

**“This changes the dialogue
between prosecutors and the bar.”**

Eric Russo, Financial Crimes Prosecutor, Paris

Non-Trial Resolutions: Regional Perspectives and Update on Project Roll Out

IBA Anti-Corruption Annual Conference
14 June 2023

Panelists

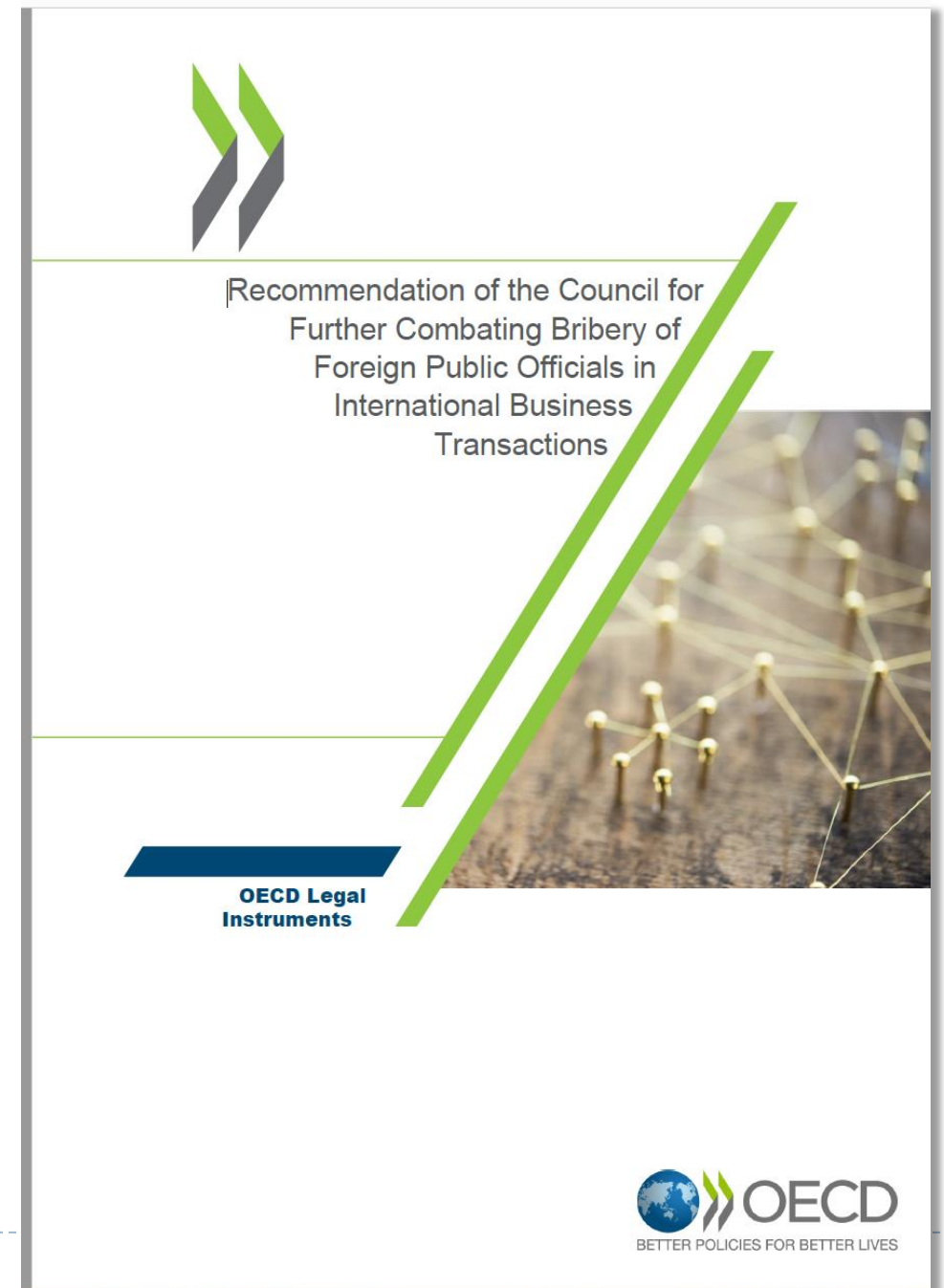
- ▶ Fabio Cagnola — Cagnola and Associati Studio Legale, Italy
- ▶ Jitka Logesova — Wolf Theiss, Czech Republic
- ▶ Michael Currie — Primerio International, South Africa
- ▶ Thomas Best — Paul Hasting, US
- ▶ Moderator: Kara Brockmeyer — Debevoise and Plimpton, US



