Summary Submission to OECD Working Group on Bribery:
Italy's Phase 4 Monitoring and Peer Review

Concerns over recent judgments: Italy placing itself outside of the OECD Anti-bribery Convention

ReCommon (Italy)

Summary

1. Italy has a strong record in prosecuting international corruption. However, very few prosecutions have resulted in final convictions.
2. In its Phase 3 Monitoring Report under the OECD Anti-Bribery Convention, the Working Group noted: "Although 60 defendants have been prosecuted and 9 cases are under investigation, final sanctions were only imposed against 3 legal persons and 9 individuals, in all cases through *patteggiamento* [plea bargaining]."[1]
3. Recent trial judgments have seen defendants acquitted on grounds that are, in our view, inimical to the provisions of the OECD's Anti-Bribery Convention as interpreted in the official commentaries and by other recognised authorities.
4. These judgments have had the effect of making it nigh on impossible to obtain a conviction in Italy for international corruption. As such, they have rendered Italy a near-toothless signatory to the Convention. Italian companies may now confidently bribe abroad in the knowledge that a conviction is highly unlikely. A prime aim of the Convention - namely to establish an international level playing field for business transactions[2] [3]- could thus been undermined.

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1 OECD Working Group on Bribery, "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy", December 2011, p.5, https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Italyphase3reportEN.pdf

2 Pieth, M. "Introduction" in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.21.

3 Italy's Foreign Affairs Ministry is explicit as to the Convention's goals: "This is a reaction to widespread practices in certain areas which divert important resources intended to help developing countries in their economic and social growth, and which distort international competition between exporting companies on world markets." - https://ambzagabria.esteri.it/ambasciata_zagabria/it/informazioni_e_servizi/fare_affari_nel_paese/convenzione_ocse/

5. Concerns have also been expressed over the integrity of the judiciary itself. Allegations have been made that the oil multinational Eni Spa had privileged access to the trial judge who acquitted in the company (and other defendants, including Royal Dutch Shell) in a recent high profile corruption trial in Milan.[4] An investigation was carried out by the magistrates in Brescia but no grounds were found to prosecute[5]

6. The acquittal of Eni, Shell and other defendants in Milan is now subject to an Appeal. The Head of the Milan Judges has denied any impropriety by the Milan bench,[6] although he has reportedly confirmed that there were attempts to interfere with the trial.

7. Prosecutors who have taken high profile corruption cases have also found themselves targets of intimidation, surveillance and unwarranted investigations.

8. This Memorandum analyses the policy implications of a number of recent Italian judgments for the integrity of the Convention and sets out the allegations that have been made relating to alleged judicial compromise and attacks on prosecutors.

Recent Italian judgments: Moving away from the Convention

9. Art. 332 bis of Italian Criminal Code establishes the crime of international corruption (bribery of foreign officials) in Italian law, based on OECD Convention. In three recent judgments, the Italian courts have interpreted elements of the law in ways that move Italy away from – rather than towards – the spirit and purpose of the Convention.

10. The three cases are:

- **Saipem, Algeria**[7] [8]
  In December 2020, the Court of Cassation upheld the decision of the Court of Appeal to acquit Saipem, a former subsidiary of Eni Spa, for international corruption. The company had been convicted by the Court of First Instance for paying €198 million (approximately US$ 215.2 million) to various Algerian government officials to secure contracts awarded by Algeria's state-owned oil company. The payments were held to have been concealed through four sham contracts with an intermediary with little due diligence having been conducted no actual services rendered. Saipem was said to have mischaracterized the payments as legitimate fees. The Court of Appeal and the Court of

4 https://www.ilriformista.it/dietro-la-sentenza-su-eni-ce-la-guerra-tra-le-correnti-in-magistratura-204639/

5 "Eni, archiviato il fascicolo nato dalle parole di Amara sul giudice", Luigi Ferrarella, Corriere della Sera, 12.02.2021, page 21 (no digital version available)

