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# OECD Report Highlights Use of Non-Trial Resolutions to Combat Foreign Bribery Cases

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The Organisation for Economic Co-operation and Development (OECD) recently released a report titled "Resolving Foreign Bribery Cases with Non-Trial Resolutions" at its annual Global Anti-Corruption and Integrity Forum in Paris.

According to the report, non-trial resolution mechanisms have become the primary means of enforcement of anti-foreign-bribery laws for parties to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Convention). The report underscores the fact that 78% of the almost 900 foreign bribery cases that were successfully concluded since the Convention came into force in 1999 were resolved through non-trial resolutions. The percentage rises to 96% in the United States, which is one of the leading enforcers of foreign bribery offences.

Non-trial resolutions refer to a wide range of mechanisms used to resolve foreign bribery cases without a full court proceeding. These mechanisms include plea agreements, which require the defendant's admission of guilt and involve a conviction, and non-prosecution and deferred prosecution agreements (DPAs), which do not result in a conviction. The cases involving legal persons concluded through non-trial resolution mechanisms can be broken down as follows:

- 20% were resolved through plea agreements;
- 70% were resolved through mechanisms that involve sanctions but not a conviction, such as non-prosecution agreements, DPAs, and civil and administrative resolutions;
- 6% involved resolutions tantamount to a conviction, but without an admission or finding of guilt; and
- 4% were concluded through mixed forms of non-trial resolutions.

While the potential for a reduced sanction is a key feature of all non-trial resolution options, the report underscores stark differences in the level of sanctions imposed in different resolutions, ranging from just US$1 to US$3.2 billion. Overall, non-trial resolutions were responsible for approximately 95% of the almost US$15 billion paid in the aggregate by sanctioned legal persons, with DPA-like resolutions and civil/administrative resolutions responsible for nearly 37% and 29% of the total, respectively.

The report points out that in some countries, non-trial resolutions have provided the means to obtain the first-ever foreign bribery resolution or have provided the only means to date for imposing corporate liability for foreign bribery offences. Crucially, a key advantage that such resolutions have over trials is that multijurisdictional cases can be resolved with several authorities simultaneously, providing both prosecutors and companies with greater certainty as to the outcome and the combined financial penalty. One such example is the multijurisdictional resolution of the case against the Brazilian company Odebrecht S.A. and its subsidiary Braskem S.A, which had paid approximately US$788 million in bribes to secure over 100 infrastructure projects worth billions of dollars in Central America, Latin America and Africa. Information and evidence-sharing between Brazil, the United States and Switzerland allowed the three countries to reach coordinated resolutions, in the form of a guilty plea in the United States, a civil leniency agreement in Brazil and a summary penalty order in Switzerland. In total, Odebrecht and its subsidiary agreed to pay approximately US$3.23 billion to the three jurisdictions, but each agreement took into account the fines imposed by the other jurisdictions.

Another development highlighted in the report is the growing number of countries that have adopted or are considering adopting DPA regimes. In Canada, under amendments to the federal *Criminal Code* that came into force on September 21, 2018, a prosecutor has discretion to enter into a "remediation agreement" with an organization accused of certain economic crimes, including foreign corruption offences; the remediation agreement stays proceedings against the organization under certain conditions. This form of non-trial resolution, which has not yet been used in Canada, would include a statement of facts and admission of responsibility by the organization, the payment of a fine and an undertaking to put in place or enhance compliance measures.

As the report makes clear, non-trial resolution systems have become an essential tool for combating economic crimes. In this context, the new remediation agreement regime is an important addition to Canada's enforcement arsenal, including against foreign bribery.

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