OECD Working Group on Bribery 2021 Recommendations

XVII. RECOMMENDS that member countries consider using a variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons, including non-trial resolutions. **Non-trial resolutions refer to mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority.**

November 2021



Non-Trial Resolutions (NTRs)

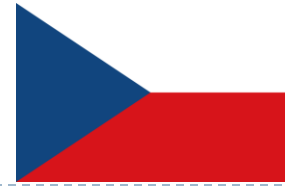
What Are NTRs?

- ▶ Agreement between enforcement authority and entity or individual to resolve a matter before full trial on the merits
- ▶ Can impose fines and disgorgement of profits, compliance and reporting requirements, prison time for individuals
- ▶ Used extensively in US (guilty plea, DPA, NPA), UK (same), Brazil (leniency agreements) and France (CJIP)

Benefits of NTRs

- ▶ Provide certainty for both sides
- ▶ Allow for resolution of even complex cases without expending resources for lengthy trials
- ▶ Incentivize voluntary disclosure of misconduct and cooperation with prosecuting authorities
- ▶ Allow for simultaneous resolution across multiple jurisdictions
- ▶ Provide opportunity to minimize collateral consequences
- ▶ Reward companies with strong compliance programs and internal controls, thereby strengthening a country's corporate culture

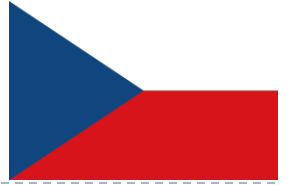
Case Study: Czech Republic



- ▶ NTR legislation does not exist in CEE/SEE, but there is a clear need for it to facilitate criminal prosecution of companies for corruption (and other) offences
- ▶ In 2022, the CEELI institute started a cooperative effort to promote the OECD WGB recommendations, with two roundtables organized thus far
 - ▶ Participation from judges, state prosecutors, officials and representatives from NGOs from most CEE/SEE countries
 - ▶ Participants showed interest in supporting the NRTs legislation (in particular, Czech Republic, Romania, Poland and Ukraine).
- ▶ **Factors driving NTR adoption:**
 - ▶ Criminal proceedings in complex cases take many years, disadvantaging both the prosecution and defense (time-barred offences, timely not related prosecution, reputational issues, high costs of the proceedings/defense)



Case Study: Czech Republic



- ▶ In Czech Republic, plea bargaining is used in some situations. However, prosecutors are unwilling to negotiate with defense counsel (“we are here to prosecute and not to negotiate”)
 - ▶ Other hurdles include no predictability, no cooperation benefits for companies, effect of plea bargain on EU public tenders – “blacklisting”
 - ▶ The approach is changing – publication of guidelines on communication between defense and prosecution during plea bargaining negotiations
- ▶ Arguments against NTRs: insufficient court oversight; way for rich companies to buy themselves out of criminal proceeding
- ▶ New EU Anticorruption Directive – a missed opportunity – doesn't tackle NTRs but introduces many important changes (e.g., mitigating factors)



Case Study: South Africa



- ▶ NTR mechanism not yet formally adopted by legislature, despite NTRs being a key recommendation in the Judicial Commission of Inquiry into Allegations of State Capture Reports issued by Chief Justice Zondo
 - ▶ Explicitly recommends that “*government introduce legislation for the introduction of deferred prosecution agreements...*” DPAs are the most common NTR mechanism that the South African legislature may consider implementing
- ▶ Currently, South African law caters for one form of NTR – the guilty plea (section 105A of the Criminal Procedure Act 51 of 1977)
 - ▶ Non-conviction based NTRs would be a valuable addition to the legislature, as these would be suitable for companies/individuals that are capable of reform
- ▶ Development of an NTR regime in South Africa must be in strict adherence to the South African Constitution
 - ▶ Must be underpinned by principles of individual accountability, due process, non-derogation from fundamental freedoms, transparency and access to information
 - ▶ Must consider developing clear criteria for voluntary disclosure of wrongdoing, cooperation with law enforcement authorities and advanced publishing of remedial measures