6 https://www.ilfattoquotidiano.it/2021/03/29/eni-nigeria-dopo-le-polemiche-procura-e-tribunale-siglano-la-pace-con-un-comunicato-il-pm-non-vince-e-non-perde-i-processi/6147546/

7 https://www.saipem.com/en/media/press-releases/2020-12-14/saipem-court-cassation-rejected-appeal-general-public-prosecutor. See also, Saipem Interim Report, pp.118-119, https://saipem-cdn.thron.com/static/UGUEDX_06SaipemSem20Ing_N90KPQ.pdf

8 https://www.traceinternational.org/TraceCompendium/Detail/411?class=casename_searchresult&type=1

Cassation ruled that the company was not guilty, since the prosecutor had failed to establish proof of an agreement to bribe. The not guilty verdict was a full acquittal ("l'inesistenza dei fatti addotti").[9] Eni and its then CEO – as entities controlling Saipem at the time of the alleged crime - were acquitted in all courts.

- **Agusta/Finmeccanica, India**[10]
  In 2016, two executives of Agusta-Finmeccanica were convicted by the Court of First Instance in Milan on corruption charges related to a 560 million euro ($672 million) contract to supply a dozen helicopters to the Indian army. Finmeccanica's subsidiary, Agusta Westland, and a middleman pleaded guilty and were also convicted. The two executives were sentenced to jail. The convictions were upheld by the Court of Appeal but, subsequently, the Court of Cassation ordered a retrial. The convictions were overturned by the Appeal Court in 2018 and the Court of Cassation in 2019. Again, the issue of "proof of an agreement to bribe" was central to the decisions.

- **Eni, Nigeria**
  In 2017, Eni, Shell and other defendants were charged in Milan with international corruption relating to the acquisition of an offshore Nigerian oil bloc, known as OPL 245.[11] The companies were said to have paid $1.1 billion in bribes to government officials, including the then President of Nigeria, Goodluck Jonathan; the then oil Minister, Diezani Alison-Madueke; and the then Attorney General Mohamed Adoke. Two intermediaries - Nigerian Emeka Obi and Italian Gianluca Di Nardo - who had opted for a fast-track judgement were convicted in September 2018 and jailed for four year.[12] Their sentence has since been overturned on appeal, a decision that will not be taken to the higher Court of Cessation. In March 2021, following a full trial, the Court of First Instance in Milan acquitted Eni, Shell and other defendants were fully acquitted on the grounds that the underlying criminality was held not to have occurred . As in the other two cases, arguments over "proof" of an agreement were central.

11. In the interests of transparency, we should declare that the OPL 245 investigation was prompted by a complaint submitted to the Milan Prosecutors' Office by Re:Common, Global Witness and The Corner House. All three groups, together with HEDA, sought to be joined as civil parties to the prosecution but were refused permission.

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9 Under Italian law, there are basically two main forms of acquittal of the accused: 1) acquittal with full formula, which is pronounced pursuant to Art. 530, paragraph 1, of the Code of Criminal Procedure, when the fact does not exist, the accused did not commit it or when the fact does not constitute an offence because the subjective element of the offence is missing (i.e. wilful misconduct or guilt); 2) acquittal with dubious formula, which is pronounced pursuant to Art. 530, paragraph 2, of the Code of Criminal Procedure, when there is no, insufficient or contradictory evidence that the fact exists, that the accused did not commit the offence or that the offence was committed.

