the books and records provision of the FCPA committed together with its US subsidiary. When deciding to resolve the case through a DPA, the DOJ took into account the fact that the company would avoid exclusion from participation in federal health care programs. Biomet received a 20% reduction off the bottom of the fine range, estimated at between USD 21.6 million and USD 43.2 million. Biomet agreed to pay a criminal fine of USD 17.28 million and was required to implement rigorous internal controls, cooperate fully with the department and retain a compliance monitor for 18 months.[362] In parallel, the SEC entered into a civil resolution with Biomet for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. Biomet paid a little less than USD 5.6 million in disgorgement of profits, including prejudgment interest and was ordered to retain an independent compliance monitor to review its FCPA compliance program. Biomet also committed to terminate its relationship with the distributor through which the company operated in Brazil.

Biomet's breach of the terms of the DPA (key elements: Failure to implement an effective compliance program and commission of additional crimes while under a DPA and monitorship)

As part of the DPA, Biomet agreed that the DOJ could decide, at its sole discretion, to extend the terms of the agreement, including the corporate compliance monitorship, for a maximum of one year if Biomet knowingly breached the provisions of the resolution.[363]

[361] The four subsidiaries are Biomet Argentina SA, an Argentine corporation and a wholly-owned subsidiary of Biomet, Biomet International, a US wholly-owned subsidiary of Biomet**,** Biomet China, a wholly-owned subsidiary of Biomet and the Swedish subsidiary, Scandimed AB.

[362] The DOJ took into account Biomet's cooperation with the investigation, the company's self-investigation of the underlying conduct as well as the remedial efforts and compliance improvements undertaken by the company. In addition, Biomet received a reduction in its penalty as a result of its cooperation in the ongoing investigation of other companies and individuals.

[363] Biomet would breach the terms of the resolution if it commits any felony under federal law subsequent to the signing of the DPA or provides deliberately false, incomplete or misleading information.

The DOJ could also prosecute the company if the terms of the resolution were to be breached. All statements made by or on behalf of Biomet, including the DPA Statement of Facts and any testimony given by Biomet would be admissible as evidence in any criminal proceedings brought by the DOJ against the company.

In 2013, Biomet learned about suspected instances of continued anti-bribery violations, including in its operations in Brazil and Mexico. Biomet was still under a monitorship and notified the SEC, the DOJ and the monitor. The company also initiated an internal investigation. At the end of the monitorship period in 2015, the monitor was unable to certify that Biomet's compliance program was reasonably designed and implemented to prevent and detect violations of the FCPA. The DOJ concluded that Biomet had not successfully satisfied its obligations under the monitorship, and decided to extend Biomet's monitorship by one year. The monitorship ultimately ended in March 2016.

Additional resolutions reached in 2017 as a result of Biomet's breach of the 2012 resolutions with the DOJ and the SEC

In January 2017, the DOJ entered into a second DPA with Zimmer Biomet (Zimmer had acquired Biomet) for violations of the anti-bribery, book and records, and internal controls provisions of the FCPA. The DOJ decided to resolve the matter through a second DPA instead of prosecuting the company because Biomet Zimmer disclosed the conduct to the DOJ, conducted a thorough investigation and disclosed all facts known to it to the DOJ. In addition, Biomet Zimmer engaged in some remedial measures, and one of its subsidiaries pleaded guilty. The DOJ found that after the 2012 DPA, Biomet, in violation of its internal accounting controls, knowingly and wilfully continued to use a third party distributor in Brazil known to have paid bribes to government officials on Biomet's behalf in the past and used an intermediary to pay bribes to Mexican customs officials to facilitate the importation of unregistered and mislabeled dental products. Biomet agreed to pay a criminal fine of USD 17.4 million. In addition, Jerds Luxembourg Holding, S.AR.L., an indirect subsidiary of Zimmer Biomet, pleaded guilty to having violated the FCPA's books and records provisions through the actions of Biomet's Mexican subsidiary, also a wholly-owned subsidiary of JERDS.

In parallel, Biomet entered into a second resolution with the SEC in January 2017 for violation of the anti-bribery, books and records and internal accounting controls provisions of the FCPA. Zimmer Biomet agreed to pay a USD 6.5 million civil penalty, USD 5.82 million in disgorgement and USD 702°705 in interests. Zimmer Biomet also agreed to retain an independent compliance monitor for a three-year period to review its FCPA policies. In 2012, the SEC had already concluded a civil resolution with Biomet for similar violations of the FCPA and Biomet had agreed to retain an independent compliance monitor.

3. Ballast Nedam and KPMG (Saudi Arabia and Suriname) – 2012 and 2013

Description of the facts

Between 1996 and 2003 Ballast Nedam, a Dutch construction and engineering company and former subsidiary of defence company British Aerospace, paid bribes to Saudi and Suriname officials to secure military construction contracts and the construction of two bridges. In Saudi Arabia, British Aerospace secured a EUR 45 billion contract for the construction of military airports by paying approximately EUR 1 billion in kickbacks to high-ranking Saudis. More than half of the bribe payments were paid by Ballast Nedam. The auditing firm KPMG Accountants NV (KPMG) helped Ballast Nedam conceal the bribes payments between 2000 and 2006.

Consecutive resolutions in the Netherlands with Ballast Nedam and the auditing firm KPMG

The case first started as an investigation by the Dutch tax authorities in 2009.[364] Ballast Nedam initiated an internal investigation and subsequently disclosed the matter to the Public Prosecution Service in January 2011. Ballast Nedam shared the findings of its internal investigation and cooperated with the criminal investigation conducted by the Fiscal Intelligence and Investigation Service (FIOD) and headed by the Public Prosecution Service.

In December 2012 the Dutch Public Prosecution Service reached an out-of-court resolution without admission of guilt with Ballast Nedam. In total, the company agreed to pay EUR 17.5 million, of which EUR 5 million was a fine paid to the Public Prosecution Service by Ballast Nedam's subsidiaries and agreed to waive a tax claim against the Dutch government worth EUR 12.5 million. Ballast Nedam agreed to continue cooperating in the investigation against third parties.[365] Ballast Nedam further agreed to take remedial measures to strengthen the company's compliance policy and to prepare new compliance guidelines. The out-of-court resolution was not subject to judicial review and did not result in corporate monitoring obligations.

The FIOD and the Public Prosecution Service also investigated KPMG and three former audit partners, for their role in the audits of Ballast Nedam for the financial years 2000-2003. In 2013, KPMG reached an out-of-court resolution with the Dutch Public Prosecution Service for its role in concealing the bribe payments made by Ballast Nedam. The Dutch Public Prosecution Service found that the audit carried out by KPMG had been carried out deliberately in a way that made it possible for Ballast Nedam to conceal the payments to foreign agents and the corresponding shadow administration. KPMG did not sufficiently picked-up the signals it received about this. Documents and evidence provided by Ballast Nedam in the context of its out-of-court resolution were used in the related proceedings against KPMG and its employees. KPMG agreed to pay EUR 3.5 million in criminal fine and EUR 3.5 million as confiscation.[366] When deciding to extend an out-of-court resolution

[364] Ballast Nedam's foreign subsidiary was dissolved in 2001.

[365] Openbaar Ministerie (21 December 2012), "*Transactie met Ballast Nedam*", www.om.nl/vaste-onderdelen/zoeken/@31092/transactie-ballast/

[366] Openbaar Ministerie (30 December 2013), "*KPMG treft schikking voor haar rol bij het verhullen van betalingen aan buitenlandse agenten*", www.om.nl/vaste-onderdelen/zoeken/@32396/kpmg-treft-schikking/

to KPMG and in determining the level of the fine, the Public Prosecution Service took into account KPMG's cooperation with the investigation, the fact that responsible KPMG's accountants no longer worked at the company and the fact that the criminal offences took place a long time ago. In addition, KPMG took remedial action to strengthen its compliance policy and put into place additional measures to prevent and sanction the commission of offences. This was the first case where an auditing firm was sanctioned for its active role in a foreign bribery scheme among the Parties to the Convention.

Impact of the resolutions on related proceedings against individuals: the Ballast Nedam's former CFO and KPMG former audit partners

In addition to the two out-of-court resolutions against Ballast Nedam and KPMG, only one individual was convicted by a court. In July 2018, a former CFO of the parent company Ballast Nedam was convicted for money laundering predicated on commercial bribery. The defendant laundered EUR 3.1 million obtained from bribe payments He was sentenced to a two-month prison sentence, ten-month suspended prison sentence and the payment of EUR 100°000. He was also prohibited to work on the board of any company for five years. In addition to the fine, the Court ordered the payment of EUR 5.1 million in confiscation corresponding to the illegal proceeds earned as a result of bribery. When determining the level of the fine, the Court took into account the fact that the criminal acts had taken place a long time ago and the defendant's advanced age.[367] A second accused, a former financial director at Ballast Nedam, was acquitted. In 2013, the Public Prosecution Service dismissed the criminal cases against all other former directors and former supervisory directors of Ballast Nedam.

The proceedings against the three KPMG former audit partners were also discontinued. In April 2018, a court in Utrecht denied the Public Prosecution Service's right to prosecute the three former KPMG auditors for their role in the bribery scheme. The court's decision was partly grounded on the fact that a prosecution would be disproportionate because some of the executives involved in the alleged bribery scheme were not prosecuted; the prosecution service did not settle with the accountants and the fact that the alleged criminal conduct took place 12 to 17 years ago. The court found that it was inappropriate for the Public Prosecution Service to prosecute the three former audit partners, while almost all other parties involved were allowed to resolve the charges through a resolution (with the exception of the Ballast Nedam former CFO). It is reportedly highly exceptional that a court intervenes in the right of the Public Prosecution Service to bring charges. The Public Prosecution Service has appealed the court decision. [368]

[367] Het Financieele Dagblad (11 July 2018), "*Cel voor exbestuurder Ballast Nedam in Saoedische corruptiezaak*"; Open Baar Ministerie (24 May 2018), "*OM eist dat tweede voormalig topman Ballast Nedam 12.700.000 euro betaalt aan Staat*", www.om.nl/vaste-onderdelen/zoeken/@103200/eist-tweede/ ; and Open Baar Ministerie (22 May 2018); "*OM eist dat voormalig topman Ballast Nedam meer dan 900.000 euro betaalt aan staat*", www.om.nl/vaste-onderdelen/zoeken/@103116/eist-voormalig/.

[368] Anti-corruption Digest (May 2018), "*Curacao-based 'Rabbit' faces jail for Ballast Nedam money laundering*", anticorruptiondigest.com/anti-corruption-news/2018/05/24/curacao-based-rabbit-faces-jail-for-ballast-nedam-money-laundering/#axzz5NUQNKb00; and FD (April 2018), "*Rechter verwijst strafzaak tegen KPMG-accountants naar de prullenbak*", fd.nl/economie-politiek/1250936/rechtbank-wijst-strafzaak-tegen-kpmg-accountants-naar-de-prullenbak.

4. Nikuv (Lesotho) – December 2016

Description of the facts and terms of the resolution

During 2012, Nikuv International Projects Ltd. (Nikuv), an Israeli information technology company, paid bribes of more than USD 500°000 to Lesotho government officials using local agents to win a government contract worth at least USD 30 million for the development and integration of a population registration, border control, and electronic ID card system.

In August 2016, Nikuv agreed to plead guilty to the Office of the District Attorney of Tel Aviv for its conduct in Lesotho. In December 2016, the court approved the terms of the plea agreement and the conviction of Nikuv. The company was imposed a fine of NIS 2.25 million and paid NIS 2.25 million as forfeiture (both corresponding to approximately USD 550°000). In addition, Nikuv agreed to revise its internal compliance policies to prevent future cases of bribery. When approving the terms of the resolution, the court took into account the fact that Nikuv admitted to committing the offence and by doing so, avoided a lengthy trial based on foreign evidence and witnesses. It also considered the multi-jurisdictional aspects of the case and, in particular, the proceedings on-going in Lesotho. Finally, the court took into account the fact that this case was the first conviction for foreign bribery ever reached in Israel.

No prosecution of related individuals conditioned to fulfilment of the corporate plea agreement

The resolution also constitutes the first conviction of a company under Israel's Bribery of Foreign Public Officials Statute. The criminal investigations against two individual agents of Nikuv were closed upon the conviction of the company in December 2016. No charges were brought against the individuals. Under the plea agreement with Nikuv, Israeli prosecutors committed not to prosecute Nikuv's executives on the condition that the company and its executives fulfil the condition of the corporate plea agreement, in particular the condition to cooperate with foreign law enforcement authorities in Lesotho.

Plea agreement conditioned to Nikuv's cooperation with foreign authorities

The plea agreement is conditioned on an independent obligation for Nikuv to cooperate with law enforcement authorities in Lesotho. Nikuv undertook that it and its officers and senior executives will cooperate fully with the authorities including by providing evidence, giving statements and testifying in local courts. This term was incorporated in the signed plea agreement as one of Nikuv's obligations.

Prior to reaching the plea agreement in Israel, Nikuv and its executives had secured an agreement with Lesotho's authorities to not be prosecuted. The condition to this non-prosecution agreement was that the company and its employees would testify against the African public official who received the bribe payments. However, Nikuv breached its commitments once its executives were no longer within the jurisdictional reach of the African's authorities. At that point, the African authorities contacted the Israeli authorities.