Case Study: South Africa



- ▶ **Challenges in the implementation of such a regime: carrot and stick principle**
 - ▶ NTR systems will only be effective where there is a real threat and ability to carry out enforcement actions and effectively prosecute wrongdoers. Yet, it is widely recognized that the South African National Prosecuting Authority lacks the resources, expertise and often, political will, to investigate and prosecute such cases. As such, currently, there is little incentive for companies/individuals to participate in an NTR regime
 - ▶ Effective NTR frameworks go hand-in-hand with an effective prosecuting agency. If effective investigation and prosecution is compromised, businesses will have little incentive to settle matters and instead take their chances in fully defending a matter
- ▶ **Following the State Capture Commission Reports, there have been instances where multinational corporations have entered into informal NTRs for multijurisdictional cases of corruption and bribery**
 - ▶ Key case relates to the Kusile project, wherein ABB (a Swiss company) agreed to pay over R2.5 billion in punitive reparations to South Africa in connection to bribery and corruption committed with Eskom during the state capture era



Case Study: Italy



- ▶ In Italy, there are no mechanisms properly qualifying as NTRs that are applicable to criminal proceedings (unlike, for example, NDAs and DPAs in USA and CJIP in France)
 - ▶ Suspension of the proceedings with probation and plea bargaining procedure are procedural instruments currently provided for in Italy that can be considered similar to NTRs
- ▶ Can evaluate introduction of a cause of non-punishability/other advantages for a company that cooperates with the judicial authority (i.e. makes available email data, documents and employee interviews)
 - ▶ In this regard, internal investigations can provide an important element of cooperation between the Judicial Authority and the company, enabling self-reporting in cases where misconduct is identified after an internal investigation