10 https://www.reuters.com/article/india-leonardo-helicopters-trial-idUSL5N22Y5WJ

11 The case file is available at: https://aleph.occrp.org/datasets/3766

12 https://www.reuters.com/article/shell-eni-nigeria-trial-idINS8N1SI006

12. Here we highlight three aspects of the judgments that seem to be directly conflict with the proper interpretation of a Party's obligations under the OECD Anti-Bribery Convention and its associated Recommendations, as established in the official commentaries and other authoritative texts:

i) **Proof of Explicit Agreement**:

Under Article 1 of the OECD Anti-Bribery Convention, Parties undertake to make it a criminal offence "intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."[13]

The Convention is itself silent on whether or not an explicit agreement to bribe must be proven for the offence to have been committed. The Official Commentary on the Convention, however, is clear that a Party to the Convention may not require proof of elements "beyond those which would be required to be proved if the offence were defined as in Article 1".[14]

In her detailed analysis of Article 1, [15] widely accepted as the most authoritative commentary available, international law expert Ingeborg Zerbes is explicit that an explicit agreement is not necessary to establish the offence. Indeed, in her view: "It would . . . contravene Article 1 of the Convention were commission of the offence of bribery in its later stages to depend on the existence of a bribery agreement" (emphasis added). [16]

Zerbes is also clear that any agreement may be tacit:

- "An offer is a declaration by the bribe-giver, on his own initiative, indicating his readiness to pay for the official act in question. By promising to do so, he makes a definitive commitment. The promise is given either of his own motion then it is at the same time an offer or he is prompted to make it by the public official. The offer and the promise can be made tacitly; they need not be explicit. In what circumstances such a tacit act can be said to have occurred is not, however, susceptible to objective general criteria. It rather depends on the social customs or habits of the locality. Neither offer nor promise requires an answer. The offence is complete as soon as it

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13 OECD Anti Bribery Convention, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

14 OECD, Commentaries on the convention on combating bribery of foreign public officials in international business transactions, Adopted by the Negotiating Conference on 21 November 1997, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, p.11.

15 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007.

16 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.116.

would be theoretically possible for the official to perceive that he or she is being offered or promised something in return for carrying out a specific official act, even if there were no such perception in fact" (emphasis added).[17]

- "Bribery is completed as soon as the object of the bribe, i.e. the public official, has perceived the existence of an offer or promise to bribe or as soon as it is *possible* for him to *obtain access* to the bribe. It is not important what he actually notices or does; the official does not have to perceive the advantage or obtain the benefit." (emphasis added).[18]

Indeed, Zerbes is clear that a requirement to prove an explicit agreement would run counter to the purpose of the Convention: ". . . an act of bribery committed on the spur of the moment, without prior agreement, must also be regarded as an offence; otherwise spontaneous gifts etc. such as cash pushed under the table, which are also obviously bribes, would escape punishment" (emphasis added). [19]

Nonetheless, the Italian Criminal Code (Art 322bis) has been interpreted to require proof of an agreement for bribery to be established by following the juridical approach under Italian law to the criminal offence of domestic corruption, which is based on an illegal contract between the private corruptor and the public official, including a promise and in some cases the actual payment of a bribe. [20] Moreover, the Courts have recently set the bar for establishing such proof extremely high. In overturning the initial conviction of Saipem for corruption in Algeria and confirming the initial acquittal of Eni, for example, the Higher Courts ruled it was not enough that a Saipem manager had testified that the top management of Saipem, the Algerian minister and the intermediary had met in a luxury hotel in Paris to agree on a bribe since the witness was not himself present and was considered "unreliable".[21] Nor was evidence that money had been

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17 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.113.

18 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.113.

19 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.110.

20 The requirement for an agreement arises from the linking of Article 322 to the provisions of Article 321 of the Criminal Code, which in turn refers to Articles 318. These articles punish the agreement and subsequent receipt of money or other benefits, by the public official, for the exercise of the function or for the adoption of acts contrary to the duties of office. See: Scollo, L., "I limiti sostanziali e processuali del reato di corruzione internazionale. Note a margine della sentenza della Corte d'Appello di Milano sul caso ENI-Saipem in Algeria", Giurisprudenza Penale Trimestrale 2, 2020, pp135-134, https://www.giurisprudenzapenale.com/wp-content/uploads/2020/07/gptrimestrale_2020_2.pdf