Upon learning of the proceedings, Israel contacted the Lesotho authorities with the assistance of an African Party to the Convention (South Africa) and opened an investigation. Requests for MLA were sent to Lesotho. It is only when it learned of the Israeli investigation that Nikuv contacted again the authorities in Lesotho to attempt to renew their prior cooperation agreement to provide evidence and testify against the Lesotho

public official on the passive side. This time, Nikuv would agree to cooperate with Lesotho provided that the authorities in turn agree not to cooperate with Israel. Lesotho declined.

Against this background, Nikuv approached the Israeli law enforcement authorities to negotiate the plea agreement. The Israeli authorities made it clear that any resolution between Nikuv and the Israeli authorities would have to include an independent obligation on the company and its officers to cooperate with the prosecution in Lesotho. When approving the plea agreement, the court emphasised that the independent obligation to cooperate that form part of the plea agreement is a highly significant condition of the agreement in regard to the facts described in the indictment. The court ruled that "*setting as a condition that the plea agreement will not apply unless [Nikuv] fully cooperates [with the Lesotho authorities], seems to me balanced and justified."* The question of determining whether Nikuv provides sufficient cooperation to the Lesotho's authorities and comply with the terms of the plea agreement is to be determined by the Israeli law enforcement authorities. In doing so, the Israeli authorities will take into account the position of the authorities in Lesotho.

Israeli authorities stated that the resolution could not have been reached if both countries had only considered their own investigation. One of the challenges was to establish communication and trust with the Lesotho's authorities. This was facilitated with the help of South African's counterparts who had extensive prior relation with the authorities and had contact with the Israel prosecution service through the Working Group.

5. Och-Ziff (Chad, Democratic Republic of the Congo (DRC), Libya, and Niger) – September 2016

Description of the facts

From 2007 through 2012, Och-Ziff Capital Management Group LLC (Och-Ziff), a US hedge fund, together with its wholly-owned subsidiary OZ Africa Management GP LLP (OZ Africa), used third-party intermediaries to pay bribes to officials in Chad, Democratic Republic of the Congo (DRC), Libya, and Niger to secure mining-related investments. In Libya, Och-Ziff secured a USD 300 million investment from the Libyan Investment Authority (LIA), the country's sovereign wealth fund, by paying USD 3.75 million to an intermediary, knowing that all or a portion would be paid to Libyan officials in return for their assistance in obtaining the LIA's mining and financial investments. In the DRC, Och-Ziff partnered with a businessman who paid tens of millions of dollars in bribes to DRC officials in exchange for investment opportunities that resulted in more than USD 90 million in profits for the company.

Parallel resolutions reached with the DOJ and SEC in 2016

The case arose from the SEC's proactive investigation into bribery committed by financial services firms to obtain investments from sovereign wealth funds overseas. In September 2016, Och-Ziff entered into parallel resolutions with both the DOJ and the SEC to sanction violations of the FCPA.

A combined parent-level DPA and subsidiary guilty plea with the DOJ

Och-Ziff agreed to resolve the case with the DOJ by entering into a resolution that included a parent-level DPA and subsidiary guilty plea. Och-Ziff entered into a three-year DPA for conspiracy to violate the anti-bribery, books and records and internal controls provisions of the FCPA. Och-Ziff agreed to pay, directly or through an affiliate, USD 213 million and to retain a compliance monitor for three years. Och-Ziff was also required to cooperate with any foreign authorities in any investigation relating to the DPA's statement of facts, including the DOJ's investigation of related individuals.

Lack of self-reporting

The DOJ factored Och-Ziff's failure to voluntarily self-disclose the misconduct and the company's failure to cooperate in a timely manner at the early stages of the investigation. In particular, Och-Ziff failed to produce important documents and in some instances produced documents only after the DOJ flagged that the documents existed, and provided documents to other defence counsel prior to their production to the government. Nonetheless, Och-Ziff received credit for its subsequent cooperation with the DOJ's investigation, including by conducting an internal investigation with regular reports to the DOJ, collecting and producing voluminous evidence located abroad, and efforts to make current and former employees available for interviews. Och-Ziff also engaged in significant remediation to improve its compliance program and internal controls. As a result, Och-Ziff was eligible for a 20% reduction off the bottom of the US Sentencing Guidelines fine range of between USD 266.3 million and USD 532.6 million. When determining the level of the fine, the DOJ also took into account the seriousness of the company's conduct, including the high value of the bribes paid to foreign officials in multiple, high-risk jurisdictions and the involvement of a high level employee within Och-Ziff. The authorities also took into account the disproportionate collateral consequences that would befall innocent employees and third parties.

Cooperation with foreign authorities

As part of its resolutions with the DOJ, Och-Ziff committed to cooperate with foreign law enforcement and regulatory authorities and agencies, as well as the Multilateral Development Banks ("MDBs"), in the investigation of any of its present or former officers, directors, employees, agents, and consultants, or any other party referred in the DPA's statement of facts. This covers investigation into any conduct related to corrupt payments, false books, records, and accounts, the failure to implement adequate internal accounting controls, investment adviser fraud, wire fraud, obstruction of justice, and money laundering. Och-Ziff agreed to disclose all factual information not protected by a valid claim of attorney-client privilege. Och-Ziff further committed to make available present or former officers, directors, employees, agents and consultants for interviews or testimony with foreign law enforcement and regulatory authorities.

Use of information covered by the DPA in subsequent prosecution

Och-Ziff agreed that it will neither contest the admissibility of, nor contradict, the DPA statement of facts should the DOJ pursue the prosecution that is deferred by the resolution. Och-Ziff acknowledged that the evidence gathered by the DOJ establishes the facts and proves beyond a reasonable doubt the charges set forth in the Criminal Information filed in the United States District Court pursuant to the resolution.

Guilty plea and judicial review

OZ Africa pleaded guilty to conspiracy to violate anti-bribery provisions of the FCPA. The DOJ recommended that no separate fine be imposed, conditioned to the payment of the USD 213 million criminal penalty by Och-Ziff under the terms specified in the DPA. Under the terms of the agreement, OZ Africa accepted its responsibility for the facts described in the information and the statement of facts. OZ Africa admitted, accepted, and acknowledged that it is responsible for the acts of its officers, directors, employees, and agents. OZ Africa also acknowledged that had the case proceeded to trial, the DOJ would have proven beyond a reasonable doubt, by admissible evidence, the facts alleged in the statement of facts. In March 2017, the Court approved the guilty plea. OZ Africa could have withdrawn its plea if the Court had rejected the terms of the agreement.

SEC resolution of administrative civil charges

Simultaneously, Och-Ziff entered into a resolution with the SEC to resolve civil charges of violating the anti-bribery, books and records, and internal controls provisions of the FCPA. The company's affiliated investment adviser, OZ Management, resolved the charges that it violated the anti-fraud provisions of the Investment Advisers Act of 1940. Och-Ziff and OZ Management agreed to pay USD 199 million in disgorgement and interest. As part of its resolution with the SEC, Och-Ziff acknowledged that it expected to enter into a DPA with the DOJ in a parallel criminal proceeding, and its subsidiary OZ Africa would enter into a plea agreement.

Resolution with related natural persons

In 2016, Och-Ziff's CEO settled the SEC charges and agreed to pay USD 1.9 million in disgorgement and USD 273°718 in interest to settle the charges. The Och-Ziff CFO also agreed to settle the SEC charges.

6. Odebrecht S.A (Central and Latin America and Africa) - 2016

Description of the facts

Between 2001 and 2016, Odebrecht S.A, a Brazilian holding company that conducted business in multiple industries, paid approximately USD 788 million in bribes to government officials, politicians, and political parties in Angola, Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela to secure over 100 infrastructure projects worth billions of dollars.[369] Odebrecht S.A. designated and operated a "Division of Structured Operations" within its Brazilian subsidiary Construtora Noberto Odebrecht to facilitate the bribery scheme. The criminal conduct was directed by the highest levels of the company, with the bribes paid through a complex network of shell companies, off-book transactions and off-shore bank accounts. Based on their parallel investigations into Odebrecht, the Brazilian, Swiss and US authorities estimate that the company's conduct generated ill-gotten benefits totaling approximately USD 3.336 billion.

Parallel Investigation and a coordinated resolution

The coordinated resolution ultimately reached by the United States, Brazil and Switzerland with Odebrecht is the largest ever global foreign bribery resolution. The case was first detected by the Brazilian authorities in late 2014, in the course of a covert investigation into payments made to Petrobras's employees, Brazilian's state-controlled oil company. This investigation led to the uncovering of a large-scale bribery scheme involving Odebrecht. The information and evidence developed during the investigation conducted in Brazil enabled the US authorities to decide on the opening of their own independent investigation. In Switzerland, the investigation has focused on the bribery angle as well as on determining how the Swiss financial institutions were used to launder the bribe and its proceeds. Brazilian press articles led Swiss financial intermediaries to notify the Swiss Money Laundering Reporting Office (MROS). The MROS in turn shared the information with law enforcement authorities.

Information and evidence sharing began between Brazil, Switzerland and the United States from the very beginning of the investigation and was a key component in allowing the countries to reach coordinated resolutions. The information and evidence sharing and the close coordination during the resolution process ultimately resulted in the simultaneous sanctioning of Odebrecht S.A. and a related subsidiary. Several coordination meetings were held, either in Brazil or by videoconference during which law enforcement authorities discussed their investigative strategy.[370] Cooperation also helped the countries determine the most effective avenues for cooperation to share information among themselves.

In December 2016, Odebrecht agreed to pay a combined fine of USD 4.5 billion as part of a coordinated resolution between Brazil, Switzerland and the United States. The company's ability to pay the total global penalties was taken into account, and it was determined that the company was only able to pay approximately USD 2.6 billion.[371] The United States and Switzerland received 10% each of the total criminal fine and Brazil received the remaining 80%. In addition, Braskem S.A., a subsidiary of Odebrecht, agreed to pay a criminal penalty of

[369] Of the total estimate of USD 788 million, USD 349 million were paid to bribe Brazilian public officials and USD 439 million to foreign public officials.

[370] Switzerland Phase 4 Report, para. 76.

[371] This is the total projected value of the fine over the entire repayment term of 22 years.

approximately USD 632 million and disgorgement of USD 325 million. The United States and Switzerland received 15% each of the criminal penalty and Brazil received the remaining 70%.

Odebrecht's payment of the fine was sequenced over time. The first payment of 10% of the fine was due to the US authorities in June 2017. By then, Odebrecht's obligation to the United States was completed, provided that the remaining amount is also paid to Brazil and Switzerland. Another 10% of the amount of the fine is to be paid to the Brazilian authorities by December 2021. While Odebrecht entered into a separate resolution with all three authorities, each of the agreements explicitly refers to and takes into account the global resolution reached with the other two jurisdictions.

Penalties imposed and factors taken into account

Plea Agreement in the United States

In the United States, Odebrecht S.A. entered into a guilty plea on 21 December 2016 for conspiracy to violate the anti-bribery provisions of the FCPA. The sanction was calculated based on the profits earned by the company and the bribes paid as well as the company's ability to pay a criminal fine. The maximum fine that could be imposed in this case was USD 6.671 billion per offences (i.e. twice the gross gain). In the plea agreement, the United States agreed to credit the amount of the fines and confiscation that Odebrecht S.A. would pay to Brazilian and Swiss authorities over the full term of their respective agreements.

When determining the level of the fine, the DOJ took into consideration *inter alia* the failure to voluntarily disclose the conduct that triggered the investigation, the nature and seriousness of the offence, which spanned over 15 years, involved the highest levels of the companies, occurred in multiple countries and involved sophisticated schemes to bribe high-level government officials and the lack of an effective compliance and ethics program at the time of the conduct. Odebrecht S.A. received a 25% reduction off the applicable US Sentencing Guidelines fine range based on a number of factors taken into account by the DOJ. While Odebrecht S.A. did not receive voluntary disclosure credits, the company received full credit for its cooperation with the government's investigation. This cooperation materialised in the gathering and analysing of evidence and the performing forensic data collection in multiple jurisdictions. Odebrecht S.A. also provided translated documents from foreign authorities as well as non-privileged facts relating to projects obtained or retained through bribery and to individuals and companies involved in the schemes. Finally, the company encouraged and facilitated the cooperation and disclosure of information and documents by current and former employees. The DOJ also took into account the absence of prior criminal record.

Odebrecht S.A. received credits for the remedial measures the company took after the alleged bribery surfaced in spite of the lack of an anti-corruption compliance program at the time of the misconduct. These measures included terminating contracts and disciplining individuals who participated in the bribery scheme, creating a Chief Compliance Officer position, adopting heightened controls and anti-corruption compliance protocols and significantly increasing human and financial resources devoted to compliance. Despite the remedial measures taken, Odebrecht S.A. was asked to retain an independent compliance monitor for 3 years because its compliance measures had not yet been fully implemented

or tested. Obedrecht's corporate monitor was appointed in April 2017.[372] Investigations are still ongoing against others parties involved in the scheme.