Case Study: Italy

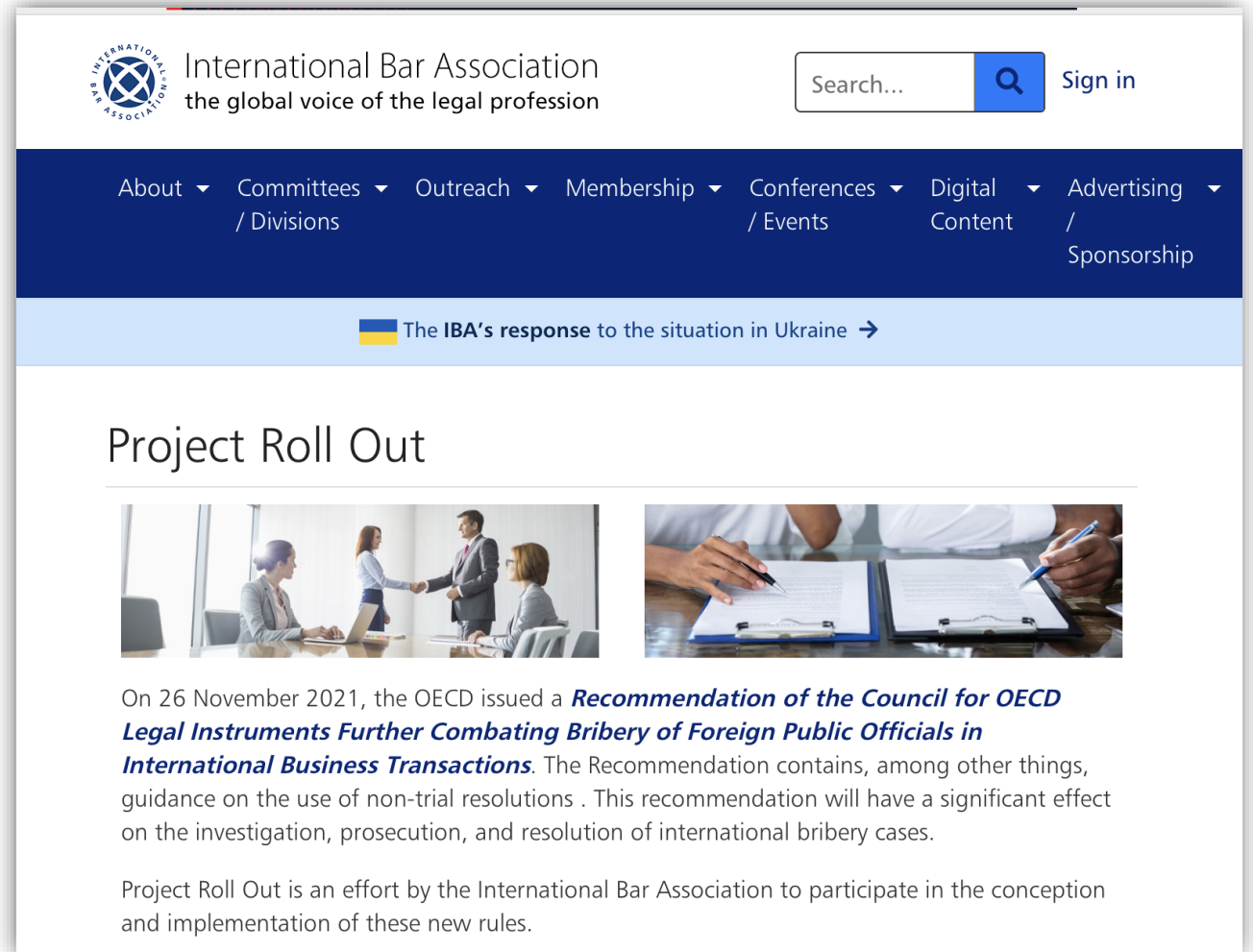


- ▶ New debates ahead:
 - ▶ Remedial compliance for entities?
 - ▶ Recent case at the Prosecution Office in Milan in a criminal proceedings against a big logistics company investigated for the crime fraudulent misrepresentation through the use of invoices for non-existent transactions (Article 2 of Legislative Decree 74/2000) by way of simulating subcontracting contracts instead of labor supply contracts
 - ▶ Ne bis in idem and the value of companies' remedial actions?
 - ▶ Implementation of policies and compliance programs to ensure proper and compliant onward management of the business as a benefit and a prerequisite for having the proceedings against the entity dismissed
- ▶ Interesting insights could be drawn from the cause for non-punishability in corruption matters (pursuant to section 323-ter of the Italian Criminal Code) and tax crime matters (pursuant to section 13 paragraph 2 of Legislative Decree 74/2000)



Project Rollout

- ▶ Encourage implementation of NTRs to enforce and resolve corruption cases
- ▶ Provide resources to help plan regional and national conferences to promote discussion of NTRs
- ▶ Upcoming regional conferences in Europe (Switzerland), Central and South America (Mexico) and Asia (Singapore)



The screenshot shows the International Bar Association website. At the top left is the IBA logo and the text "International Bar Association the global voice of the legal profession". To the right is a search bar with "Search..." and a magnifying glass icon, and a "Sign in" link. Below this is a dark blue navigation bar with white text for "About", "Committees / Divisions", "Outreach", "Membership", "Conferences / Events", "Digital Content", and "Advertising / Sponsorship". A light blue banner below the navigation bar features the Ukrainian flag and the text "The IBA's response to the situation in Ukraine →". The main content area has a white background with the heading "Project Roll Out". Below the heading are two images: the left one shows four business professionals in a meeting, and the right one shows hands signing documents. The text below the images reads: "On 26 November 2021, the OECD issued a **Recommendation of the Council for OECD Legal Instruments Further Combating Bribery of Foreign Public Officials in International Business Transactions**. The Recommendation contains, among other things, guidance on the use of non-trial resolutions. This recommendation will have a significant effect on the investigation, prosecution, and resolution of international bribery cases." At the bottom, it states: "Project Roll Out is an effort by the International Bar Association to participate in the conception and implementation of these new rules."