

Italy hauled over the coals by OECD

OPL 245 judgment not compatible with OECD Anti-Corruption Convention

The Organisation for Economic Co-Operation and Development (OECD) has strongly condemned Italy for recent judgments that now place Italy at odds with the OECD's Anti-Bribery Convention.

In an excoriating report [1] published today, the OECD's Working Group on Bribery, which acts as guardian of the Convention, concludes: "The Working Group indeed considered in the past that Italy's foreign bribery offence complied with the Convention. But this was before the spate of recent acquittals that created jurisprudence on the offence."

In the recent trial of oil giants Shell and Eni, who were controversially acquitted in 2021 of bribing Nigerian officials to obtain a licence to the OPL 245 offshore oil field, the Working Group explicitly states that elements of the judgment did "not conform to the Convention"

The Working Group was particularly concerned that the court had held that the companies could not be liable for foreign bribery if the bribes were paid as a result of a corrupt agreement between former oil Minister Dan Etete (who held the license that the companies sought to purchase) and Nigerian officials.

The Working Group also expressed "extreme concern" over the "systematic rejection of circumstantial evidence" by judges in a number of foreign bribery cases, including the OPL 245 case, making convictions nigh on impossible.

Describing the reasoning in these cases as demonstrating a "troubling pattern", the Working Group tears into the practice of examining "each piece of circumstantial evidence in isolation", with "arguably speculative and uncorroborated" explanations then being put forward which do not stand up to scrutiny if the facts are considered as a whole rather than separately.

Again, the OPL 245 case is cited as illustrative of the Working Group's concerns: "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 practising lawyer. However, the judgment did not refer to any documentary evidence (e.g. invoices) of the services rendered or the debt 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 licence. 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."

The Working Group also warns that interpretations of Italian law that require explicit proof of an agreement to bribe (for example, through video evidence) have placed Italy at odds with the OECD Convention.

The OECD recommends that Italy should change its laws to bring them back into line with the OECD Convention and provide training for judges to acquaint them of the Convention's provisions.

"The OECD report is utterly damning" says Olanrewaju Suraju of HEDA, a Nigerian human rights and anti-corruption group. "The acquittal of Shell, Eni and other defendants in Italy must now be in doubt. Instead of upholding the OECD Convention, the judges shredded it".

"The OECD vindicates our warning that Italy moved away from the OECD Convention", says Antonio Tricarico of the Italian non-governmental organisation ReCommon. "It is a clear slap in the face of Italian judges and the Appeal Prosecutor dealing with the Opl245 case. Italy's Supreme Council of Magistrates and Italy's Minister of Justice should urgently open an investigation on their wrongdoing to restore Italy's credibility internationally"

"OECD Peer reviews are taken very seriously", says Nicholas Hildyard of the UK group Corner House Research. "Italy has effectively been put into special measures by the OECD. Urgent action is required if its credibility is to be restored. A first step would be to halt the malicious investigations into the prosecutors who sought to hold Shell and Eni to account." [2]

Editors 'notes

1. The OECD report (Implementing the OECD Anti-Bribery Convention: Phase 4 Report – Italy) is available at <https://www.oecd.org/daf/anti-bribery/italy-phase-4-report.pdf>
2. Dr Fabio de Pasquale and his colleague Sergio Spadaro, who prosecuted the OPL 245 case in Milan, have found themselves targets of intimidation, surveillance and unwarranted prosecution. Both are accused of withholding items of evidence from the defence: namely, a video tape and a draft report of a separate investigation by the Guardia di Finanza. The allegations seem absurd. The court record of the OPL 245 trial 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. There are widespread concerns that the prosecution was 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. In the event, he was replaced: and the new prosecutor dropped the Appeal.