A Civil Leniency Agreement in Brazil with the Federal Prosecution Service

In Brazil, Odebrecht S.A. signed a leniency agreement in the course of civil proceedings with the Federal Prosecution Service on 1 December 2016, based on a systemic interpretation of Brazil's legislation (notably, of the Corporate Liability Law No. 12,846/2013) and internal prosecutorial regulation. All related companies of the Odebrecht Group are also Parties to the agreement and are therefore subject to its terms and conditions. In addition, the leniency agreement was also signed with adherents who are low-level employees of Odebrecht who agreed to provide evidence against the company. As part of the leniency agreement, these adherents are granted immunity from prosecution, provided that the FPS finds their testimonies relevant in the proceedings against third parties. The prosecutors decided that the public interest test governing the conclusion of leniency agreements was met because an agreement would contribute to the investigation of other suspect individuals and legal entities**.** In addition, the agreement could potentially enable the authorities to identify other bribery schemes undermining other areas of Brazil's public sector. Furthermore, the conclusion of the agreement would also "preserve the company's own existence and the continuity of its activities" (…) ensure the adequacy and effectiveness of company integrity practices" and "encourage Odebrecht to enter into negotiations and conclude an agreement in other jurisdictions".

As part of the leniency agreement, Odebrecht S.A. agreed to share with the FPS any other facts and evidence that would be uncovered in the course of the company's internal investigations within 360 days from the judicial approval of the agreement. Odebrecht S.A. further agreed to assist the authorities by clarifying data found in Odebrecht electronic systems and electronic databases, to identify the companies and bank accounts used abroad in connection with the bribery scheme and to put in place internal compliance measures. Odebrecht S.A. also committed to make full restitution for the damages caused, amounting to 97.5% of the Brazilian share of the penalty. The remaining 2.5 % of the Brazilian share of the penalty corresponds to the confiscation of assets used in money laundering. In addition, Odebrecht S.A. agreed to be subject to an independent monitor reporting directly to the FPS . This monitor was imposed in parallel to the monitor that the DOJ imposed as part of Odebrecht's plea agreement. While these two monitorships are independent of each other, the DOJ also appointed the Brazilian monitor to serve as counsel to the US monitor. Furthermore, the two monitors, in consultation with the Brazilian and US prosecution authorities, have coordinated their activities (e.g. conducting interviews, reviewing documents, holding meetings) as they carry out their respective mandates. According to Brazil, this will help ensure that the monitors' reports and ultimate recommendations to Odebrecht do not conflict. The agreement signed by the parties was sent for approval to the 5th Chamber of Coordination and Review of the FPS in December 2016 and was ratified by the 13th Federal Court of the Subsection of Curitiba in May 2017. Judicial review of the agreement was necessary because the leniency agreement contains provisions granting immunity from prosecution to low-level employees of Odebrecht who testified against the company.

[372] GIR (April 2017) "*DOJ picks Odebrecht and Embraer monitors*", www.mofo.com/resources/news/170411-doj-odebrecht-embraer.pdf.

The leniency agreement contains a confidentiality clause restricting access to the contents of the agreement itself, including its annexes and all statements and documents obtained as a result of the agreement. The purpose of the clause is, according to Brazil, not to jeopardise the investigation and prosecutions of related natural or legal persons.[373] However, this clause can be waived by a court and does not prevent the prosecutors from making public the existence of the agreement and the amount of the fine.

In general, Brazilian law provides that any information gathered through a cooperation agreement (with or without an express confidentiality clause) should only be publicised when formal charges are filed.[374] Exceptionally, a Supreme Court judge decided to lift the secrecy of most statements before the conclusion of the investigations in the ***Odebrecht case***, given its scope and the involvement of sitting politicians. The facts relating to foreign bribery and even a portion of the national bribery schemes remained confidential in order not to hinder ongoing investigations. This continued confidentiality obligation to protect the legitimacy of the investigation was initially granted for six months and was subsequently extended. For this reason, Brazil has not published the annexes to the leniency agreement containing a description of the facts, whereas the United States has published the full plea agreement, including the facts underlying its resolution.

In addition, the FPS agreed to not share any information with foreign authorities for a period of six months.[375] During this time period, the Brazilian authorities committed not to share any information with foreign authorities in the context of informal requests or even formal MLA requests. In turn, Odebrecht agreed to cooperate directly with foreign authorities to resolve bribery allegations against the company. Since the expiry of the six-month period, no extension was requested and Brazilian authorities have been able to cooperate with foreign authorities, either spontaneously or on request, under certain conditions (see below).

In March 2016, Marcelo Odebrecht, the former CEO of Odebrecht, and two former executives of the company, were sentenced to 19 years and 4 months in prison in Brazil. In December 2016, 77 current and former Odebrecht executives signed cooperation agreements with the Brazilian authorities to resolve domestic and foreign bribery charges. The cooperation agreements are confidential following an order of the Supreme Court. The individual cooperation agreement were signed alongside with the company's Agreement because the company itself was not able to provide a full description of the facts without the statements of its employees. Odebrecht being a family-run company, with the major shareholders acting as top executives, the executives themselves were running the scheme. Therefore, it made no sense to enter a resolution for the legal person without entering a corresponding plea for the natural persons involved.

In July 2018, Odebrecht also signed a leniency agreement with Brazil's Attorney General Office (AGU) and the Office of the Comptroller General (CGU) concerning the facts covered by the 2016 agreement, particularly regarding federal matters. The administrative Agreement was signed on the basis of the Corporate Liability Law. This new resolution includes a fine with a projected value of USD 2.2 billion over the 22-year repayment

[373] Clause 11.

[374] Law 12850/2013, article 7, paragraph 3.

[375] Clause 19.

period.[376] The amount of the fine will be taken from the global fine Odebrecht agreed to pay as part of the coordinated resolution with the United States, Brazilian and Swiss authorities.[377] The agreement foresees that the Odebrecht Group should reach agreements in the victim countries within a period of three years, renewable for another 3 years. If no agreement is reached within this timeframe, the administrative Agreement will be amended to adjust the level of the fines. In addition, the CGU's compliance experts will monitor the company's compliance program for 22 years, corresponding to the repayment term.

Summary penalty order in Switzerland

In Switzerland, the Office of the Attorney General (the OAG) issued a summary penalty order on 21th December 2016.[378] The OAG found the Brazilian subsidiary Construtora Noberto Odebrecht guilty of not having taken all reasonable organisational measures required to prevent the offences of money laundering and bribery of foreign public officials. The subsidiary was fined CHF 4.5 million (approximately EUR 3.9 million). In turn, the parent company Odebrecht SA was found guilty of not having taken all reasonable organisational measures required to prevent the offence of money laundering. However, the parent company received a fine of CHF 0 in accordance with article 49 CC and taking into account the level of the fine imposed in the United States. In addition, the OAG ordered the two companies to pay jointly as confiscation CHF 117 million (approximately EUR 100.3 million) by way of an equivalent claim because of their complicity in the commission of the offences. The calculation of the amount of the proceeds or profit obtained by companies was decided in coordination with the Brazilian and American authorities and based on internal analysis and analysis by external financial experts as well as estimates provided by one of the convicted companies. The OAG took into account the economic capacity of companies as a determining factor in the calculation. Proceedings against related natural persons involved in the bribery scheme are still ongoing.[379]

Odebrecht case - Sharing of information and cooperation with foreign countries

The limitations posed by the terms of the resolutions

In the United States, at the request of the DOJ, Odebrecht was asked to cooperate with any foreign authorities in any investigation relating to the plea's statement of facts.

[376] This resolution used a specific methodology for the calculation of the exact amounts to be paid by the company related to administrative and civil fines, foreign bribery, damages and disgorgement in the federal level.

[377] Portal da Transparência, Ministério da Transparência e Controladoria-Geral da União; and Reuters (July 2018) "*Odebrecht signs new leniency deal with Brazil authorities*", www.portaltransparencia.gov.br/sancoes/acordos-leniencia/300001.

[378] While the summary penalty order was not made public, the OAG issued a press release, www.portaltransparencia.gov.br/sancoes/acordos-leniencia/300001. The OECD Working Group on Bribery, however, notes in its Phase 4 Report of Switzerland that the press release did not contain any information concerning the reasons for the choice of procedure, the collection of evidence, or the principles underlying calculation of the fines imposed (see para. 116). Upon finalising this study, Switzerland stressed that the press and every interested party could access this information pursuant to Article 69 Abs. 2 SCP.

[379] Switzerland Phase 4 Report (2017).

However, in Brazil, the civil leniency agreement with Odebrecht contains three cumulative conditions restricting the sharing of data, information and evidence produced in or arising from the conclusion of the agreement with foreign authorities.[380] First, the Parties to the agreement should be notified of formal requests that Brazil receives within 10 days. Second, while any information and evidence obtained in connection with the leniency agreement can be shared, any such material that the company or the individuals provided against themselves cannot be used to sanction the company or individuals again. This restriction, however, does not preclude other authorities from sanctioning the adherents to the leniency agreement through independent investigations. Nor does it apply to the use of any information or evidence against third parties to the civil leniency agreement. Last, the requesting authorities shall provide, whenever possible, prior commitment that they will respect the restrictions on the use of information and evidence provided. Brazil reports that this condition has created some difficulty when the other country does not have a clear legal framework for making agreements restricting the use of evidence provided or for identifying the applicable authority who can make such a binding agreement. It indicates, however, that it has so far been able to resolve the matter through bilateral negotiations.

In this way, Brazil has reached agreement with 10 of the 11 countries in which Odebrecht has paid bribes on how to share evidence or has already provided such evidence, either through offering spontaneous information, through answering passive requests or directly by the company. For instance, in July 2018, Brazil's Prosecutor's Office and its Argentine counterpart signed a legal cooperation agreement whereby Argentina expressed its will to receive evidence gathered in Brazil, under the terms and conditions set in the leniency agreement signed between Odebrecht and the FPS in December 2016. Similar types of agreements for sharing information have also been signed with other countries, including the Netherlands, Norway, and Switzerland.[381] In total, Brazil has received approximately 230 MLA request from 34 countries.

Odebrecht and the companies of its economic group are not bound by the same secrecy rules and can disclose information and evidence covered by the leniency agreement with foreign authorities for concluding similar resolutions abroad. The plea agreements signed with the former Odebrecht executives contain similar confidentiality clauses and restriction to the sharing of information with foreign counterparts.

(i) Notification

The leniency agreement with Odebrecht stipulates that Brazilian authorities must notify the parties to the agreement within 10 days should it receive a formal request from a foreign country to share information and evidence covered by the leniency agreement. The notification of the parties is not a general rule applicable to all incoming formal requests for cooperation that Brazil receives. Instead, this was negotiated by Odebrecht as part of its agreement with the FPS However, two exceptions to this notification rule provide that Odebrecht and related parties will not be notified if: (i) the foreign authority expressly

[380] The agreement also restricts the sharing of data, information and evidence produced in or arising from the conclusion of the agreement in domestic and international fora, including the OECD on the condition that the information is protected and anonymised and subject to the period of confidentiality of six-month.

[381] GIR (July 2018), "*Brazil to share Odebrecht plea agreements with Argentina*",; and FPS Press Release (July 2018), "*MPF acerta bases de acordo para utilização de delações firmadas no âmbito da Lava Jato em investigações na Argentina*", www.mpf.mp.br/pgr/noticias-pgr/argentina-faz-acordo-com-o-mpf-e-podera-utilizar-delacoes-feitas-no-brasil-no-ambito-da-operacao-lava-jato.

requests that the information is shared confidentially and the request for cooperation cooperation is based on a treaty or international convention in force in Brazil; or (ii) if the investigation may be hindered by a third party previously aware of the foreign investigation. Brazil's FPS considered that the request for notification could be accepted because Brazilian law does not provide for confidentiality concerning requests for mutual legal assistance. Moreover in most instances, the company would already be cooperating with the requesting authorities and therefore would be aware of the facts at stake.

(ii) Sharing of information related to adherents and third parties

Brazilian authorities can share information and evidence arising from the agreement that relate to the parties to the leniency agreement as well as third parties, both as a result of a formal request or an informal request received on the basis of the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. At the same time, however, no document or evidence provided by Odebrecht and the signatories to the leniency agreement can be used against themselves. Clause 5(1) of the leniency agreement provides protection to Odebrecht S.A. which extends to all the companies of its economic group. The scope of protected facts is very broad and covers all facts discovered in internal investigations and all material provided to the FPS.[382] The Brazilian authorities can, however, inform foreign authorities of the terms of the leniency agreement to avoid the application of double jeopardy (*ne bis in idem*). [383]

Related proceedings in foreign countries

Other countries are investigating or prosecuting the same foreign bribery scheme that led to the coordinated resolution in Brazil, Switzerland and the United States. Argentina Colombia, the Dominican Republic, Ecuador, Mexico, Panama, and Peru are reportedly investigating either the conduct of Odebrecht in their respective countries or the passive bribery committed by their public officials who allegedly received bribes from Odebrecht. It is hence highly likely that requests will be made by foreign authorities to Brazil to share information and evidence produced in or arising from the conclusion of the coordinated agreements. The coordinated resolution concluded with the Brazilian, Swiss and US authorities did not prevent other authorities from sanctioning Odebrecht in their countries for the active bribery of domestic officials.

