

The 2021 OECD Recommendation Influences South African National Prosecuting Authority to Consider Non-Trial Resolutions in Corruption Cases

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The South African National Prosecuting Authority (“**NPA**”) recently confirmed that intends developing and implementing a policy for non-trial resolutions (“**NTR**”) particularly in matters involving foreign bribery and corruption. This follows a very important recommendation by the OECD titled the “2021 OECD Anti-Bribery Recommendation” (the “**OECD Recommendation**”). The NPA appears to have that adopting a formal NTR policy may be the most efficient means to combating foreign bribery and corruption in South Africa and repatriating assets (particularly those which are no longer situated with the borders of South Africa.

The OECD Recommendation defines NTRs as “*mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on negotiated agreements with a natural or legal person and a prosecuting or other authority.*”

The OECD Recommendation (which was first published in 2009) was updated to specifically take into account the OECD Convention on Combating of Foreign Public Officials in International Business Transactions (the “**Convention**”). South Africa adopted this Convention in 2007. An OECD study on the use of NTRs from 2019 indicates that NTRs are increasingly used in cases pertaining to foreign bribery amongst a number of OECD member states. The study noted that in countries belonging to the Convention, there were 890 cases of foreign bribery since 1999, of which 695 were concluded through NTRs. Among the largest users of NTRs were Germany, the United Kingdom and the United States.



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There are several well-established advantages in using NTRs. The use of a formal NTR policy would assist in reducing the time periods as well as the financial resources associated with investigating and prosecuting what can often be complex cases. Key impediments in cross border investigations from a prosecutorial perspective is the role of mutual legal assistance in light of the jurisdictional limits of national prosecuting agencies (such a securing witness or subpoenaing documents).

Respondents also benefit from such a process as there is the advantage of resolving an investigation, limiting resources in defending a complaint and bolstering a respondent's reputation in circumstances where a respondent is seen to be cooperating with an investigation. Respondents would typically also benefit from reduced penalties or sanctions for any wrongdoing than would otherwise be the case if the matter was fully prosecuted through the ordinary channels.

Key to such a formal NTR policy would be the extent to which a respondent is required to admit guilt. While there are several policy considerations which might require respondents to do so as a matter of principle, in practice an express and inflexible requirement that any party seeking to benefit from an NTR must admit liability is likely to be counterproductive. Firms may be far more inclined to fully defend the case against them if an admission of guilt is a formal requirement to utilising an NTR. If the primary policy objective is to repatriate funds, agencies might be better off entering into settlements that secure the expeditious return of funds than obtaining an admission of guilt.

The efficacy of an NTR framework, however, would therefore need to provide guidance as to who the relevant authority would be that is responsible for entering into settlements, how that authority intends exercising its discretion to use NTRs and what offences would be suitable for resolution by way of NTR as well as what the scope is to impose penalties and prison sentences.

To date, South Africa has no formal NTR policy or regime in place. There are, however, several instances where the NPA has informally utilised NTS. For example, in December 2020, the Special Investigating Unit (“SIU”) negotiated and concluded a settlement with ABB South Africa in terms of which ABB South Africa agreed to repay Eskom ZAR 1.57 billion in overpayments pertaining to contracts that were unlawfully awarded through alleged corrupt means during work at Eskom's Kusile project. This is no doubt largely inspired to deal with the overwhelming number of cases involving corruption and bribery in both the public and private sector in South Africa. As former NPA investigating directorate head, Hermione Cronje, has previously stated that “*There is certainly room to expand non-trial resolution options available to prosecutors in our efforts to advance accountability for state capture.*”

NTR's would therefore be a particularly useful tool, even if only used for a limited period of time in order to resolve investigations, seek to recover as much ill-gotten gains as possible and focus the investigative efforts on the most influential protagonists responsible for wrongdoing (which at a level of principle is not too dissimilar to the manner in which amnesty regimes are used). Efforts to detect and prosecute corruption and bribery if these efforts are combined with an effective reward for whistle-blower regime. Combining NTR's with a reward for whistle-blower regime may be an effective way of funding a sustainable whistleblowing regime.

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