21 Scollo, L., "I limiti sostanziali e processuali del reato di corruzione internazionale. Note a margine della sentenza della Corte d'Appello di Milano sul caso ENI-Saipem in Algeria", Giurisprudenza Penale Trimestrale 2, 2020, pp135-134, https://www.giurisprudenzapenale.com/wp-

paid to an official sufficient to convict. What was required, the judges in the Appeal Court ruled, was "the rigorous demonstration of the conclusion of a corrupt agreement prior to the exercise of the functions subservient to private interests and having as its specific object the bribing a public official"[22] (emphasis added).

In domestic corruption cases, wiretaps or secretly recorded video are typically used to provide such evidence, although numerous convictions have been obtained on the basis of circumstantial evidence, such as the receipt of money. But obtaining such evidence in jurisdictions outside of Italy, particularly where the local anti-corruption enforcement agencies are uncooperative, is nigh on impossible.

Commenting on the Saipem Court of Appeal ruling, legal scholar Luigi Scollo states: "The Court seems to unequivocally downgrade the possible verification of the gift to a mere indication of the corrupt agreement which, therefore, must be proven in all its aspects. This approach, which derives from the configuration of the crime of international bribery as a subjective extension of the crime of domestic bribery, poses an obvious problem of proof, given that the transnational crime, by its nature, is committed at least in part outside the national borders, thus making it difficult, if not impossible, to reach proof of the agreement, its exact content and the persons between whom it occurred." [23]

The judges in the OPL 245 case took a similar approach to that of the Higher Courts in the Saipem case. In line with the case law established by the Court of Cassation, the judges ruled that "a central element"[24] of the offense of bribery is "an agreement between the private bribe-giver and the public official, prior to the performance by the public officials of the act contrary to their duties of office".[25]

The judges went on to state: ". . . the conduct implementing the agreement (the bribe to the public official and the unlawful act of the public official) represents an accessory element that deepens the harm caused by the crime, constituting, on the evidentiary level, proof of the agreement, but does not exhaust the proof of bribery, which remains based on the demonstration of the agreement between clearly identified parties. Therefore, even the proof of the bribe or the unlawfulness of the act committed by the official are not considered sufficient, even jointly, to prove the commission of the crime of domestic or international bribery,

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22 Judgment n. 286 of 15.01.2020, appeal proceeding number 2501/2019, Milan Court of Appeal, Judges Ondei, Puccinelli, Boselli, paragraph 6.2.1.1 p. 153

23 Scollo, L., "I limiti sostanziali e processuali del reato di corruzione internazionale. Note a margine della sentenza della Corte d'Appello di Milano sul caso ENI-Saipem in Algeria", Giurisprudenza Penale Trimestrale 2, 2020, pp135-134, https://www.giurisprudenzapenale.com/wp-content/uploads/2020/07/gptrimestrale_2020_2.pdf

24 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.57, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

25 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.56, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

because these are elements also found in other types of crimes.. Specifically, in our system, unlike in other legal systems, unlawful payments characterize three different crimes: corruption, bribery and extortion." [26]

Such rulings place Italy disastrously at odds with the aims of the OECD Convention and the Parties obligations under it. In effect, acts which are criminalised as bribery in other jurisdictions, such as the US, are not deemed bribery offences in Italy, although they may constitute other offences. The goal of establishing a level playing field for businesses internationally is therefore undermined.

We recommend that the Italy Phase 4 Monitoring Panel review the implications of recent Italian case law on the centrality of agreements to bribery. We would further recommend that Italy be encouraged to adopt legislation that enables conviction for bribery on the basis of a payment for corrupt purposes rather than requiring proof of an underlying agreement, on the model of the Foreign Corrupt Practices Act (1977). [27]

ii) Conflicts of Interest

The OECD's 2003 "Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service"[28] binds the Parties (which include Italy) to take account of its accompanying Guidelines. These clearly state that "Where a private interest has in fact compromised the proper performance of a public official's duties, that specific situation is better regarded as an instance of misconduct or 'abuse of office', or even an instance of corruption, rather than as a 'conflict of interest'" (our emphasis).