To date, Odebrecht concluded at least six resolutions in foreign countries. For example, in the **Dominican Republic**, Odebrecht entered into a resolution with the authorities in January 2017 and agreed to pay USD 184 million.[384] The amount is equivalent to the double of the price of the alleged bribes paid to Dominican Republic officials. Odebrecht further committed to providing information and documents on the bribes, including documents on bank transfers and email communications, which have allowed the authorities to start an investigation on the passive side of the bribery scheme. In July 2017, Odebrecht signed an

[382] According to the leniency agreement, the following are protected from disclosure: "documents, evidence, corroboration data, electronic and computer systems (as well as all the data of the Drousys System available to Odebrecht S.A. and the companies of its economic group), databases, documented interviews and depositions provided by the gents."

[383] Clause 21.

[384] BN Americas (January 2017), "*Odebrecht to pay US$184mn in Dominican Republic fine*", www.bnamericas.com/en/news/infrastructure/odebrecht-to-compensate-dominican-republic-for-paid-bribes/.

agreement of efficient cooperation with **Panama** authorities and agreed to pay USD 220 million.[385] Similarly, in **Guatemala**, Odebrecht reached a resolution with the authorities in January 2018 whereby it agreed to pay a fine of USD 17.9 million.[386] In addition, Odebrecht has concluded agreements with **Colombia**, **Ecuador,** and **Peru**.

[385] TVN Noticias (August 2017), "*Odebrecht firmó acuerdo con la Procuraduría y pagará $220 millones de multa*", www.tvn-2.com/nacionales/Odebrecht-acuerdo-Panama-pagara-millones-Ministerio-Publico_0_4816018390.html

[386] Prensa Libre (January 2018), "*Odebrecht pagará a Guatemala US$17.9 millones de resarcimiento*", www.prensalibre.com/guatemala/politica/odebrecht-devolvera-al-estado-los-us199-millones-que-pago-en-sobornos

7. Rolls-Royce (Angola, Azerbaijan, Brazil, China, India, Indonesia, Iraq Kazakhstan, Malaysia, Thailand and Nigeria) – January 2017

Description of the facts

Between 1989 and 2013, two companies owned by Rolls-Royce Holdings plc (Rolls-Royce plc and a US-based subsidiary Rolls-Royce Energy Systems Inc. hereinafter Rolls-Royce) engaged in a systematic and widespread bribery scheme over 12 countries. Rolls-Royce paid bribes to foreign public officials and employees of state-owned companies to secure contracts with state-owned companies in the civil aerospace, defence aerospace and energy sectors in Angola, Azerbaijan, Brazil, China, India, Indonesia, Iraq, Kazakhstan, Malaysia, Thailand and Nigeria, arising from an investigation into its use of an intermediary Unaoil. In most of the bribery schemes, Rolls-Royce used intermediaries and paid inflated commission fees totalling close to USD 98 million, knowing that portions of such fees would be used to pay bribes to foreign public officials. The facts investigated by the United Kingdom, the United States and Brazilian authorities were split based on their respective jurisdictional reach. The SFO estimates that the misconduct under investigation generated gross profits of GBP 258 million (approx. USD 335.3 million).

Parallel investigations and coordinated resolutions over different misconduct involving the same company

The case led to a coordinated global resolution of the relevant conduct between the SFO and the Department of Justice (DOJ) in the United States and between the DOJ and the Brazilian Federal Prosecution Service (FPS). The UK and US investigations were conducted in parallel as they were not covering the same conduct whereas the US and Brazilian investigations covered similar conduct. In Brazil, the allegation surfaced in the course of the Lava Jato Operation on the domestic bribery case at the Brazilian state-owned company Petrobras. In the United Kingdom, the case came to the attention of the SFO following internet postings raising concerns about Rolls-Royce civil business in China and Indonesia. In the United States, the company eventually approached the DOJ. However, this does not qualify as a self-report because the company only did so after the press began reporting on the alleged bribery and after the SFO had opened its investigation.

The SFO and the DOJ shared information from the outset of the investigation to determine which authority was best placed to investigate, in particular in relation to the conduct of Rolls-Royce US subsidiary Rolls-Royce Energy Services, Inc. The DOJ and the SFO divided responsibilities for the investigation at a relatively early stage, with the DOJ focusing on conduct within certain countries within Rolls-Royce's energy division. In turn, the SFO focused on conduct in other countries in the energy and other divisions of Rolls-Royce. Early agreement on primacy between the United Kingdom and the United States significantly facilitated the resolution of the case and helped overcome obstacles caused by the legal differences between the countries' regimes, in particular the admissibility of compelled interviews, laws on corporate criminal liability and on disclosure.

The relationship between Brazil and the United States allowed for sharing of evidence, including documents obtained and witnesses interviewed. Brazilian prosecutors were effective at developing cooperators that enabled the United States to build the Brazilian piece of the investigation.

Penalties imposed and factors taken into account

A DPA in the United Kingdom (key aspects: judicial approval of DPA, public interest test, credit for cooperation received despite failure to self-report, commitment to not investigate or prosecute Rolls-Royce for additional conduct pre-dating the DPA arising from its currently opened investigations into Airbus and Unaoil, corporate monitoring).

In December 2016, the SFO Director made an application to propose a DPA with Rolls-Royce and Rolls-Royce Energy Systems Inc. In January 2017, Rolls-Royce plc and Rolls-Royce Energy Systems Inc. entered into a DPA with the SFO for conspiracy to bribe under section 1 of Prevention of Corruption Act 1906, failure to prevent bribery under section 7 of the Bribery Act 2010 and foreign bribery-related accounting misconduct pursuant to section 17(a) Theft Act 1968. Rolls Royce agreed to pay USD 310.6 million in criminal fine (GBP 239 million), USD 16.9 million for the SFO's costs (GBP 13 million) and USD 335.3 million in disgorgement of the profits gained as a result of the alleged offences described in the DPA (GBP 258 million). As DPAs fall outside the UK public procurement mandatory exclusion system, Rolls-Royce was not debarred from public contracts.[387] The resolution (the DPA) does not contain a formal admission of guilt. However, it requires Rolls-Royce to admit to the facts covered by the DPA. The DPA's Statement of Facts is therefore admissible against the company should the SFO pursue the prosecution that has been deferred.

Judicial approval and public interest test- In the United Kingdom, the courts provide an independent judicial oversight of DPAs by performing a detailed analysis of the circumstances of the investigated offences, the public interest of the DPA and an assessment of the financial penalties that would have been imposed had the indictment proceeded to trial and conviction. The Crown Court at Southwark (the Court) stated that the acceptance of the DPA in this case was in the public interest, considering in particular the company's cooperation and remedial measures taken. In addition, the Court also considered the impact of a prosecution on the company and the balance between the costs to prosecute the case and to resolve it with a DPA. The extent of the assistance provided by Rolls-Royce in the investigation was also material to assess the public interest and the balance between prosecution and DPA.[388] In addition, the Court stated that Rolls-Royce is an "industry of central importance" to the United Kingdom and a non-trial resolution was in the interests of the country, the company's shareholders, its employees, customers and "those with whom it deals".[389]

Self-reporting – Rolls-Royce was eligible for a DPA although it initially failed to voluntarily disclose certain matters to the SFO. The allegations were indeed revealed online by a whistleblower and the SFO approached Rolls-Royce to ask about the allegations. The fact that Rolls-Royce was deemed eligible for a DPA in the absence of self-reporting has attracted criticism from civil society in a context where the company knew about the

[387] This is because DPAs do not result in a conviction for the corporate defendant. Civil society has criticised the fact that the decision to grant a DPA to Rolls-Royce put too much emphasis on the risk of mandatory exclusion attached to a criminal conviction.

[388] Assistance provided by Rolls Royce was also taken into account to determine the appropriate discount from the financial penalty imposed.

[389] The judge did however note the "national economic interest is irrelevant" when making the decision to approve this DPA. (See Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para. 57).

alleged conduct since 2010 and decided not to notify the authorities.[390] Other factors weighed in favour of Rolls-Royce receiving a DPA, including the fact that the senior management involved in the misconduct had been replaced and that the company was under new leadership by the time the DPA was entered into. The Court ultimately granted a 50% reduction based on the "extraordinary" level of cooperation provided by Rolls-Royce and the fact that the conduct Rolls-Royce ultimately reported was "far more extensive" (and of a different order) than what may have been uncovered without the company's cooperation. In the United States, the DOJ granted a 25% reduction in the context of its separate DPA, taking into account the lack of self-reporting.

Commitment to not investigate or prosecute Rolls-Royce for additional conduct pre-dating the DPA - The resolution does not provide "any protection against prosecution for conduct not disclosed by Rolls-Royce prior to the date on which the Agreement comes into force". However, the SFO provided assurances that it would not be in the interest of justice to investigate or prosecute Rolls-Royce for additional conduct pre-dating the DPA and arising from the currently opened investigations into Airbus and Unaoil.[391] Similarly, the Court found that although the investigations into Unaoil and Airbus are "insufficiently advanced to uncover evidence" that could be included in the DPA, subsequent investigation into the matter would not "change the proposed terms" of the current DPA because of its already extensive "geographic, commercial and chronological scope together with the quantum of proposed financial terms".

Corporate monitoring - The DPA is not conditioned to corporate monitoring but on another form of independent oversight. Rolls-Royce is required to continue an anti-bribery and corruption compliance review conducted by an already appointed external reviewer, devise an implementation plan, complete the plan and report to the SFO in respect of its implementation.

A DPA in the United States

In December 2016, Rolls-Royce plc entered into a three-year DPA with the DOJ for conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay a USD 195.5 million criminal fine. The DOJ credited the USD 25.5 million paid to Brazil as part of a parallel resolution because the conduct underlying the resolutions overlapped. Therefore, the total amount to be paid to the United States was USD 170 million. No confiscation measures were imposed. As part of the resolution, Rolls-Royce committed to cooperate with foreign states.

When determining the level of the criminal fine, the DOJ took into account the fact that Rolls-Royce did not disclose the criminal conduct to the US authorities until after the media began reporting allegations of corruption and after the SFO had initiated an inquiry into the allegations. As a result, Rolls-Royce was not eligible to receive voluntary disclosure credit.

[390] Corruption Watch, (January 2017), "*A failure of nerve: the SFO's settlement with Rolls Royce*", www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/#.W2L__W996Ul; Transparency International (January 2017), "*Rolls-Royce case: justice for sale or fair settlement?*", www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/#.W2MDZW996Uk

[391] Rolls-Royce's misconduct in the Unaoil bribery investigation is, however, covered by the DPA reached by the company in the United States. See Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para. 134.

The DOJ, however, granted full credit for Rolls-Royce's subsequent cooperation with the DOJ's investigation. Rolls-Royce also received credit for the significant remedial measures it took, including terminating business relationships with multiple employees and third party intermediaries, enhancing compliance procedures to review and approve intermediaries and implementing new and enhanced internal controls to address and mitigate corruption and compliance risks. As a result, Rolls-Royce received a 25% reduction from the bottom of the US Sentencing Guidelines fine range.[392] The DOJ also took into account the nature and seriousness of the offence that spanned 12 countries over 20 years. In addition, the department considered the parallel resolutions reached by the SFO and the Brazilian federal prosecutors (FPS) in determining the resolution. No corporate monitor was imposed but Rolls-Royce agreed to report to the DOJ about remedial actions taken.

Conditional release from liability – the DOJ agreed not to bring separate criminal or civil case against Rolls-Royce or any of its subsidiaries in relation to the conduct covered by the US DPA as well as the facts covered by the UK DPA. However, the resolution indicates that the SFO may use any information covered by the US DPA against Rolls-Royce in a prosecution for perjury, obstruction of justice, false statement, or any crime of violence. The agreement does not protect the company from prosecution for any future misconduct by Rolls-Royce.

A civil leniency agreement in Brazil to resolve the domestic bribery side of the case

In 2014, a former executive of Petrobras admitted having received bribes from Rolls-Royce through middlemen. In turn, the middlemen admitted to paying bribes on behalf of Rolls-Royce as part of the cooperation agreements they signed with the Brazilian Federal Prosecutors (FPS). In early 2015 Rolls-Royce spontaneously communicated the findings of its internal investigation together with documents and evidence, including bank transfers, communication and interview records to the FPS regarding allegations of bribery of employees of Petrobras. In January 2017, Rolls-Royce signed a leniency agreement for conspiracy to commit domestic bribery to close civil proceedings with the FPS and agreed to pay USD 25.5 million in compensation including a USD 5.1million fine (BRL 20.7 million) to the Brazilian authorities. The full amount was subsequently restituted to Petrobras as compensation for damages and return of profits. This is because, although Petrobras is not party to the leniency agreement, the company is considered a victim of the bribery scheme. The amount corresponds to the fine calculated by the DOJ for Rolls-Royce's conduct in Brazil. As a result, the DOJ DPA gives full credit to Rolls-Royce for the amount paid in Brazil.

