



The Recommendation 6 Network

To: The FACTI Panel

Re: Addressing Bribery and Corruption - Cooperation and Settling Disputes

The FACTI April 16, 2020 Concept Issues Note entitled Overview of Existing Frameworks and Understanding Priorities includes the following description of the work of one of its clusters:

Cooperation and settling disputes: improving cooperation and standardization on bribery investigation and prosecution; examining options to strengthen peer review processes; exploring options to improve capacity; improving international cooperation on asset recovery and return.

The undersigned were engaged in a project similar to FACTI's in 2014. The Secretary General of the OECD asked a panel of experts on foreign bribery what the OECD might do to make a step change in the work the OECD was doing in the fight against corruption. The panel was called the *OECD Secretary-General's High Level Advisory Group on Anti-Corruption and Integrity*. Its full report, including its 22 recommendations, can be read here: <https://www.oecd.org/corruption/oecd-hlag-anti-corruption-and-integrity.htm>.

One of the findings of the OECD High Level Advisory Group was that properly structured negotiated settlements (rather than full trials to conviction and punishment) in international bribery cases can be a very effective tool in reducing bribery. The panel observed that the use of negotiated settlements, or non-trial resolutions, has increased dramatically around the world. The panel found that the use of non-trial resolutions suffered from inadequate international consistency and cooperation. To be truly effective as a tool against corruption it requires the proper balance of enforcement and incentives. To be perceived as fair and to be acceptable to the public, many stakeholders' interests must be better addressed than they now are.

This finding has led to the commencement of a significant project by the OECD Working Group on International Bribery, the aim of which is to issue international guidelines on the use of non-trial resolutions. Our "The Recommendation 6 Network" has contributed a draft set of guidelines, with expert commentary, for the OECD Working Group's consideration. The relevant documents can be found here <https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/>

At the same time the International Bar Association has a project to engage the private sector in the OECD Working Group's progress on issuing guidelines. Its particulars can be found here

https://www.ibanet.org/LPD/Criminal_Law_Section/AntiCorruption_Committee/Project-Roll-Out.aspx.

Many of the issues inherent in the OECD Working Group's work are being addressed by the FACTI panel. There appears to be a considerable opportunity for the work at the OECD and the work you are undertaking to complement and enhance one another. In a nutshell, the missing piece in the OECD work is the participation of the countries that are not members of the OECD. As you will have heard in the FACTI video conference discussions, many of those countries perceive that they are excluded from decisions that affect them.

In particular, we note that international cases of corporate corruption have been focused largely on the corporations that make the bribery payments, rather than on the recipients of bribery payments. Until recently corporate bribery has been the main focus of the OECD Working Group on Bribery, for obvious reasons. The OECD membership consists largely of countries that are the domicile of corporations that have historically been the source of bribery payments rather than the recipients, and the OECD Anti-Bribery Treaty is in fact focused on them. The OECD Working Group has itself recognized the inadequate attention paid to the recipients or solicitors of bribes and has made that topic one focus of its work going forward.

With respect to the topic on which we have worked, non-trial resolutions, we believe the UN is in a unique position to address gaps in law enforcement by:

- Facilitating cooperation in investigations

Several of the commentators in the FACTI consultations noted that the existing process for mutual legal assistance is ossified and ineffective.

- Establishing standards for the allocation of penalties among investigating nations and nations where the damage from corruption was incurred.

Participants in the FACTI process have identified the inadequacy of asset recovery processes, noting a failure of prosecuting services in the domiciles of the bribery payors to set asset recovery by the victim nations as a goal. One of the reasons for this expressed to us by prosecutors is their perception that the victim nations are not making adequate efforts to pursue corruption, and that they do not cooperate in international investigations. One prosecutor told us, "When they actually prosecute someone, then we'll think about sending them [some of the penalties we've collected]." Whether fair or accurate, this perception is widespread. In addition, today it is arbitrary and often up to individual prosecutors who pursue cases against a corporation what consideration may be given to the countries where bribery took place.

It would be a true breakthrough if the UN and the OECD could develop common principles for the allocation and sharing of penalties paid by corporate defendants – especially those who

have entered into non-trial resolutions where such principles could be applied early in the resolution of a case.

We would be delighted to discuss these ideas at your convenience. We are best reached by email at tina.soreide@nhh.no and peter.y.solmssen@gmail.com