Foreword

Twenty-odd years ago, when international conventions to prevent and combat corruption entered into force, it was clear that legal persons played an important role in the commission of corruption offences. Therefore, despite the ambivalence of a number of states with differing legal traditions and no history of sanctioning legal persons, it quickly became widely accepted that they too must be liable for corruption if there existed factors connecting them to any actions committed. This was not a smooth process: one of the last large states to adopt adequate legislation was Argentina and that was as recently as 2018.

It soon became evident that traditional judicial proceedings against legal persons frequently become plagued by severe and lengthy complications, which led practitioners to look at plea bargaining, a concept that until then had only been used in proceedings against natural persons. Regardless of the various names used in connection with legal persons – negotiated settlements, deferred prosecution agreements, non-prosecution agreements, non-trial resolutions – this concept became the go-to instrument in attributing liability to legal persons involved in foreign bribery. Of 890 foreign bribery cases successfully concluded since 1999, as many as 695 ended in negotiated settlements. Globally, this represents 78 percent of all cases, and in individual countries this percentage is even higher: in Germany and the United Kingdom 79 percent and in the United States 96 percent.

There are several reasons why this relatively new method of sanctioning legal persons is so popular, with the following being the most prominent: for legal persons, the increased likelihood of a trial and conviction for foreign bribery in an increasing number of states and the opportunity of obtaining a reduced sentence in the process of negotiated settlements; for states or prosecution services, the cooperation of companies and significantly reduced costs. Even though the basic aim of negotiated settlements should be to serve justice, increasing numbers of experts as well as representatives of civil society are becoming concerned about the law enforcement legitimacy in those processes for they see them as simply a tool for providing firms with a way of negotiating their way out of a real investigation.

Further to the basic differences between judgments returned in regular judicial proceedings and negotiated settlements (in contrast to settlements, trials may have some additional consequences: debarment, suspension, or dissolution of the company, registration in criminal records, etc.), there are now

considerable differences between negotiated settlements themselves, given the absence of international standards and different work practices in national jurisdictions. These differences have to do with the extent of prosecutorial discretion, the level of judicial oversight, what can be regarded as mitigating or even exculpatory circumstances, the position of the individual perpetrator, the level of transparency, etc. All this makes the results of negotiated settlements at the global level highly unpredictable, with some states resorting to them very rarely while others will not use them at all.

There is only one way to motivate more states to use negotiated settlements, to ensure that at least their most important characteristics are harmonized and to eliminate the shortcomings that bother experts and civil society: that is to establish adequate global standards. This was one of the reasons why, in 2018, as the OECD Working Group on Bribery began preparing for the review of its 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions, it included among the topics that required further work the establishment of basic standards for harmonizing the global use of negotiated settlements, or non-trial resolutions as they are called in 44 member states of this Group. The final text of these standards will be adopted in 2020, when the Working Group begins to monitor their implementation.

Whatever the content of these new standards, it is clear that they will only address the most important issues and they will do so in dry legal language. Therefore, because of the vastly different levels of knowledge and experience in this field across the various states, I wholeheartedly welcome the publication of *Negotiated Settlements in Bribery Cases: A Principled Approach*, which contains a number of top-drawer contributions, providing an extremely interesting and useful combination of the basic principles, theoretical knowledge, practical know-how, and a visionary outlook for the future. It presents the views and thoughts of the leading global authorities in this field, those who have left their mark in the resolution of a number of open issues in the fight against foreign bribery. These thoughts will serve as a useful tool, both to the OECD in preparing the first standards and to the academics and practitioners from the various states in using them, as well as providing the necessary breadth of knowledge for negotiated settlements to be finally recognized as a useful means of obtaining justice in proceedings against legal persons.

Let me conclude by thanking the creators of this book for having thought of it in the first place, by congratulating the contributors for the succinct and insightful presentation of their ideas, and by recommending that everybody who is or will be in any way involved in negotiated settlements read this book

as it will give them the necessary depth of knowledge on the subject to make their existing and future work that much easier.

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