

## SUBMISSION CONCERNING ITALY TO THE EUROPEAN COMMISSION'S EU RULE OF LAW REPORT 2023

19<sup>th</sup> January 2023

Dear Sir/Madam,

**Re: Italy's Non-Compliance with OECD Anti-Bribery Convention: A threat to the Rule of Law**

The fight against corruption forms one of the four pillars of the European Commission's Rule of Law Framework.<sup>1</sup>

We therefore write to draw your urgent attention to the recent findings of the OECD Working Group on Bribery that Italy is no longer in compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [“**the Convention**”]. The Working Group acts as guardian of the Convention, which underpins national anti-bribery legislation throughout the European Union.

Italy's non-compliance, reflected in three recent court judgments, undermines the fight against corruption not only in Italy but internationally. Bluntly stated, it poses a major threat to the Rule of Law throughout the European Union.

We therefore request that the Commission take immediate action under the Rule of Law Framework by initiating a dialogue with Italy in order to address its non-compliance with the Convention.

Our detailed concerns are set out below

**The OECD Working Group on Bribery's Peer Review of Italy**

In October 2022, the OECD Working Group on Bribery adopted its Peer Review of Italy's implementation of the OECD Anti-bribery Convention.<sup>2</sup> Germany was a member of the Peer Review team.

The Peer Review was excoriating, concluding that Italy was no longer in compliance with the Convention. The Review States: “The Working Group indeed considered in the past that Italy's foreign bribery offence complied with the

---

1 European Commission, 2022 Rule of Law Report, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en)

2 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

Convention. But this was before the spate of recent acquittals that created jurisprudence on the offence”.<sup>3</sup>

Three recent rulings were singled out as being of particular concern, namely:

- The acquittal of two executives of Agusta-Finmeccanica for bribery in India (referred to in the Review as “the Helicopters [India] case”):
- The Acquittal of Saipem (a former subsidiary of Eni Spa) for securing contracts through bribery in Algeria (the “Oil and Gas [Algeria] Case”): and
- The acquittal of Eni Spa, Royal Dutch Shell and others for obtaining the OPL 245 oil bloc in Nigeria through bribery (the “Oil Prospecting [Nigeria] Case”).

In the “Oil Prospecting [Nigeria] case”, the Working Group expressly determined that elements of the Italian acquittal judgment did “not conform to the Convention”.<sup>4</sup> The Working Group was particularly critical of the Milan Court’s ruling that the companies could not be liable for foreign bribery if there was a corrupt agreement between Nigerian officials and the former oil minister who held the oil license rather than between the companies and the Nigerian officials – even if Shell and Eni knew that the bribes would be paid.<sup>5</sup>

The Working Group also expressed “extreme concern” over the “systematic rejection of circumstantial evidence”<sup>6</sup> by judges in these cases, making convictions nigh on impossible. The examiners criticized the Italian Courts for examining “each piece of circumstantial evidence in isolation”,<sup>7</sup> with “arguably speculative and uncorroborated”<sup>8</sup> explanations then being put forward which do not stand up to scrutiny if the facts are considered as a whole rather than separately.

One consequence, evident in the “Oil and Gas [Algeria] case”, is that “large opaque payments to intermediaries have been rejected as evidence of foreign bribery”.<sup>9</sup>

The “Oil Prospecting [Nigeria] case” is also cited as illustrative of the Working Group’s concerns. The passage merits quoting in full:

“Half of the purchase money was laundered through multiple cash transfers to currency exchanges and then distributed, including to one official to purchase a USD 4.5 million property. It was nevertheless found that the property was compensation for legal services rendered earlier by the official when he was a practicing lawyer. However, the judgment did not refer to any documentary evidence (e.g. invoices) of the services rendered or the debt

---

3 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, paragraph 116, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

4 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 128, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

5 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 127, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

6 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 103, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

7 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 103, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

8 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 108, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

9 OECD, Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy, Commentary below paragraph 104, <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>

owed. It is also undoubtedly odd to pay for legitimate legal services with a sale of real property funded by numerous small cash payments cycled through money exchanges. A single direct cash transfer from the debtor to the official would have been more logical. The debtor in this case certainly had the means to pay the official directly: he had just pocketed USD 400 million from the sale of the Oil Prospecting License. In the same case, while internal company emails contained language suggestive of bribery, the reasons for the acquittals repeatedly adopted exculpatory interpretations of the correspondence."