This guidance was not followed by the Milan Court of First Instance in its treatment of conflicts of interest that were critical to the prosecution case in the OPL 245 trial.

The judges did not dispute that the OPL 245 licence acquired by Eni and Shell had been awarded by former Nigerian Oil Minister Dan Etete to a company called Malabu Oil and Gas which he partly owned; nor that this constituted a conflict of interest.[29]

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26 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.57, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

27 Scollo, L., "I limiti sostanziali e processuali del reato di corruzione internazionale. Note a margine della sentenza della Corte d'Appello di Milano sul caso ENI-Saipem in Algeria", Giurisprudenza Penale Trimestrale 2, 2020, pp135-134, https://www.giurisprudenzapenale.com/wp-content/uploads/2020/07/gptrimestrale_2020_2.pdf

28 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0316

29 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.74, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.The judges state: "The issue of the lawfulness of the original award to Malabu arises because of the conflict of interest in which Dan Etete found himself at the time the license was issued. Indeed, in 1998, Etete was both Petroleum Minister and the hidden owner of Malabu, which clearly meant he was at the same time the grantor and recipient of the mining license."

The Prosecutor argued that the 1998 award therefore breached the Code of Conduct for Public Officials contained in the 5th Schedule to the Nigerian Constitution of 1979, rendering illegal both the negotiations conducted by the oil companies and the subsequent Resolution Agreement through which they purchased the licence. [30]

The judges rejected that view, ruling that the award was legal because neither party to the original award has sought to void it on the grounds that it was corruptly awarded.[31] Under Nigerian law, as interpreted by the judges, there was therefore no conflict of interest. In the words of Eni's expert witness Oditah, who is cited by the judges: "since the beneficiary has not raised an issue of conflict of interest, this constitutes confirmation that such conflict of interest does not exist." [32]

In treating the determinant of a conflict of interest as a matter of contract law, the Court is at odds with the OECD's firm guidance that conflicts of interest should be treated as instances of "misconduct or 'abuse of office', or even an instance of corruption".[33]

Taking account of the OECD Guidance, we would maintain that Etete's award of the licence to Malabu should properly be viewed as an act of corruption: it was therefore illegal regardless of whether or not the contracting parties had sought to void it. The judges were therefore also at odds with the Guidance (and the Convention) to argue that the defendants ENI and Shell were free to enter into the Resolution Agreements because the original 1998 award had not been voided on grounds of conflict of interest. The 1998 award was corrupt and the companies, as acknowledged by the judges, had a duty "not to commit or to contribute to the committal of unlawful acts".[34]

We recommend that the Italy Phase 4 Monitoring Panel examines the Italian court's treatment of conflicts of interest in international corruption case; and makes recommendations to ensure that Italian law is in line with the OECD 2003 "Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service".[35]

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30 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.74, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

31 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.76, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

32 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.75, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

33 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0316

34 Judgement, Official Translation, p.90. "Eni (like any other economic operator) is under an obligation not to commit or to contribute to the committal of unlawful acts"

35 Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0316

iii) Internal Controls, Due Diligence and Intention to Bribe

The 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions[36] (endorsed by Italy) stresses the need for companies to have "adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery".

