

Foreign bribery and non-trial resolutions

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FACTI ISSUES NOTE

The FACTI Panel published its [interim report](#) on 24 September 2020.

The FACTI Panel will hold a series of high-level virtual regional consultations with global stakeholders from 9 to 23 November 2020. The consultations aim to discuss possible means to address the shortcomings identified in the interim report. To orient the consultations a series of short issues papers are being presented along with guiding questions for the consultations.

INTRODUCTION

Foreign bribery causes economic and social damage on a scale that the amounts of the bribes themselves, no matter how large, do not capture. In that regard, an OECD report observes that a \$1 million bribe can quickly amount to a \$100 million loss to a poor country, by way of derailed projects and inappropriate investment decisions.

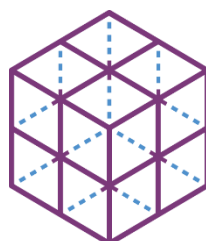
Countries are increasingly resorting to non-trial resolutions (NTRs) to resolve foreign bribery cases. According to the OECD, close to 80 per cent of concluded foreign bribery cases in their member countries were resolved through NTRs. NTRs are any agreements between a legal or natural person and an enforcement authority to resolve foreign bribery cases short of full criminal proceedings. Prerequisites usually involve voluntary self-reporting on the part of the company and its co-operation with enforcement authorities. As such, domestic enforcement authorities see NTRs as a pragmatic tool to overcome profound power and information asymmetries when they investigate acts of corruption in secret, complex, multi-layered and multi-jurisdictional transactions.

In its interim report, the FACTI Panel welcomes greater enforcement against

bribery, but also notes at that the development of NTRs poses important challenges.

First, and despite the fact that joint investigations involving multiple enforcement authorities on the supply side are increasing, there is little international cooperation with demand-side enforcement countries. As a result, affected countries are usually not aware of legal proceedings in supply-side countries until after they are concluded or settlements reached, and thus are not in a position to make compensation claims.

Even though the UN Convention Against Corruption explicitly recognizes that countries damaged by corruption should be compensated, compensation is quite exceptional in foreign bribery. Only 3 per cent of the payments imposed on companies in the course of foreign bribery settlements reached over the period 2000-2013 went back to the affected countries. The outcome is that supply-side countries accumulate fines and disgorged profits, while affected countries are most often left out of the bargain.



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The low level of cooperation with demand-side enforcement authorities also hinders the prosecution of bribe takers and some fear that NTRs may become a type of protection for corrupt officials. Foreign bribery is a two-sided affair, and it is critical not to give the impression that a case is resolved where only the supply-side of the transaction has been dealt with.

The fundamental challenge is a lack of trust between country authorities. There may even be suspicions that demand-side countries may be co-conspirators rather than victims, a concern that may sometimes be legitimate. The result is that the damage caused to the citizens, who are the ultimate victims of bribery transactions, is not compensated.

Finally, the whole system remains extremely fragmented, with important gaps in the way some countries make use of NTRs including the lack of strong safeguards, insufficient incentives and the lack of transparency.

LOOKING FORWARD

While resolving foreign bribery cases should not lead to impunity for corporate wrongdoers nor for corrupt officials; the ultimate victims of corruption should be properly compensated. To that end, the Panel would like to examine ideas to improve the pursuit of foreign bribery.

Guiding question for the consultations:

- **What is your view on the potential effectiveness of guidelines/standards on the use of non-trial resolutions for foreign bribery cases?**
- **How can the world enhance international cooperation between supply and demand-side countries in foreign bribery cases?**
- **What is the best way to address the compensation gap to ensure that citizens are properly compensated for the damage caused to them due to bribery schemes?**

Further details on the high-level regional consultations can be found on the FACTI Panel website: <http://www.factipanel.org/events>.