In sum, the interpretations of Italian law that require explicit proof of an agreement to bribe have placed Italy at odds with the OECD Convention. One consequence is that Italian companies (and companies working in joint venture with Italian companies) are now far less likely to be convicted for bribery than their non-Italian counterparts.

### **EU-wide Impacts of Italy's Non-Compliance**

Italy's removal of itself from compliance with the OECD Convention poses a major threat to the Rule of Law not just in Italy but more widely throughout the European Union.

Not only has Italy's non-compliance resulted in acquittals which, in other EU jurisdictions, would likely have resulted in a conviction; but, because of double jeopardy rules, those acquittals have prevented other countries taking action to prosecute bribery. Following the acquittal in Italy of Shell and Eni in the OPL 245 case, for example, the Dutch Prosecutors Office has now dropped an investigation into Shell over the alleged bribery in Nigeria: this despite the Dutch Prosecutors Office having told Shell in March 2018 that it had evidence to prosecute the company and Shell itself self-reporting alleged illegal conduct related to an oil deal in Nigeria by one of its managers.

Beyond its impacts on the Rule of Law, Italy's non-compliance with the Convention also places companies from other Member States at a disadvantage. The level playing field that the Convention seeks to establish for companies operating internationally no longer exists, creating pressure for other Member States to weaken their enforcement of anti-corruption legislation.

In addition, Italy's non-compliance can only serve to discredit the OECD Convention as an effective anti-bribery instrument, thus undermining the standing of anti-bribery legislation in many EU jurisdictions. In the "Oil and Gas (Algeria) case", courts in Algeria (which is not a party to the OECD) have convicted an official of receiving bribes to award a contract to Eni's subsidiary<sup>10</sup> while Italy (which is a party) has acquitted the company of international corruption. The Italian judgment is clearly to the detriment of the international fight against corruption. A similar outcome, which can only serve further to undermine the credibility of the Convention, may soon emerge in Nigeria, which is prosecuting Shell and Eni over the "Oil Prospecting (Nigeria) case".

## **Italy's Failure to Act**

Regrettably, Italy has conspicuously failed to act on the findings of the OECD Peer Review.

In November 2022, for example, the Italian Court of Appeal refused to uphold an appeal by the Federal Republic of Nigeria, acting as a civil party, against the acquittal of Eni and Shell in the OPL 245 case. Given that this decision was made after the OECD Working Group had reported, it was open to the Court of Appeal to take on board the concerns raised by the Peer Review team through a ruling that (unlike that of the Milan First Instance Court) was in line with the OECD Anti-Bribery Convention. That the Court of Appeal did not do so is an indictment of the Italian judiciary's willingness to acknowledge (let alone address) the growing gaps between Italian jurisprudence and the OECD Convention. That unwillingness is further underscored by the hostile response of the Associazione Nazionale Magistrati to the Peer Review of Italy.<sup>11</sup>

## **Requested Action by the Commission**

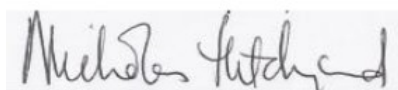
In light of the above, we request that the European Commission takes immediate steps to address the systemic threat that Italy's non-compliance with the OECD Anti-Bribery Convention poses to the Rule of Law.

We would therefore urge the Commission forthwith to initiate dialogue with Italy under the procedures laid out in the Rule of Law Framework.<sup>12</sup>

Yours Sincerely



*Antonio Tricarico*  
Programs Director  
ReCommon APS  
Italy



*Nicholas Hildyard*  
Director  
Corner House  
England



*Olanrewaju Suraju*  
Chairman  
HEDA Resource Centre  
Nigeria

*Please kindly reply to:*

Antonio Tricarico  
Programs Director  
ReCommon  
Via dei Sardi, 28  
00185 Roma  
Italy  
[atricarico@recommon.org](mailto:atricarico@recommon.org)  
mobile: +39.328.8485448

<sup>11</sup> Associazione Nazionale Magistrati , <https://www.associazionemagistrati.it/doc/3866/lanm-sul-phase-4-report-dellocse-in-tema-di-lotta-alla-corruzione.htm>

<sup>12</sup> European Commission, Rule of Law Framework, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en)