Such internal controls – and accompanying due diligence practices – are considered essential to the prevention of bribery. Indeed, as Ingeborg Zerbes remarks in her authoritative commentary on Article 1 of the OECD Anti-bribery Convention, a failure to act on suspicions of bribery constitutes an offence in many jurisdictions:

> "Article 1 of the Convention requires a certain intention, whether the bribery is of a direct or indirect character. Notwithstanding the individual differences between national concepts, there is a certain amount of common ground between them: intention will be inferred wherever someone knows or has serious grounds to believe that his agent is committing bribery but does nothing to prevent it." [37]

In the OPL 245 case, the Prosecutor argued that internal Shell documents provided clear evidence that senior managers were aware that bribes would be paid. These included a briefing prepared by a senior manager, which stated that the "in country view" was that "the President is motivated to see 245 closed quickly - driven by expectations about the proceeds that Malabu will receive and political contributions that will flow as a consequence".[38]

The judges dismissed this evidence as non-probative, since it was considered to be based on "rumour".[39] Even were this true – which we would contest[40] – the "rumour" should have triggered due diligence

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36 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009, https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf

37 Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Officials", in Pieth, M, Low, L. A. and Cullen, P. (eds) The OECD Convention on Bribery: A Commentary, Cambridge University Press, 2007, p.121.

38 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.134, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

39 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.226, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf.

40 The judges dismiss the communication as "a rumour in the public domain", which is therefore "unusable by itself" as evidence. In fact, on a plain English reading, the use of the opening phrase "in country view" clearly establishes that the information is anything but a rumour. Used adjectively, according to the Oxford English Dictionary, the phrase "in country" means "operating within a country rather than from outside of it". Since the Briefing is a Shell document, the "operating" entity is clearly Shell. The only possible interpretation is that the author of the Briefing is referring to the views of Shell's OPL 245 team operating in Nigeria. To dismiss the information as "rumour", the Judges would therefore need to provide evidence that the information provided by the team to senior management in The Netherlands was mere gossip. This is clearly not the case. Indeed, the Judges rely on Shell communications as factual evidence elsewhere in the Judgment.

under Shell's internal controls, in line with the Best Practice guidelines of the 2009 Recommendation. It does not appear to have done so, nor was this failure considered by the judges, even though it was clearly at odds with the 2009 Recommendation. No consideration was also given to whether or not the failure to act to prevent the suspected bribery constituted "intention" to bribe, and thus, *pace* Zerbes's authoritative commentary, bribery under Article 1 of the Convention.

The judges' treatment of due diligence lacuna by Eni is also at odds with Italy's obligations under the Convention and the 2009 Recommendation. The judges acknowledge that Eni used an intermediary company, Energy Venture Partners, to negotiate with Dan Etete and Malabu. It was also accepted that no due diligence was undertaken by Eni on EVP, even though its mandate to negotiate had been signed by a convicted money launderer.[41] Nonetheless the Judges ruled:

> "However, all of those cited problems are only apparent ones. A first aspect to be considered is that the company procedures at the time required that due diligence be carried out on a contractual counterparty only when the agreement called for the establishment of a joint venture. Instead, the relationship with EVP involved simple intermediation and, consequently, the absence of due diligence was consistent with the guidelines then in force: Eni did not assume any independently actionable financial obligation towards EVP, but limited itself to agreeing to restrict its own negotiating activity."[42]
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> This very partial reading of the due diligence requirements that arise from the obligation to prevent bribery, as laid out in 2009 Recommendation, sets a low bar for the internal controls that Italian companies put in place, jeopardising movement towards a level playing field internationally and further moving Italy away from fulfilling its obligations under the Convention.
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> Most egregious of all, however, is the judges' ruling that suspicions of illegality should not preclude companies from entering into a deal; and that companies are under no obligation to conduct due diligence on a government's likely use of any monies received. Discussing Eni and Shell's relationship with Dan Etete (to recall: the former oil minister who awarded OPL 245 to his own company and who had been convicted of money laundering over another deal), the judges opine:
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> > "The consequence of recognizing Malabu as the legitimate licensee was that any economic operator interested in

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41 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.222, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf: "Another anomaly allegedly consists in Eni having signed an exclusive agreement with EVP for the negotiations. That agreement is allegedly suspicious (i) because EVP had not undergone any prior due diligence, (ii) due to the objective limitation on its own negotiating freedom that Eni deemed acceptable, and (iii) because the authorisation of EVP to represent Malabu had been proven only on the basis of presentation of a mandate signed by a previously convicted individual, such as Etete."

