Additional submission
to the OECD Working Group on Bribery
Italy's Phase 4 Monitoring and Peer Review

The following submission builds on the one filed by ReCommon, HEDA and Corner House in February 2022 in the context of the upcoming Phase 4 Monitoring and Peer Review under the OECD Anti-Bribery Convention.

Italy has a strong record in prosecuting international corruption. However, very few prosecutions have resulted in final convictions.

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]

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.

The Opl245 corruption case involving Eni and Shell in 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.[2] 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 years.[3] Their sentence has since been overturned on appeal, a decision that was not taken to the higher Court of Cessation. In March 2021, following a full trial, the Court of First Instance in Milan fully acquitted Eni, Shell and other defendants on the grounds that the underlying criminality was held not to have occurred. As in the

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

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

other two cases, arguments over “proof” of an agreement were central. An appeal requested by the public prosecutor of Milan and the Federal Republic of Nigeria as civil party to the case is pending.

The Department of Justice and the Security and Exchange Commission investigated the case too. However once prosecution developed in Milan Court, US authorities opted for closing the investigation[4]. This does not mean that they could not in the future reopen the case or sanction the companies involved – listed in Wall Street – for the same crime[5].

Given the controversy about the case, currently also in Abuja Court, commentators have wondered whether the case, if prosecuted in a US Court, would have led to an outcome different from the first instance judgement in Milan.

Therefore it is worth comparing case-law in the US and jurisprudence in Italy concerning the international corruption crime and how the spirit and the letter of the OECD Anti-Bribery Convention have been interpreted by courts in the two countries in the last years.

As already raised with the Working Group on Bribery, three aspects of recent judgments by Italian Courts on international corruption cases – as detailed in ReCommon, HEDA and Corner House submission - seem to be directly in 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:

1. Proof of explicit agreement;

2. Conflicts of interest;

3. Internal controls, due diligence and intention to bribe.

Below follows a short comparison between what emerges from Italian case-law about the interpretation of provisions under the Convention against what has been the practice of US courts on the same three issues mentioned above.

1. Proof of explicit agreement

1a. Italy

The Italian Criminal Code (Art 322bis) has been interpreted by Milan judges 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. [6] Very often

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4 https://www.eni.com/content/dam/enicom/images/canali/media/5%20copy.jpg

5 https://www.reuters.com/article/us-eni-nigeria-doj/us-doj-says-eni-probe-not-closed-for-lack-of-evidence-could-re-open-idUSKBN1WH250

6 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

middlemen are directly involved in alleged corrupt agreements, both in the host State as well as acting on behalf of the corporations. The role of these third parties further raises the threshold for proving the crime so that proof that payments by corporations reach intermediaries even with the intention of influencing decisions by public officials is not regarded as sufficient evidence to prove the corrupt agreement if it is not established that through this the public official was fully aware and supportive of the corrupt deal; similarly the detection of the payment by the intermediary to the public official is not sufficient evidence when the corrupt agreement involving the foreign corporation is not proven.

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".[7] Nor was evidence that money had been 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"[8] (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.

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"[9] 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".[10]

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

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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

7 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

8 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

9 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

10 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.

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, 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." [11]

1b. United States

The federal anti-bribery statute and the related one outlawing extortion make it a crime for a public official to request or receive "anything of value" in return for doing or refraining from doing an official act and for an individual or firm to offer or pay an official for taking or not taking a decision.[12] The nub of the crime of bribery is the existence of a *quid pro quo.* An agreement that in return for a "quid," the official will provide a "quo."

The prosecution need not produce the text of an agreement to win a conviction. As Supreme Court Justice Anthony famously observed, were that the case "the law's effect could be frustrated by knowing winks and nods."[13] It is enough if an agreement can be inferred from the circumstances: the closeness in time between a payment and an official act, irregularities in the procedures followed in taking the act, and similar facts suggesting the official accepted money or something of value in return for doing or not doing something.[14]

Where the alleged bribe takes the form of a campaign contribution to the official, the courts do demand more evidence than in other cases, as for example those where money was paid in return for a public contract. The reason is that campaign contributions are not only permitted by American law but are a constitutionally protected form of a free speech. Hence, a generalized expectation that an official will be "supportive" or "look with favor" on the contributor's wishes will not suffice to sustain a charge of bribery. Rather, as the Supreme Court ruled in upholding a conviction for extortion, the prosecution must prove beyond a reasonable doubt the contribution was made "in return for an explicit promise . . . to perform or not to perform an official act."[15]

In *United States v. Siegelman*,[16] defendants appealed from a jury verdict finding that a campaign contribution was in fact a bribe. The grounds were that the prosecution

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11 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.

12 The principle antibribery statute is 1U8 U.S.C. § 201. Extortion is criminalized by 18 U.S.C. § 1851.

13 Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

14 See for example United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998); United States v. Massey, 89 F.3d 1433 (11th Cir. 1996); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990).

