



## **IBA Anti-Corruption Committee**

### **Commentary on non-trial resolutions, recent OECD Guidance and Project Roll Out**

#### **I. OVERVIEW**

##### **A. What is Project Roll Out?**

- Project Roll Out is a project by the IBA Anti-Corruption Committee to encourage countries to implement the use of non-trial resolutions for international corruption cases.

##### **B. What are non-trial resolutions (NTRs)?**

- Non-trial resolutions are agreements between an entity or individual and an enforcement authority to resolve a criminal or civil matter without a full trial on the merits. They can occur at any stage of an investigation or prosecution of a bribery offence, and can impose financial penalties, disgorgement of profits, compliance and reporting conditions and other sanctions (including prison terms for individuals).
- NTRs can involve a conviction (eg, plea agreement), or some type of non-conviction agreement (eg, deferred or non-prosecution agreements).
- Although most prominently used in Brazil, France, the United Kingdom and the United States, a recent IBA study found that 57 of the 66 countries studied used some form of non-trial resolution to resolve international corruption cases.<sup>1</sup> A similar study by the Organisation for Economic Cooperation and Development (OECD) Working Group on Bribery in 2019 found that 27 of the 44 member countries already use some form of

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<sup>1</sup> [www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf](http://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf)

NTR.<sup>2</sup> Indeed, nearly 80 per cent of all foreign bribery cases have been resolved through NTRs.<sup>3</sup>

- NTRs provide benefits to enforcement authorities, corporates and the public at large, by providing the possibility of more efficient investigations and resolutions to enforcement authorities, sanctions short of a trial and criminal conviction to corporates, and enhanced and ongoing compliance obligations for the corporate community and public.<sup>4</sup>

### C. What is the role of the IBA and the Private Bar?

- NTRs and the incentives that come with them provide very significant advantages to companies, particularly companies that operate in more than one jurisdiction.
- Now that the OECD Recommendation has been issued, IBA members in OECD member countries can help educate their corporate clients about the benefits of NTRs and can advocate for their government to adopt an NTR framework that meets the OECD standards.
- IBA members in non-OECD countries can use the OECD framework to help their countries adopt a NTR system that is fair and transparent.

## II. 2021 OECD RECOMMENDATION

- A. On 26 November 2021, the OECD issued its Recommendation for Further Combating the Bribery of Foreign Public Officials ('2021 Recommendation'), which sets out new standards that the 44 member countries of the OECD must meet.<sup>5</sup>
- B. The 2021 Recommendation promotes the use of NTRs to resolve international bribery matters, recommending that member countries use NTRs to address foreign bribery by both corporate entities and individuals.
- C. The Recommendation sets out a consistent and transparent global framework for the use of NTRs, emphasising the importance of due process, transparency and accountability. Specifically, the Recommendation states that member countries should:

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<sup>2</sup> [www.oecd.org/corruption/resolving-foreign-bribery-cases-with-non-trial-resolutions.htm](http://www.oecd.org/corruption/resolving-foreign-bribery-cases-with-non-trial-resolutions.htm)

<sup>3</sup> *Ibid.*

<sup>4</sup> See Item 1 of the Recommendation 6 Network's Explanatory Notes: 'Non-trial Resolutions designed and implemented with the purpose of deterring bribery enhance law enforcement, promote compliance and are consistent with the requirement of the [OECD Anti-Bribery Convention] that sanctions should be effective, proportionate and dissuasive.'

[www.ibanet.org/LPD/Criminal\\_Law\\_Section/AntiCorruption\\_Committee/Project-Roll-Out](http://www.ibanet.org/LPD/Criminal_Law_Section/AntiCorruption_Committee/Project-Roll-Out).

<sup>5</sup> [www.oecd.org/corruption/2021-oecd-anti-bribery-recommendation.htm](http://www.oecd.org/corruption/2021-oecd-anti-bribery-recommendation.htm)

- Adopt a **clear and transparent framework regarding NTRs**, including which authorities can use them, whether they are available for companies and individuals, and whether they require admission of facts or guilt;
  - Develop **clear and transparent criteria regarding how to qualify for an NTR**, including whether it requires self-disclosure of wrongdoing, cooperation with the authorities' investigation and/or remedial measures;
  - Provide clear and publicly available information regarding the advantages that can be obtained through NTRs; and
  - **Make resolutions public**, including the central facts of the matter, key persons involved, factors weighed when deciding to use an NTR, sanctions imposed and basis of the sanctions, and remedies imposed.
- D. The Recommendation also requires OECD countries to incentivise self-reporting of wrongdoing, cooperation with government investigations, and remedial measures through the use of reduced sanctions and other advantages. It further recommends that countries incentivise companies to adopt and enhance both anti-corruption compliance programmes and their internal controls.

### III. WHAT ARE THE BENEFITS OF NTRS?

#### A. Benefits for companies

- NTRs provide certainty:
  - A negotiated resolution removes the uncertainty of trial, providing both company and prosecutor with some certainty regarding both the outcome and the financial and other sanctions; and
  - Because many NTRs are announced at the same time as the charges, they can also shorten 'bad press' days for the company.
- Companies can resolve matters across multiple jurisdictions at once:
  - NTRs allow companies to resolve matters in multiple jurisdictions at the same time, paying one global settlement amount; and
  - Although it may not always prevent other countries from later initiating their own investigations or sanctions, the more countries that adopt an NTR framework consistent with the OECD Recommendation, the less this should happen.
- NTRs provide a framework to allow a company to engage with prosecutors in a more cooperative posture.
- The negotiated nature of NTRs allows companies to work with authorities to minimise the unfair or undesirable collateral consequences of the final resolution, while at the same time achieving enforcement officials' public policy objectives.

- NTRs reward companies that have strong compliance programmes and internal controls.

#### **B. Benefits for prosecuting authorities**

- NTRs save scarce government resources:
  - Countries have limited resources to devote to criminal and civil enforcement of anti-bribery and related laws;
  - NTRs only allow prosecutors to resolve a matter without expending the resources for a lengthy trial; and
  - By incentivising self-disclosure and cooperation, NTRs also encourage companies (and individuals) to provide information that may lead to an investigation, and to cooperate with government investigations once they have commenced.
- NTRs permit multi-jurisdictional resolutions:
  - One significant advantage that NTRs have over trials is the ability to resolve a matter across multiple jurisdictions at the same time, giving both prosecutors and companies some certainty in the outcome; and
  - For countries where enforcement of foreign bribery laws is new, participating in a global settlement process with other countries who have a history of successfully resolving such matters can be an invaluable learning tool.
- By incentivising compliance programmes and strong internal controls, NTRs can strengthen a country's corporate culture.

### **IV. NEXT STEPS**

#### **A. National and regional discussion and implementation**

- Regional and national conferences are being held to bring together the organised bar, through members of the IBA, prosecutors, judges and government officials.
- In many countries, the formal adoption of NTRs will require decisions about national enforcement policies. The Recommendation is by design quite flexible, so implementation will be associated with choices about the principles articulated in the Recommendation, such as publication of incentives available to corporations that choose to disclose voluntarily and cooperate, processes for negotiating and concluding NTRs, public disclosures, independent or robust reviews and the like.

#### **B. IBA leadership**

- IBA members are encouraged to organise or to participate in these national and regional discussions, taking into consideration this commentary.