42 Judgment No. 3055 OF 3.17.2021, Milan Court of First Instance, per translation on Eni's website, p.222, https://www.eni.com/assets/documents/documents-en/opl-245-full-decision.pdf

> acquiring the licensee rights necessarily had to deal with Malabu and its shareholders. Therefore, the legal basis of the Prosecutor's statement according to which 'As early as 2007 Eni, and Shell even earlier, but as early as 2007 Eni had all the information it needed to avoid even just sitting down with Dan Etete', is not clear. Not 'sitting down with Dan Etete' would have meant giving up in advance the opportunity to negotiate an exploration license that a democratically elected government had recognized - rightly or wrongly - as being held by Malabu. The Prosecutor's thesis would have imposed upon Eni a sort of self-limitation of its freedom of action which has no basis in any legal norm. It is therefore incomprehensible why the Italian company should have given up pursuing its corporate objectives. Further, it cannot be argued that the past events of OPL 245 had created a situation of suspicion due to the presence of a person of dubious reputation such as Dan Etete and that, for this reason alone, Eni should have refrained from negotiating the acquisition of the license. In this regard, it is worth remembering that any suspicious situations due to the geopolitical context of reference do not in themselves constitute an impediment to the performance of economic activities in developing countries by international economic operators. In other words, Eni (like any other economic operator) is obliged not to commit or be complicit in unlawful acts, but this does not place it under any all-encompassing obligation to refrain from acting whenever there is even a generic doubt that third parties may independently behave in a manner which does not comply with the law. Nor, for that matter, are Eni and Shell required to ensure that the choices made by the Nigerian government best serve the interests of local communities. Indeed, like any economic operator, oil companies legitimately pursue aims of economic profit and their freedom of action, as far as it is relevant here, is limited only by the requirement to comply with criminal law."

The judges' position seems entirely at odds with the primary purpose of the Convention, which is to prevent bribery, and the 2009 Recommendation, which is intended to put in place the internal controls to accomplish this.

The fact that Etete had awarded himself the OPL 245 bloc when he was oil minister was more than enough to trigger suspicions of illegality in any sale of OPL 245 that Malabu might enter into. Neither Eni nor Shell should have "sat down with Etete" until such suspicions were allayed through thorough due diligence – particularly since the company's own due diligence consultants had red flagged concerns over Etete.[43] Moreover, it was incumbent on both companies to conduct similar due diligence to ensure that any monies that were likely to be received by the Government of Nigeria would not be misappropriated, particularly given intelligence from managers that bribes would be paid. Indeed, Italy

43 The Risk Advisory Group, First Report, 2007, https://aleph.occrp.org/entities/63100432.c2704e17cd1f51d8e38cfe74c6b823ede128b643 |The Risk Advisory Group, Third Report, 2010, https://aleph.occrp.org/entities/63100529.ea4e4a2ea7aef680a3a7e094b42f80f49d62299d

itself has also stressed that a purpose of the Convention is to prevent practices "which divert important resources intended to help developing countries in their economic and social growth"[44].

There is also a concern that, in giving primacy to the economic interests of the companies, the Judges' ruling breaches Article 5 of the Convention, which prohibits consideration of economic considerations being a factor in corruption investigations and prosecutions.

We recommend that the Italy Phase 4 Monitoring Panel examines the treatment by Italian courts of the due diligence obligations that arise from the OECD Convention and the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions;[45] makes recommendations to ensure that Italian law is in line with the Convention and the 2009 Recommendation; and examines whether the OPL 245 ruling breached Article 5 of the Convention.