As part of the agreement, Rolls-Royce committed to provide a detailed description of the facts and to identify the individuals who took part in the bribery scheme, including public officials and employees of other companies involved. The company also committed to fully cooperate with the FPS and other Brazilian authorities investigating the facts covered in the leniency agreement and to implement an adequate internal compliance program. The terms and conditions of the leniency agreement were reviewed and approved by the FPS's Fifth Chamber for Coordination and Review and Anti-Corruption (the Fifth Chamber) in February 2017. Contrary to the terms of the UK and US DPAs, the resolution with the FPS does not protect Rolls-Royce from additional proceedings related to the facts covered in the leniency

[392] The fine range was between USD 260.6 million to USD 521 million.

agreement.[393] The agreement is only binding on the FPS with whom it was concluded, not other government agencies. A formal investigation by the Brazilian Ministry of Transparency over the same facts covered by the agreement is currently on-going. The investigation is based on the findings of the FPS's investigation that led to the leniency agreement. [394]

Resolutions with individuals

In the United Kingdom, the DPA resolved the case against the company, but the investigation into individual suspects is ongoing. The corporate DPA provides no protection against prosecution of any present or former officer, employee or agent.[395] Pursuant to the UK DPA, Rolls-Royce must cooperate in the investigations conducted by other domestic and foreign law enforcement agencies and regulatory authorities, as well as the Multilateral Development Banks ("MDBs"). Cooperation must also be provided in any investigation or prosecution of any of Rolls-Royce's present or former officers, directors, employees, agents, or consultants, or any other third party, in relation to the conduct described in the DPA Statement of Facts. The identity of related individuals has been anonymised in the DPA Statement of Facts to not prejudice subsequent criminal proceedings. Information on these individuals can be shared with foreign authorities because of an MLA request where legally possible.

In the United States, the DPA expressly indicates that the resolution does not provide any protection against prosecution of any individuals. Three Rolls-Royce employees and four intermediaries have been charged in connection with the case and pleaded guilty in November 2017.

Similarly, in Brazil, the leniency agreement does not protect individuals from prosecution. Instead, the agreement provides that the statements and documents produced under the agreement can be used at the request of the FPS as a warrant to perform additional searches and seizures as well as other precautionary measures in the investigation of third parties. The leniency agreement contains a confidentiality clause restricting access to the the Statement of Facts covered under the leniency agreement. The purpose of the clause, according to Brazil, is to not jeopardise the investigation and prosecutions of related natural or legal persons. While documents and evidence provided by cooperating defendants or companies entering into leniency agreements are kept confidential as a rule, Rolls- Royce provided documents and evidence before concluding the agreement.[396] Thus, the Brazilian prosecutors have discretion on whether to use the materials, make them public, or provide them through international mutual legal assistance.

[393] Consultor Jurídico (January 2017), "*Acordo da Rolls-Royce na "lava jato" não protege a empresa de novas ações*", www.conjur.com.br/2017-jan-17/acordo-rolls-royce-lava-jato-nao-protege-novas-acoes

[394] GIR (August 2018), "*Rolls-Royce forced to wait for outcome of Brazil bribery probe*", globalinvestigationsreview.com/article/1173201/rolls-royce-forced-to-wait-for-outcome-of-brazil-bribery-probe; Mlex (February 2018), "*Rolls-Royce faces formal corruption investigation by the Brazilian Ministry of Transparency*", mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/latin-america/rolls-royce-faces-formal-corruption-investigation-by-the-brazilian-ministry-of-transparency; GIR (February 2018), "*Brazil's CGU upgrades Rolls-Royce investigation*", globalinvestigationsreview.com/article/1159132/brazil%E2%80%99s-cgu-upgrades-rolls-royce-investigation.

[395] Judgment of Sir Brian Leveson, 17 January 2017, Serious Fraud Office and Rolls-Royce Plc & Anor, para. 66.

[396] Law 12850/2013, Article 7, paragraph 3.

8. SBM Offshore (Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq) – 2014 and 2016

Description of the facts

Between 1996 and 2012, SBM Offshore N.V., a Dutch company specialised in offshore oil drilling equipment, together with its US-based subsidiary SBM Offshore USA, paid a total of approximately USD 180 million in commission payments to intermediaries. A portion of these payments was used to pay bribes to government and public officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq. The bribes aimed at securing improper advantages and obtain or retain business with state-owned oil companies. The payments were made with the knowledge of former SBM Offshore employees, including a member of the Management Board of SBM Offshore USA. Based on the investigation, the US authorities determined that SBM Offshore N.V. earned USD 2.8 billion in profits from the contracts secured with the state-owned oil companies in the five countries.

Parallel investigations and consecutive resolutions in the Netherlands, the United States and Brazil

In the spring of 2012, SBM Offshore N.V. voluntarily disclosed to the Dutch Public Prosecutor's Office that the company had initiated an internal investigation into potentially improper payments made to its sales agents for services. The scope of the internal investigation was determined in consultation with the Public Prosecutor's Office and the Dutch Fiscal Intelligence and Investigation Service (FIOD). The investigation lasted two years and focused on the period from 2007 through 2011.[397] In parallel, the FIOD conducted its own criminal investigation under the direction of the Prosecutors' Office. Documents were seized, witnesses and other persons involved were interviewed and mutual legal assistance was requested SBM Offshore N.V. similarly self-reported to the US authorities in 2012 about the potential misconduct in general terms and provided full disclosure in 2013. In Brazil, the allegations against SBM Offshore N.V. were uncovered in the course of the investigation into payments made to Petrobras, the Brazilian state-controlled oil company in 2014.

Cooperation between the three countries (the United States, the Netherlands and Brazil) started well after they had started their own investigation. Evidence was shared through formal channels between Netherlands and the United States. Both formal and informal channels were in turn used to share evidence between Brazil and the United States. The investigation in the Netherlands focused on Equatorial Guinea, Angola and Brazil because the authorities considered that "the investigation into these three countries [was] sufficiently representative for the entirety, taking into account the portion these three countries represented in SBM Offshore's business." In the United States, the investigation focused on bribery allegations in Brazil, Angola, Equatorial Guinea, Kazakhstan, Iraq, and elsewhere. In turn, the investigation in Brazil focused on the allegations of bribery of employees of the Brazilian oil state-owned company Petrobras.

In November 2014, the Dutch authorities concluded an out-of-court resolution with SBM Offshore N.V. At the same time, the US authorities initially declined to continue investigating the company. In 2016, the DOJ reopened the investigation based on additional

[397] In the context of the internal investigation by SBM Offshore N.V., hard drives and other electronic data and documents were analysed. Interviews were also conducted with current and former employees.

information revealing that a portion of the corrupt scheme and engaged in conduct within the jurisdiction of the United States. Resolutions were reached in November 2017 with the parent and US subsidiary. SBM Offshore N.V. entered into a three-year DPA with the DOJ and its American subsidiary entered into a guilty plea.

In Brazil, the probe was centred on the allegations of bribery involving employees of the Brazilian state-owned enterprise Petrobras. Brazil's investigations began in March 2011 once local media started reporting on allegations of corruption. The FPS then made international legal assistance requests to the Netherlands (August 2014), Switzerland (October 2014) and the United States (December 2014) as well as subsequent requests to the United Kingdom, Jersey and Guernsey. Brazil indicated that the formal responses to requests for cooperation as well as meetings with prosecutors in the Netherlands and Switzerland played an important role in preparing for the proceedings in Brazil. In November 2014, Brazil's Ministry of Transparency and Office of the Comptroller General (CGU) filed an administrative proceeding against SBM Offshore. In March 2015, Brazil's the Attorney General's Office (AGU), the CGU and SBM Offshore signed a MoU to initiate discussions on a potential resolution and for the disclosure of information relevant to the CGU's investigations.[398] The terms of a first leniency agreement reached in July 2016 with the the Federal Prosecution Service, and SBM Offshore were rejected by the review board of the FPS in September 2018. A new leniency agreement was signed in July 2018, this time without the involvement of the FPS. In September 2018, the FPS concluded another agreement with SBM Offshore (See below the section on corporate resolutions in Brazil).

Corporate resolutions and factors taken into account

In the Netherlands (key elements: self-reporting and factors taken into account to decide to settle the case out-of-court; internal investigation and cooperation with Dutch law enforcement authorities; remedial measures and use of sales agents)

In the Netherlands, the investigation was led by the Dutch Public Prosecutor's Office and the Dutch Fiscal Intelligence and Investigation Service (FIOD). In November 2014, SBM Offshore N.V. entered into a resolution with the Dutch Public Prosecutor's Office for bribery committed in Equatorial Guinea, Angola and Brazil. In its decision to resolve the case out-of-court, the Dutch Public Prosecutor's Office took into account the fact that SBM Offshore voluntarily disclosed the misconducts to law enforcement authorities in the Netherlands and in the United States. In addition, the company initiated an internal investigation and fully cooperated with the subsequent criminal investigations conducted by the Dutch authorities. In particular, SBM Offshore kept the authorities informed of the conduct of the internal investigation and fully disclosed its findings. In addition, the authorities took into account the independent remedial measures taken by the new Management Board to enhance the company's compliance measures, including the creation of a Chief Governance and Compliance Officer position in the Management Board. SBM Offshore also undertook extensive measures to restrict the use of sales agents and established a Validation Committee in order to assess all its sales agents and to decide whether to approve the sales agent and its commission.[399] SBM Offshore also decided to

[398] SBM Offshore Press release (March 2015), "*Memorandum of Understanding Signed with CGU and AGU",* www.sbmoffshore.com/?press-release=memorandum-of-understanding-signed-with-cgu-and-agu

[399] The Validation Committee consists of the CEO, the Chief Governance and Compliance Officer, the Group Controller and the Group Sales Director.

no longer use sales agents in those countries where the company itself has a substantial presence. To resolve the case, SBM Offshore N.V. agreed to pay a criminal fine of USD 40 million and USD 200 million in disgorgement. The Dutch Public Prosecutor's Office also imposed some form of monitoring on the company and asked to receive information on the continued implementation of SBM Offshore's compliance policies.

In the United States (key elements: lack of timely voluntary disclosure; coordinated resolutions between parent company and its subsidiary; reasons to enter into resolutions, elements taken into account to determine the amount of the fine and confiscation)

Three years later in the United States, SBM Offshore N.V. entered into a three-year DPA with the DOJ and its American subsidiary pleaded guilty for conspiracy to violate the anti-bribery provisions of the FCPA in late November 2017. SBM Offshore N.V. agreed to pay a total monetary penalty of USD 238 million. As part of the total amount, SBM Offshore N.V agreed to pay USD 500°000 criminal fine and USD 13.2 million in criminal forfeiture on behalf of its US subsidiary. [400] The corporate resolutions follow guilty pleas by two former executives of the US subsidiary in early November 2017. The resolutions were consecutive and not simultaneous to the resolution in the Netherlands. Nonetheless, the US resolutions credited the resolution already reached with the Dutch authorities and took into account the proceedings in Brazil, that were ongoing at the time, in respect of overlapping conducts.

In determining the corporate fine against the parent company, the DOJ took into account the effect of the imposition of the fine on the continued viability of SBM Offshore N.V. Based on the findings of the investigation, the DOJ had estimated that the fine range was between USD 4.5 billion and USD 9 billion. The DOJ took into account the nature and seriousness of the offence, which lasted over 16 years, the involvement of employees at the highest level of the organisation, including two high-level executives at the US subsidiary, and the companies' deliberate efforts to conceal the scheme. SBM Offshore N.V. received a 25% reduction off the applicable US Sentencing Guidelines fine range based on its cooperation and remediation measures taken by the company. In particular, the DOJ noted that SBM Offshore N.V. conducted its own internal investigation, including an expedited internal investigation into one of its agents, and provided regular updates to the authorities. It also made foreign-based employees available for interviews in the United States, producing documents to the United States from foreign countries, collected, analysed, and organised voluminous evidence and information, including on the individuals involved. The company also took significant remedial measures and implemented a new and enhanced system of internal controls to address and mitigate corruption and compliance risks. The DOJ also acknowledged the lack of a previous criminal record. However, SBM Offshore N.V. did not receive voluntary disclosure credit because, although the company voluntarily self-reported, full disclosure of the alleged acts only occurred a year later and the disclosure was therefore not timely. No corporate monitoring was imposed in the United States because the Dutch authorities had already ordered similar measures. At the request of the DOJ, SBM Offshore N.V. was required to cooperate with any foreign authorities and the Multilateral Development Banks (MDBs) in any investigation of the company, or its

[400] The plea agreement explains that this represents the amount of proceeds traceable to the bribery offences committed by SBM Offshore USA and that "the more than USD 13.2 million in actual proceeds have been dissipated or commingled with other property which cannot be divided without difficulty, such that the actual proceeds are no longer readily identifiable and available". The USD 500°000 criminal fine and USD 13.2 million in criminal forfeiture are to be deducted from the total fine imposed on the parent company.

present or former subsidiaries, affiliates, officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to possible corrupt payments under investigation by the United States.

In Brazil (key elements: review of the terms of leniency agreements; coordination between administrative and criminal enforcers, agreement with third parties; terms and conditions of leniency agreements).