15 McCormick v. United States, 500 U.S. 257, 273 (1991).

16 640 F.3rd 1159 (11th Cir. 2011).

had failed to produce an *express* agreement, oral or written, showing the contribution was made in return for an official act. The appeal failed, the 11th Circuit Court of Appeals holding that the requirement of an *explicit* agreement in campaign contribution cases does not mean the agreement must be *expressly* stated. It was enough if from defendants' conduct, the jury could infer an *explicit* agreement: "Explicit… does not mean express."[17]

Conclusion

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 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.

2. Conflicts of Interest

2a. Italy

Milan 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.[18]

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. [19]

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.[20] 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." [21]

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17 Id. at 1171.

18 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."

19 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.

20 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.

21 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.

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".[22]

2b. United States

Under federal law it is a crime for an executive branch employee to participate "personally and substantially" in a "particular" government matter that will affect his own financial interests, as well as the financial interests of a spouse or minor child; a general partner; an organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person with whom the official is negotiating for or has an arrangement concerning prospective employment.[23] Certain other financial conflicts of interest and conflicts arising from friendships or other non-financial ties that could affect an official's judgement are ethics violations that can lead to suspension from service, demotion, and other administrative penalties.[24]

In addition, if an official awards a contract to a company in which he or she has an undisclosed interest, the government is entitled confiscate the corrupt employee's interest in the firm. The leading case is a 1909 Supreme Court decision where a U.S. army officer was found to have corruptly steered a dredging contract to a firm in which he had a secret interest. Upon conviction the Army was awarded the stock the employee held in the company.[25] As the D.C. Court of Appeals explained in a recent case, the rationale is straight forward. Justice does not permit a public official to "retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent." Any benefit so taken "without a full disclosure. . . is a betrayal of his trust . . . and he must account to his principal for all he has received."[26]

Conclusion

Taking account of the OECD Guidance, it is likely that a US Court 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 Milan 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 same Milan judges, had a duty "not to commit or to contribute to the committal of unlawful acts".[27]

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22 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

23 18 U.S. Code § 208.

24 These ethics violations are found in Standards of Ethical Conduct for Employees of the Executive Branch, codified at 5 C.F.R. §s 2635.401 - 2635.503

25 U.S. v. Carter, 217 U.S. 286 (1910).

26 U.S. v Kearns, 595 F.2d 729 (D.C. Cir. 1978).

27 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"

3. Internal controls, due diligence and intention to bribe

3a. Italy

In the OPL 245 case, the Milan 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".[28]

The judges dismissed this evidence as non-probative, since it was considered to be based on "rumour".[29] Even were this true – which we would contest[30] – the "rumour" should have triggered due diligence 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, bribery under Article 1 of the Convention.

The Milan 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.[31] 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,

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28 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.

29 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.

30 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.

31 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."

but limited itself to agreeing to restrict its own negotiating activity."[32]

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:

"The consequence of recognizing Malabu as the legitimate licensee was that any economic operator interested in 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."

3b. United States

Since December 2008 any firm awarded a federal contract in the amount of $5 million or more and which requires at least 120 days to perform must establish within 90 days of the award an anticorruption compliance program that:

i) contains a written code of business ethics and conduct,
ii) trains employees on ethics and compliance periodically, and
iii) has an internal control system able to discover improper conduct.

The rules also require that the program be overseen by someone of "sufficiently high level [with] adequate resources to ensure [its] effectiveness."[33] After a review found government agencies were not systematically checking their contractors for compliance, a rule was added requiring the government employee responsible for contract execution to verify that the contractor had an anticorruption compliance program in place.[34]

In addition to requiring federal contractors to have an ethics and anticorruption compliance program, the federal government provides a very strong incentive for other firms to have such a program. In determining the penalty to impose on a corporation for a violation of a criminal law, the guidelines judges are bound to consult in determining a sentence direct that when the defendant is a corporation,

32 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

33 FAR § 52.203-13, Contractor Code of Business Ethics and Conduct.

34 FAR § 42.302(a)(71).

the court examine whether it has an "effective compliance and ethics program."[35] The existence of such a program can reduce the fine or other sanction the court would otherwise levy.

A notable case involved the prosecution for foreign bribery of an employee of the investment bank Morgan Stanley. While ordinarily the Department of Justice prosecutes the corporate employer of a bribe payer on the grounds the employer failed to adequately supervise its employee, the Department declined to prosecute Morgan Stanley, concluding that it had that it had "constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials."[36]

Conclusion

A US Court would have hardly endorsed the very partial reading by Milan judges 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. 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.[37] 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 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"[38].

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.

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35 United States Sentencing Commission, *Guidelines Manual 2021*, p. 509, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf

36 U.S. Department of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA. April 12, 2012, https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required

37 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

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