Concerns over attacks on prosecutors and alleged judicial compromise

13. Following the acquittal of Eni, Shell and other defendants in the OPL 245 case, the Prosecutors have been subject to a number of attacks, which, taken in the round, seem to strongly suggest that the Italian political establishment is intent on weakening Italy's enforcement of the OECD Convention and deterring corruption prosecutions through the outright intimidation of prosecutors.

    Immediately following the acquittal, the Milan Public Prosecutors Office faced concerted criticism in the media that public money had been wasted,[46] even though Italy is obliged under the Convention to prosecute cases where there is evidence of corruption, which was confirmed by the judge in the preliminary hearing.

    The attacks have now escalated from general criticism of the Prosecutors Office to charges being laid against the two Prosecutors in the trial – Dr Fabio de Pasquale and his colleague Sergio Spadaro.[47]

    Both are accused of withholding items of evidence from the defence: namely, a video tape and a draft report of a separate investigation

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44 https://ambzagabria.esteri.it/ambasciata_zagabria/it/informazioni_e_servizi/fare_affari_nel_paese/convenzione_ocse/

45 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009, https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf

46 https://www.lastampa.it/cronaca/2021/09/22/news/eni-nigeria-assolti-in-appello-gli-intermediari-non-c-e-prova-della-corruzione-1.40730240/

47 https://www.corriere.it/cronache/21_ottobre_08/loggia-ungheria-davigo-de-pasquale-verso-processo-e39b1568-27b1-11ec-8e22-571cfe84393b.shtml

by the Guardia di Finanza. The allegations seem absurd. The court record of the Milan trial of Eni and Shell – as well as evidence seen by us from other proceedings clearly shows that a transcript of the video had been in Eni's hands for years. As to the Guardia di Finanza file, it is said to have contained privileged information which it would have been illegal for de Pasquale and Spadaro to disclose. It was within their discretion not to do so – and their decision was entirely proper. There are widespread concerns that the prosecution is motivated by a political desire to remove de Pasquale, who previously convicted two Italian Prime Ministers of corruption – Bettino Craxi and Silvio Berlusconi - as the lead prosecutor in the Appeal against the acquittal of Shell, Eni and other defendants. These concerns should be set in the context of press allegations that, if upheld, cast grave doubts on the integrity of the OPL 245 judgment.

Concerns over the probity of the trial first surfaced in February 2020 when de Pasquale sought to admit a statement by Piero Amara, a former external lawyer for Eni managers, that he was told that Eni had conducted surveillance of the prosecutors, key witnesses and the judges in order to discredit witnesses or gain an advantage in the proceedings. The judges refused to admit the evidence.

It has also been reported that Amara alleged that Eni's lawyers had "preferential" access to OPL 245 judges.[48] This is denied by Eni. The Brescia prosecutor dismissed the allegations after an investigation.

The Head of the Milan Public Prosecutors Office, Francesco Greco, has confirmed that de Pasquale and Spadaro were subject to "intimidation" and that there had been attempts to "delegitimise the Milan prosecutor"[49].

The Head of Milan's judges, Roberto Bichi, has also confirmed that there were attempts to influence the OPL 245 trial[50].

We recommend that the Italy Phase 4 Monitoring Panel seek an explanation as to the motivations for the prosecution of de Pasquale and Spadaro; and inquires into the alleged tainting of the OPL 245 trial.

48 https://www.ilriformista.it/dietro-la-sentenza-su-eni-ce-la-guerra-tra-le-correnti-in-magistratura-204639/

49 https://www.ilfattoquotidiano.it/in-edicola/articoli/2021/03/25/il-procuratore-greco-sostegno-ai-pm-attaccati-inchiesta-dovuta/6144778/

50 https://www.ilfattoquotidiano.it/2021/03/29/eni-nigeria-dopo-le-polemiche-procura-e-tribunale-siglano-la-pace-con-un-comunicato-il-pm-non-vince-e-non-perde-i-processi/6147546/