In Brazil, SBM Offshore endeavoured to resolve the case simultaneously with the Brazil's Public Prosecutors Office (the FPS), the Attorney General's Office (AGU) and Brazil's Ministry of Transparency and Office of the Comptroller General (CGU). In September 2016, the FPS's Fifth Chamber for Coordination and Review and Anti-Corruption (the Fifth Chamber) refused to approve the terms of the USD 340 million leniency agreement reached two month earlier between SBM Offshore N.V. and the FPS. Simultaneous agreements had been negotiated and signed with the AGU, the CGU and Petrobras.[401] It was the first time that resolutions were signed by both administrative and criminal enforcers in Brazil and the first time the Fifth Chamber rejected an agreement concluded by federal prosecutors. The prosecutors and the AGU appealed the decision of the Fifth Chamber to the Higher Council of the FPS which confirmed it in December 2016.[402] The agreement was rejected on the ground that the Dutch company had failed to provide Brazilian authorities with sufficient documents and evidence to assist them in their bribery investigation into Petrobras.[403] The review board also found that the amount agreed as part of the resolution was insufficient to cover the damages caused by SBM's illegal conducts. Against this background, SBM Offshore requested that all agreements be suspended and returned to the negotiation stage. The CGU and the AGU accepted the request and SBM Offshore renegotiated the terms of two separate resolutions, one with the FPS and a joint agreement with the CGU and the AGU.

In July 2018, SBM Offshore N.V. and SBM Holding Inc. S.A. signed a leniency agreement with the AGU and the CGU under the Brazilian Corporate Liability Law to resolve the allegations of bribery of employees of the Brazilian state-owned company Petrobras. The terms of the agreement are reportedly to a large extent comparable to the agreement which was reached in July 2016 with the FPS, the CGU, AGU and Petrobras.[404] In particular, the

[401] As part of the agreement, SBM had agreed to pay Petrobras USD 149.2 million; USD 6.8 million to the FPS and USD 6.8 million to the Council of Control of Financial Activities.

[402] GIR (December 2017), "*SBM can settle Brazil allegations for US$340 million*", globalinvestigationsreview.com/article/1151346/sbm-can-settle-brazil-allegations-for-ususd340-million

[403] At the time, Brazil's Ministry of Transparency said that "while it recognises the powers the FPS has under Brazilian law to review the terms of leniency deals, the decision was wrong. The ministry said that the agreement had terms requiring SBM to provide the authorities with further information to assist in Operation Car Wash. [And] that the clauses of the agreement provided that authorities can re-investigate SBM if new facts come to light showing the company withheld key information*". Source:* GIR (September 2016), *"SBM in limbo as Brazil MPF rejects US$340 million settlement",* globalinvestigationsreview.com/article/1068408/sbm-in-limbo-as-brazil-mpf-rejects-ususd340-million-settlement

[404] SBM Offshore Press Release (July 2018), "*Leniency Agreement Signed Between SBM Offshore, Brazilian Authorities and Petrobras",* www.sbmoffshore.com/?press-release=leniency-agreement-signed-between-sbm-offshore-brazilian-authorities-and-petrobras

agreement now contains an express provision for non-discharge in respect of reparation of damages and the total amount recovered will be restituted to Petrobras.

Petrobras is part to the 2018 leniency agreement and will receive the full amount SBM Offshore agreed to pay - and not the Brazilian authorities. In total, SBM Offshore agreed to pay USD 327 million of which USD 71 million is a civil fine and USD 256 million corresponds to compensation for alleged damages caused by the bribery scheme. In addition, the leniency agreement provided for USD 179 million in anticipated damages connected with certain contracts between Petrobras and SBM Offshore. SBM Offshore agreed to report to the CGU on its compliance programme for three years. The company also agreed to cooperate with the CGU and AGU's ongoing investigations into third parties in relation to the conduct covered by the leniency agreement. The agreement does not contain a debarment clause and SBM Offshore can therefore bid for Petrobras tenders under the same conditions as other companies.

The FPS decided not to sign the agreement signed with the AGU and the CGU, even though the prosecutors took part in the negotiation. The FPS disagreed over some of the terms of the agreement and has been pursuing a separate civil lawsuit against SBM Offshore alleging improbity since December 2017. In September 2018, SBM entered into a separate leniency agreement with the FPS which is pending approval by the Fifth Chamber. [405] The FPS is now satisfied with the terms of the agreement.

Resolutions with natural persons

As clearly stated in the terms and conditions of SBM Offshore's DPA in the United States, the agreement does not provide any protection against prosecution of any individuals. In the United States, two former executives of the US-based subsidiary, a former CEO and a former marketing executive pleaded guilty to having violated the anti-bribery provisions of the FCPA in early November 2017 and respectively received a 36 months imprisonment and a USD 150°000 and a 30 months imprisonment and a USD 50°000 fine.

No proceedings were initiated in the Netherlands over the natural persons involved in the Bribery schemes. The Dutch prosecutors' Office determined that it did not have jurisdiction to prosecute related individuals in the case but indicated that it would cooperate fully with the countries that have jurisdiction to prosecute the natural persons involved.[406] Sharing of information and evidence covered by the out-of-court resolution with foreign authorities is restricted to the possible prosecution of individuals. The Netherlands, however, indicates that no information and evidence can be shared on the corporate entity SBM Offshore for prosecution purposes because of the *ne bis in idem* principle. Requesting countries seeking mutual legal assistance can ask the Dutch authorities to not notify SBM Offshore of the requests. In this case, SBM Offshore did not have to be notified.

In Brazil, three SBM executives agreed to pay USD 60°000 each in 2016 to settle allegations that they tried to conceal evidence of bribery from Brazilian prosecutors without

[405] GIR (September 2018), "*SBM Offshore settles with prosecutors in Brazil*", globalinvestigationsreview.com/article/1173695/sbm-offshore-settles-with-prosecutors-in-brazil

[406] The Dutch prosecutors did recall their jurisdiction over criminal acts committed in the Netherlands or over criminal acts committed abroad by Dutch nationals.

admitting to the allegations.[407] The three former SBM executives as well as two former sales agents of SBM entered into a cooperation agreement with the FPS, ratified by the Judge of the 3rd Federal Criminal Court of the Rio de Janeiro. In addition, three former Petrobras executives were also sentenced. Other proceedings against natural persons remain ongoing.

[407] FCPA Blog (January 2016), "*SBM Offshore chief and board member settle Petrobras allegations with Brazil prosecutors*", www.fcpablog.com/blog/2016/1/27/sbm-offshore-chief-and-board-member-settle-petrobras-allegat.html

9. Siemens AG (Asia, Africa, Europe, the Middle East and the Americas) - 2008

Description of the case

From 2001 to 2007, Siemens AG, a German-based global powerhouse in the fields of industry, energy, healthcare and infrastructure solutions listed on the NYSE, engaged in an unprecedented bribery scheme both in scale and geographic reach. In total, Siemens AG paid nearly USD 1.3 billion in bribes contracts to government officials in Asia, Africa, Europe, the Middle East and the Americas to secure public work through various mechanisms, including business consultants' agreements, cash desks and slush funds. The case originated from the discovery of Siemens' slush funds system. In 2006, the Munich Public Prosecutors Office commenced an investigation into Siemens AG and its employees for on possible foreign bribery and falsification of corporate books and records. Shortly thereafter, Siemens AG voluntarily disclosed to the DOJ and SEC potential FCPA violations in multiple countries and initiated an internal investigation.

The Siemens case is one of the most prominent multi-jurisdictional foreign bribery cases and the first coordinated resolution between two Parties to the Convention. The DOJ and the SEC closely collaborated with the Munich Public Prosecutor's Office throughout the investigation. The high level of cooperation, including the sharing of information and evidence, was made possible by the use of the MLA provisions of the Convention. The enforcement actions by the US and German authorities resulted in combined penalties of more than USD 1.6 billion in 2008. Siemens USD 800 million resolution with the United States in 2008 had been the biggest FCPA case until Swedish Telia Company AB agreed to pay USD 965 million to both the DOJ and SEC for FCPA offences in 2017. However, the combined monetary penalties imposed in the Siemens case remain one of the highest penalties ever imposed in a foreign bribery case to date. The success and coordination of the prosecution and sanction in the Siemens case demonstrate the excellent level of cooperation between Germany and the United States, which culminated with the respective authorities simultaneously announcing the sentences and levels of sanctions imposed against Siemens AG.

Enforcement actions in Germany and in the United States

In the United States

In 2008, Siemens AG pleaded guilty to violation of the internal controls and books and records provisions of the FCPA. Three of its subsidiaries in turn pleaded guilty to conspiracy to violate the anti-bribery and internal controls and books and records provisions of the FCPA.[408] The US authorities deemed that guilty pleas would be appropriate as opposed to other type of resolutions because of the pervasive nature of the bribery scheme and Siemens AG's failure to self-report the misconducts. Under the terms of the plea agreements, Siemens AG agreed to pay USD 448.5 million as a criminal fine and Siemens Argentina, Bangladesh, and Venezuela each agreed to pay a USD 500°000 fine. Siemens AG agreed to retain an independent compliance monitor for a four-year period to oversee the continued implementation and maintenance of a robust compliance program and to make reports to the company and the DOJ. In addition, Siemens AG reached a resolution of a related civil complaint filed by the SEC, charging the company with violating the FCPA's anti-bribery, books and records, and internal controls provisions.

[408] The subsidiaries are Siemens Argentina, Siemens Bangladesh and Siemens Venezuela.

Siemens AG agreed to pay USD 350 million in disgorgement of profits. In total, Siemens AG and its subsidiaries paid USD 800 million to the US authorities.

When determining the level of the criminal fine, the DOJ took into account the cooperation and extensive internal investigation, In particular, Siemens AG only disclosed the potential FCPA violations to the US authorities after the Munich Public Prosecutor's Office initiated searches of multiple Siemens AG offices and homes of Siemens AG employees. Siemens AG and its subsidiaries disclosed these violations after initiating an internal investigation of unprecedented scope. In addition, Siemens AG shared the results of that investigation with the DOJ and cooperated extensively with the ongoing investigation, including the investigations over third parties. In addition, Siemens AG took disciplinary action against individual wrongdoers, including senior management and took remedial action with the complete restructuring of the company and the implementation of a sophisticated compliance program. As a result, the fine imposed on Siemens AG was below the advisory sentencing guideline range, estimated in the plea agreement in between USD 1.35 and 2.70 billion.

As part of its guilty plea, Siemens AG agreed to continue fully cooperating with the DOJ, the German and other foreign authorities in their ongoing investigations of bribe payments by company's employees and agents. Siemens agreed to disclose non-privileged information and to give access to books, records and internal controls in connection with the case. In turn, the US authorities agreed not to use any information covered under the agreement against Siemens AG, its subsidiaries and affiliates and not to press criminal charges against these entities for the conduct concerned by the agreement, related conduct or conduct arising from the disclosed information. The agreement, however, does not apply to future conducts and to the prosecution of related executives and employees of the company.

In Germany

In December 2008, Siemens AG's resolved its case with the Munich Prosecutor's Office in a non-trial resolution. Siemens AG was held liable as a result of the administrative offence of violation of supervisory duties committed by its senior managers pursuant to section 30 and 130 OWiG. Siemens AG agreed to pay a EUR 395 million fine (approx. USD 549.8 million), including a EUR 250°000 fine and EUR 394.75 million in disgorgement of profits. Siemens AG was not debarred from public procurement in Germany on the ground that all executives involved in the bribery scheme had left the company and based on the remediation corporate compliance measures taken by Siemens AG. This resolution was concluded after the telecommunication unit of Siemens AG was held liable by the Munich I regional court in October 2007 for the offence of bribery of public officials committed by its employees in Russia, Nigeria and Libya in 77 cases from 2001 to 2004.[409]

When determining the level of the fine, the Munich Prosecutor's Office took into account the expected substantial punishment to be imposed by the US authorities and the penalties received as part of a previous case in 2007.The prosecutors also took into account Siemens's extensive cooperation with law enforcement authorities to mitigate the amount of the regulatory fine. Siemen AG's cooperation with the investigation was deemed

[409] Siemens AG's telecommunication unit received a regulatory fine of EUR 201 million (approximately USD 287 million, including a EUR 1 million fine and EUR 200 million in disgorgement of profits).

instrumental to the success of the investigations both in Germany and in the United States. The size of the investigative team appointed by Siemens to conduct the internal investigation was unprecedented. A permanent contact point was appointed to share information with the authorities. Siemens also launched a temporary amnesty program relating to possible violations of anti-corruption company rules to incentivise employees and agents to come forward with information which ultimately proved extremely useful for the investigation.[410] In addition, Siemens AG took remedial and disciplinary measures against involved employees, including members of the company's managing board. However, the prosecutors retained, as aggravating factors, the long use of the slush funds by many different business units and the participation of members of Siemens AG's managing board.

Link between corporate resolution and prosecution of related individuals

In the United States, Siemens AG's plea agreement does not close or preclude the investigation and prosecution of any related natural persons. In fact, the document and evidence handed over by Siemens as part of its resolution were used to prosecute the natural persons involved. Siemens AG further committed to cooperating with the authorities' investigation against former executives, employees and agents involved in the bribery schemes. Based on information disclosed by Siemens AG as a result of the resolution, the DOJ charged eight individuals in 2011, including former Siemens executives and intermediaries with conspiracy to violate the anti-bribery, books and records and internal control provisions of the FCPA; conspiracy to commit wire fraud; conspiracy to commit money laundering; and substantive wire fraud. Two of the defendants pleaded guilty to conspiracy to violate the FCPA in 2015 and March 2018 and agreed to testify against others. The resolutions are conditioned on the defendants' full cooperation in ongoing investigations.

The SEC also charged seven former Siemens executives with violating the FCPA in 2011. In April 2013, a US District Court entered a final judgment against one of the former Siemens senior executives to resolve the SEC civil action civil penalty and imposed a USD 275°000 fine. The case was resolved without the defendant either admitting or denying the allegations in the SEC's complaint. In February 2014, two former senior executives received a USD 524°000 civil penalty. One of the defendants was also required to pay an additional USD 414°000 in disgorgement and interest. These are the highest individual civil penalties imposed for violations of the FCPA by the SEC.

In Germany, the former executives and employees of Siemens AG case were, for the most part, prosecuted and sanctioned for the offence of breach of trust – on the basis of the existence and functioning of a slush fund – and not for foreign bribery. From 2008 to 2011, 24 former executives and employees agreed to a conditional exemption from prosecution or termination of the prosecution under section 153a of the Criminal Code of Procedure. Their cases were resolved under this procedure as the executives were first time offenders and their level of guilt was deemed very low.[411] In addition, six former executives were convicted for breach of trust and four former executives were prosecuted for the

[410] Under the amnesty, the company guaranteed that it would not make claims for damages or unilaterally terminate employee relationships. However, the company reserved the right to impose lesser disciplinary measures.

[411] Germany Phase 3 Report, para. 136.

administrative offence of lack of supervision. Of these, two former members of the managing board were fined EUR 150°000 and EUR 250°000. Both had also agreed to compensate Siemens AG through a civil resolution (in one case for EUR 3 million), an element that was taken into account to determine the amount of the administrative fine.[412] Since 2011, of the 25 former executives and employees sanctioned in relation to the Siemens case, 16 individuals resolved their case through a resolution under section 153a of the Criminal Code of Procedure and were mainly sanctioned for breach of trust. In addition, one former executive was sanctioned for the administrative offence of lack of supervision and eight former executives were convicted for breach of trust, either as a result of a penal order or a negotiated sentencing agreement.

Impact of the resolutions on proceedings and cooperation with foreign authorities

It is unclear whether the information covered as part of the companies' resolutions in Germany could be and were shared with foreign authorities for the purpose of their own investigations. The United States indicated having provided assistance to foreign authorities. The wide scope of Siemens' business activities generated multiples investigations against Siemens for bribery of domestic officials in at least 21 countries and resulted in resolutions in Greece, Israel, Italy, Nigeria.[413] The World Bank also initiated proceedings and reached a resolution with Siemens AG in July 2009 over the company's conduct in Russia.

[412] No information is available on the sanctions imposed against the other three former executives.

[413] Australia, Austria, Azerbaijan, Argentina, Bangladesh, Brazil, China, France, Germany, Greece, Hungary, Indonesia, Israel, Italy, Liechtenstein, Nigeria, Norway, Russia, Switzerland, Taiwan, US. Source: US District Court of Columbia, US v Siemens AG, Information; J. ANYANGO ODUOR, F. FERNANDO et al., «Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery», Stolen Asset Recovery Initiative, 2014, p.131, star.worldbank.org/sites/star/files/9781464800863.pdf

10. Société Générale (Libya) - 2018

Description of the facts

Between 2004 and 2009, Société Générale SA (SocGen) a French global financial services institution, together with two wholly-owned subsidiaries, SGA Société Générale Acceptance, N.V. (SGA SocGen) and SAS Lyxor Asset Management (Lyxor) wilfully paid commissions totalling USD 90 million to a Libyan broker to secure investments from Libyan state-owned financial institutions, worth USD 3.66 billion. SocGen knew that a portion of the commissions was transferred to Libyan government officials working at the financial institutions. Based on the investigation, the French and US authorities estimate that SocGen conduct generated ill-gotten benefits totaling approximately USD 523 million in connection with the bribery scheme.

First coordinated resolution between the French and the US authorities

In June 2018, SocGen reached a parallel resolution with the French National Financial Prosecutor (PNF) and the DOJ in the first coordinated enforcement action by both authorities in a foreign bribery case. This case came to the attention of US authorities in 2012 based on a referral from the US SEC. The French PNF opened a preliminary investigation in 2016 based on media articles published from March to November 2014 about related civil proceedings between SocGen and the Libyan Investment Authority (LIA) in London. Coordination between the French and the United States began during the investigative stage and allowed for a faster resolution of the case. The authorities shared evidence and agreed to reach a coordinated resolution of their respective proceedings against SocGen. The cooperation reportedly involved regular contact between the authorities during the resolutions' negotiations. SocGen only started cooperating with the investigation after the DOJ provided the bank with evidence of its guilt.

In June 2018, SocGen entered into a three-year DPA with the DOJ for conspiracy to violate the anti-bribery provisions of the FCPA. As part of the DPA, SocGen agreed that its subsidiary SGA SocGen would plead guilty to charges of conspiracy to violate the anti-bribery provisions of the FCPA. SocGen agreed to pay USD 585 million criminal penalty of which USD 500°000 is to be paid as a criminal fine on behalf of its subsidiary, SGA SocGen. In addition, half of the amount of the fine was credited to the French authorities. When deciding to resolve the case with a DPA as well as when determining the level of the fine, the DOJ took into account SocGen's cooperation and remediation, as well as the disproportionate collateral consequences that would be triggered if the parent company pleaded guilty. SocGen received a reduction of the applicable US Sentencing Guidelines fine range estimated between USD 731.9 million and USD 1.46 billion based on a number of factors taken into account by the DOJ. In particular, SocGen did not receive voluntary disclosure credit as it failed to voluntarily self-disclose the matter. SocGen did not either receive full cooperation credit because of some delays in its cooperation at the early stages of the investigation, which led the DOJ to develop significant independent evidence of the companies' misconduct. However, SocGen received substantial credit for its cooperation by conducting an internal investigation and providing of regular updates on the status of and facts learned during the internal investigation to the US authorities as well as producing evidence located abroad. The DOJ also took into account the seriousness of the companies' conduct, including the high value of the bribes paid to foreign officials. If the parent company meets the terms of the agreement, the criminal charges against SocGen will be dismissed. However, SGA SocGen will have to persist in its guilty plea.

In France, SocGen signed the first *CJIP* ever reached in a foreign bribery case in May 2018. As part of the resolution, SocGen agreed to pay in total USD 292.8 million (EUR 250.15 million) to the PNF, equal to 50 percent of the total criminal penalty otherwise payable to the US authorities. As part of the total fine, the PNF added EUR 82°713 to the fine it intended to levy based on the seriousness of offences the bank committed. When determining the amount of the fine, the PNF took into account several factors, including SocGen's gross revenue over the past three years and the amount illegally obtained from bribery. The terms of the CJIP were approved by a court and the resolution published on the French Anti-Corruption Authority's (AFA) webpage.[414]

A coordinated corporate monitorship

As part of the French resolution, SocGen agreed to be subject to corporate monitorship by the French Anti-Corruption Authority (AFA). Corporate monitoring can be imposed for a maximum of three years. The PNF, however, determined SocGen's monitoring measures would be imposed for two years, based on the measures already taken by the bank since 2010 to strengthen its internal compliance structure. The resolution foresees that SocGen should allocate EUR 3 million to the monitoring process. In light of the significant remediation measures taken, SocGen's risk profile and the monitoring by the AFA, the US authorities declined to impose their own monitor. However, SocGen will have to self-report to the US authorities over the three years during which prosecution is differed and should the AFA identifies misconduct, the French authorities or the company itself would be expected to report to the DOJ.

Compensation of victims

When a victim is identified, and unless the legal person involved justifies the reparation of its damage, the CJIP provides for the amount and the terms of the compensation for damages caused by the foreign bribery offence. In this case and in parallel to the criminal proceedings in France and in the United States, SocGen was part of a civil proceeding in the United Kingdom brought by the LIA in 2014 over allegations that the bank bribed Libyan officials to enter the LIA into financial derivatives trades that harmed Libya financially. In 2017, a day before the trial was scheduled to begin, SocGen issued a formal apologise and agreed to resolve the proceedings by paying EUR 963 million. The High Court of Justice of England and Wales ultimately didn't rule on the matter. The PNF therefore took these elements into account when determining the terms of the resolution, after confirming with the LIA that the bank had fully compensated the financial institution. As a result, the PNF decided that the resolution did not need to include any compensation measures because SocGen had already compensated the LIA.

Investigation into related individuals

The investigation into related individuals is ongoing in the United States with help from the SFO. As part of its US DPA, SocGen and its direct and indirect subsidiaries are required to cooperate with any foreign authorities law enforcement and regulatory authorities and agencies, as well as the Multilateral Development Banks ("MDBs"), in any investigation of the bank, its direct and indirect subsidiaries, or any of its present or former officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to the facts covered by the DPA.

[414] Société Générale CJIP with the National Financial Prosecutor, www.economie.gouv.fr/afa.

11. Standard Bank (Tanzania) - 2015

Description of the facts

Between 2012 and 2013, ICBC Standard Bank Plc (formerly Standard Bank Plc) failed to prevent its former sister company Stanbic Bank Tanzania from committing bribery. In March 2013, Stanbic Bank Tanzania, paid USD 6 million in bribes to a local partner in Tanzania called Enterprise Growth Market Advisors (EGMA) to induce members of the Government of Tanzania, to favor the companies' proposal for a USD 600 million private placement to be carried out on behalf of the Government of Tanzania. In April 2013, Standard Bank self-reported the matter to the UK authorities and initiated an internal investigation in parallel to the probe conducted by the SFO.

First deferred prosecution agreement in the United Kingdom

In November 2015, a UK court approved a three-year DPA reached between the SFO and Standard Bank for violation of Section 7 of the UK Bribery Act (UKBA). The company agreed to pay a fine of USD 16.8 million and USD 8.4 million to disgorge profits. In addition, the DPA imposed an independent review of Standard Bank anti-corruption compliance measures by Price Waterhouse Coopers (PwC) and requires the Bank report to the SFO within six-months. Standard Bank was also required to cooperate with any other agency or authority, domestic or foreign, in related investigations.

This case is the first DPA reached in the United Kingdom since DPAs became available in 2014 and the first use of the offence of failure to prevent bribery under section 7 of the UKBA. As part of the resolution, Standard Bank was required to admit to the facts covered in the DPA statement of facts but without an admission of guilt. The SFO found that it was in the interest of justice to conclude a resolution by way of a DPA, and not to prosecute this case, given the timing and nature of self-report, the level of cooperation (Standard Bank conducted an internal investigation and disclosed its findings to the SFO) and the agreement that the company conduct an independent review of compliance procedures. Similar factors were taken into account when assessing the level of the fine.[415]

Cooperation with foreign authorities

The United Kingdom had concurrent jurisdiction with the United States in the case. The UK authorities therefore consulted with its foreign counterparts with a view to cooperate the investigation. An agreement was reached with the DOJ that the SFO would take the lead. The DOJ agreed to take no action to the extent that the full conduct would be captured in the UK DPA and that appropriate sanctions could be imposed. The Tanzanian Prevention and Combatting of Corruption Bureau agreed to a SFO lead on the basis that the SFO could sanction the conduct and obtain compensation, which would be transferred back to Tanzania.[416]

In addition, the SEC which was also informed of the proposed DPA and aware of the proposed disgorgement of profit of USD 8.4 million agreed to impose a penalty of

[415] The UK SFO took into consideration the level of cooperation including timing and extent of self-report and cooperation throughout the UK SFO investigation.

[416] United Kingdom Phase 4 Report (2017), para. 122; and Allen & Overy (April 2016), "First UK deferred prosecution agreement between the SFO and a bank", www.allenovery.com/publications/en-gb/Pages/First-UK-deferred-prosecution-agreement-between-the-SFO-and-a-bank.aspx.

USD 4.2 million in respect of separate related conduct. The SEC took into consideration the proposed disgorgement figure in the UK DPA when imposing the civil fine. In turn, the UK court that approved the DPA took into account the fact that the terms of the proposed UK DPA was brought to the attention of the SEC and that, as a result, the SEC had announced its intention to impose a civil fine of USD 4.2 million for separate but related conduct when approving the final terms of the DPA. The UK authorities indicated that coordination facilitated the swift resolution of the case.

Requirement to compensate victims

One specific feature of the Standard Bank DPA is the requirement that Standard Bank pay USD 7 million in compensation to the Government of Tanzania. The amount represents the total fee paid to the corrupt intermediary plus interest. In addition, the judgement approving the UK DPA indicates that the company should provide assistance to the Tanzanian authorities with their investigation. Compensation to the Government of Tanzania was returned in line with advice being received from the UK DFID. In general, DFID provides assistance to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is "transparent, accountable and fair", and identify means by which compensation can be paid to avoid the risk of further corruption In providing the payment to Tanzania, the SFO was assisted by the Foreign & Commonwealth Office and DFID working in collaboration with the Ministry of Finance of the Government of Tanzania. Following the Standard Bank case, the SFO, the CPS and the National Crime Agency adopted general principles with respect to providing compensation to victim governments or countries as part of the resolution of foreign bribery cases.[417]

[417] UK SFO, *General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases*, www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/

12. Telia Company AB (Uzbekistan) – 2017

Description of the facts

Between 2007 and 2010, Telia Company AB (formerly TeliaSonera AB, hereinafter Telia), a Swedish telecommunication provider, together with its Uzbek and Dutch subsidiaries conspired to pay approximatively USD 331 million in bribes to an Uzbek government official - who was a close relative of a high-ranking government official and had influence over the Uzbek governmental body that regulated the telecom industry - to enter and operate on the telecommunications market in Uzbekistan. The granting of business advantages was conditioned to the acquisition by Telia of Coscom - a United States-based third-largest telecommunication operator in Uzbekistan at the time – and to the transfer of several millions of dollars in cash and shares of ownership in Telia's Uzbek investment to Takilant Limited, a shell company incorporated in Gibraltar whose beneficial owner was the Uzbek government official. The payments were funnelled through Coscom and Dutch subsidiaries Sonera Holding BV, TeliaSonera UTA Holding BV and TeliaSonera Uzbek Telecom Holding BV. Based on the investigation, the US and Dutch authorities determined that Telia was only able to operate and to reach a dominant position in the telecommunication market in Uzbekistan by bribing foreign public officials.

Parallel investigations and coordinated resolutions

Different sources led to the opening of investigations by the several Parties involved. The case first started in Switzerland where a report was filed by a Swiss bank for money laundering predicated on passive bribery in relation to the Uzbek official. In Sweden, media reports contributed to the opening of the investigation. As Norwegian prosecutors learned of the Swedish and Swiss investigations, they alerted the US regulators (the SEC) who, in turn, alerted the Department of Justice (DOJ). Both the DOJ and the SEC opened investigations into Telia, VimpelCom, and Mobile Telesystems (MTS), three major telecom companies that paid bribes in Uzbekistan through the same shell companies that were identified in the Swedish media report. In turn, the Dutch law enforcement authorities detected the case through a combination of several sources, including a MLA request from Sweden, Switzerland and the United States, information provided by the Dutch tax authorities and media reports. The Dutch, Swedish and US authorities started cooperating in their investigations within the first six months. The contact between Switzerland and Sweden were simultaneously taken. Sweden contacted the US and Dutch authorities using both formal and informal channels of communication. The coordination of the investigations allowed the sharing of evidence, including documents obtained and witnesses' interviews. Indeed, while key evidence was located within Sweden, the possibility to bring formal charges in Sweden was highly dependent on the investigations conducted in the Netherlands, Switzerland and the United States.

In 2017, Telia reached a coordinated resolution totalling more than USD 965 in criminal and regulatory penalties (USD 548 million in criminal penalties) as a result of a DPA with the United States' authorities where the company's securities traded publicly in New York between 2002 and 2007, and an out-of-court resolution with the Dutch authorities in connection with the involvement of three Dutch subsidiaries of Telia. Criminal proceedings against the company and individual defendants are pending in Sweden where the company is incorporated. Sweden's legal system requires prosecutors to first prove individual misconducts beyond reasonable doubt in court, in the absence of a resolution procedure available in law.

Criminal penalties imposed and factors taken into account

In the United States, Telia entered into a three-year DPA with the DOJ for conspiracy to violate the anti-bribery provisions of the FCPA in September 2017. The decision to resorting to enter into a DPA was made in part based on Telia's cooperation with the DOJ and remediation measures taken by the company. As part of the agreement, Telia Company AB agreed to pay a criminal fine of approximately USD 508 million with credit of USD 274 million for the amount paid to the Netherlands as explained below. Telia also agreed to cooperate with any foreign states if requested by the DOJ. When determining the level of the fine, the DOJ took into consideration *inter alia* the nature and seriousness of the offence, the large amount of bribes paid as well as the involvement of high-level management within the company. Telia received a 25% reduction off the applicable US Sentencing Guidelines fine range based on a number of factors taken into account by the DOJ. Although Telia did not receive voluntary disclosure credits, the company received full credit for its cooperation with the DOJ. This cooperation included the conduct of an internal investigation together with regular reports to the DOJ, sharing of information on relevant facts of the case and about the individuals involved in the bribery scheme. The DOJ also took into account the absence of prior criminal history. Telia also received credits for having taken remedial actions which included the implementation of enhanced corporate compliance measures and the termination of contracts of all individuals involved. On this basis, the DOJ decided not to impose an independent corporate compliance monitor.[418] Telia's Uzbek subsidiary Coscom LLC in turn entered into a plea agreement with the DOJ for conspiracy to violate the anti-bribery provisions of the FCPA in September 2017.

In the Netherlands, Telia entered into an out-of-court resolution with the Dutch Prosecution Service (*Openbaar Ministrie*) and agreed to pay a criminal fine of USD 100 million and another USD 174 million was confiscated in relation to the involvement of three subsidiaries based in the Netherlands for bribing government officials and keeping inaccurate books and records. In determining the fine, the prosecutors took into account the multiple payments made over a long period of time, the fact that the bribe payments were significant but credited Telia for its cooperation during the investigation. This resolution was reached in coordination with the US authorities. As a result, the DOJ agreed to credit the criminal penalty paid to the Dutch prosecutor as part of its agreement with Telia Company AB.[419]

Related disgorgement proceedings

Disgorgement proceedings were also coordinated between the United States, the Netherlands and Sweden. The Dutch and US authorities estimate that Telia generated USD 457 million in illegally obtained profits, which were subject to disgorgement. The amount for disgorgement of criminal proceeds was divided between the three authorities. In September 2017, Telia entered into a separate resolution with the Securities and Exchange Commission (SEC) for violations of the anti-bribery and internal accounting

[418] Independent monitors are a typical feature of resolutions reached with US authorities, and usually last between two to three years. A monitor's role is mainly to implement adequate corporate compliance programme.

[419] By judgment of July 20, 2016, the Amsterdam District Court also sentenced Takilant Ltd to pay a fine of EUR. 1.6 million and a criminal confiscation of EUR 123 million. Takilant was convicted for the co-commission of passive foreign bribery and forgery for receiving bribe payments.

controls provisions of the FCPA and agreed to pay USD 208.5 million of disgorgement. Telia also agreed to pay USD 40 million to the DOJ as forfeiture. The remaining disgorgement amount of USD 208.5 million is to be paid to Sweden. This is, however, conditioned on the outcome of separate criminal proceedings for disgorgement against Telia on-going in Sweden, The imposition of corporate penalties in Sweden largely depends on establishing that an individual representing the company possesses the requisite intent. Sweden prosecutors must therefore first prove individual and related corporate wrongdoings in criminal proceedings to be able to receive its share of the disgorgement agreed in the US Proceedings. If Sweden does not successfully conclude its legal procedure against Telia before mid-March 2019, the amount provisioned for disgorgement will be re-allocated to the Netherlands.

Related proceedings against individuals.

In Sweden, three Telia executives are pending trial together with the legal person Telia.[420] A verdict is expected in February 2019. Proceedings are ongoing against related individuals in the United States but not in the Netherlands.

[420] GIR (September 2017), "Sweden to prosecute individuals before accepting its cut of the Telia settlement", globalinvestigationsreview.com/article/1147658/sweden-to-prosecute-individuals-before-accepting-its-cut-of-the-telia-settlement

13. VimpelCom (Uzbekistan) – February 2016

Description of the facts

Between 2006 and 2012, VimpelCom, a Dutch-based telecommunication provider, together with its wholly-owned Uzbek subsidiary Unitel, conspired to pay over USD 114 million in bribes to an Uzbek government official - who was a close relative of a high-ranking government official and had influence over decisions made by the Uzbek telecommunications ministry (UzACI) concerning Uzbekistan's telecommunications market. In addition, Unitel paid over USD 30 million in sponsorships or charitable contributions. Payments were made to obtain and subsequently retain Uzbek telecommunications business. Based on the investigation, the US and Dutch authorities determined that VimpelCom managed to reach a dominant position in the telecommunication market in Uzbekistan as a result of the bribery committed throughout the years and resulted in significant profits as a consequence.

Parallel investigations

The VimpelCom bribery case is linked to a similar case in the Uzbek telecommunication business involving the Swedish telecommunication provider Telia Company AB (formerly TeliaSonera AB). As for the Telia case, the investigation first started in Switzerland where a report was filed by a Swiss bank for money laundering predicated on passive bribery in relation to the Uzbek official. In Sweden, media reports triggered the opening of the investigation. As Norwegian prosecutors learned of the Swedish and Swiss investigations, they alerted the US regulators (the SEC) who, in turn, alerted the Department of Justice (DOJ). Both authorities opened investigations into VimpelCom, Telia, and Mobile Telesystems (MTS), three major telecom companies that paid bribes in Uzbekistan through the same shell companies that were identified in the Swedish media report. In turn, the Dutch law enforcement authorities detected the case through a combination of several sources, including a MLA request from Sweden, Switzerland and the United States, information provided by the Dutch tax authorities and media reports. Cooperation between the United States and the Netherlands began at case opening. In the Netherlands, the investigation was initiated in 2013 and carried out by the Fiscal Intelligence and Investigation Service (FIOD) under supervision of the National Prosecutor's Office for Serious Fraud, Environmental Crime and Asset Confiscation. VimpelCom also initiated its own internal investigation and regularly informed both the Dutch and US authorities of the result of the probe. Cooperation allowed for sharing of evidence, including documents obtained as a result of search warrants executed by the Netherlands and witnesses interviewed.

A coordinated resolution between the Dutch and the US authorities

In February 2016, VimpelCom agreed to the terms of a global resolution with both the Dutch and the US authorities, whereby both jurisdictions agreed to impose equal fines. In the United States, VimpelCom Ltd reached a three-year DPA with the DOJ for conspiracy to violate the anti-bribery, books and records and internal controls provisions of the FCPA. Simultaneously, Unitel LLC agreed to plead guilty for conspiracy to violate the anti-bribery provisions of the FCPA.

VimpelCom agreed to pay a total of USD 460 million, of which half of the amount was deducted, corresponding to the fine paid to the Dutch authorities as part of a separate resolution and USD 40 million forfeiture was credited against this amount. The total criminal penalty was calculated by applying the principles set forth in the DOJ's Justice

Manual, Chapter 8 of the United States Sentencing Guidelines, and the FCPA Enforcement Policy. VimpelCom was eligible for a 45 % reduction off of the bottom of the US Sentencing Guidelines fine range estimated between USD 837 million to USD 1.7 billion. When determining the level of the fine, the DOJ took into account VimpelCom's initial failure to self-report the matter after the company conducted an internal investigation and uncovered the wrongdoing. However, the company received full credit for its cooperation with the authorities' investigation. VimpelCom received an additional credit for its prompt acknowledgement of wrongdoing by its employees after being informed by the DOJ of its criminal investigation, and the company's willingness to resolve promptly its criminal liability on an expedited basis. As part of the DPA, VimpelCom agreed to cooperate with foreign authorities and multilateral development banks (MDBs) in any investigation of the company, its subsidiaries or affiliates as well as its executives; employees and agents. Although VimpelCom had taken some remedial actions, an independent compliance monitor was imposed.

In addition, VimpelCom, which was listed on the New York Stock Exchange between 1996 and 2013, resolved a civil proceeding with the SEC. Under the terms of the resolution, VimpelCom agreed to a total of USD 375 million in disgorgement of profits and prejudgment interest. The amount is to be divided between the SEC and Dutch prosecutor. The SEC agreed to credit the USD 40 million forfeiture paid to the DOJ as part of its resolution with the company.

In the Netherlands, the Public Prosecutor Office concluded an out-of-court resolution with VimpelCom to resolve foreign bribery claims and violations of books and records. As part of the resolution, VimpelCom agreed to pay USD 230 million including a USD 100 million fine and the confiscation of USD 130 million. In addition, VimpelCom agreed to pay USD 167.5 million in confiscation of the illegally obtained proceeds by its wholly-owned subsidiary Unitel. In determining the fine, the Dutch authorities took into account that the payments to government officials took place over 7 years and that the bribe payments were significant. Similar to when a sentence is imposed in court, the defendant's attitude was taken into account, including that VimpelCom cooperated with the investigation and has made the findings of its internal investigation available. The resolution takes into account that VimpelCom has also reached resolutions with the DOJ and SEC. No additional corporate monitoring was imposed by the Dutch authorities who acknowledged the imposition of an external compliance monitor as part of the resolution reached with the US authorities. VimpelCom simply agreed that the company will undertake corporate compliance measures and report irregularities on its own initiative.

Cooperation in the investigation of the companies' executives, employees and agents

Investigation against related individuals is ongoing in the Netherlands. The Dutch Prosecution shared information from its investigation with countries in which prosecution of the other individuals is possible. In the United States, VimpelCom provided information about its officers, directors, employees, agents and consultants related to possible violations of the FCPA as part of its DPA with the DOJ. VimpelCom received an additional 20% credit for its prompt acknowledgement of wrongdoing by its employees after being informed by the DOJ of its criminal investigation and cooperating with the investigation.

Related civil forfeiture actions

The DOJ filed two civil complaints to foreign authorities seeking forfeiture in June 2015 and February 2016. In June 2015, the DOJ sought forfeiture of more than USD 300 million

in bank and investment accounts held in Belgium, Luxembourg and Ireland that constitute funds traceable to bribes, or funds involved in the laundering of the bribes, paid by VimpelCom and another telecommunications company to the same Uzbek official. In February 2016, the DOJ sought forfeiture of more than USD 550 million held in Swiss bank accounts, which also constitute bribe payments made by VimpelCom and two separate telecommunications companies, or funds involved in the laundering of those payments, to the Uzbek official. The outcome of these civil complaints is pending.

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