

Italian High School of the Judiciary
**The Fight Against Foreign Bribery:
Tools, Issues and Perspectives for a Reform**

Naples, 3 and 4 July 2023

On 3 and 4 July 2023, a training conference entitled “The Fight Against Foreign Bribery: Tools, Issues and Perspectives for a Reform” (FP 23006) was held in Naples at the local headquarters of the *Scuola Superiore della Magistratura*.

The initiative is part of Italy's response, due in October 2024, to the Recommendations adopted in October 2022 by the Working Group on Bribery (WGB), in the framework of the monitoring of the OECD Anti Bribery Convention (ABC); in particular, Recommendation No.10(a) requires Italy to provide training and awareness-raising to judicial authorities on the treatment of circumstantial evidence in foreign bribery cases.

The WGB Report points out alleged critical aspects of the Italian legislation also in its application, *inter alia* as regards the standard of proof for foreign bribery, with specific reference to the atomistic rather than holistic assessment of circumstantial evidence, and the need to prove the bribery agreement in all its aspects.

As a result of the intense and interactive exchange of opinion held all along the seminar, in plenary session and in the working groups, among distinguished experts and selected participants, the following shared points of reflection were outlined by the Coordinators of the course:

1. From a legislative perspective, progresses of Italian legislation were positively assessed; in particular, the recent implementation (through Legislative Decree No. 24 of 10 March 2023, OJ 15 March 2023), of Directive 2019/1937 on whistleblowing, which also allows to overcome some critical issues on the subject pointed out in the WGB report itself.
2. Turning then to the issues relating to the standard of proof, it does not appear likely to be questioned - together with the fundamental principles of the autonomy and independence of the judiciary - the criterion for the evaluation of circumstantial evidence expressed in Art. 192, para. 2, CCP and the rule of judgment provided for in Art. 533 of the same Code; these rules are indeed fundamental principles of the Italian legal system, of application in trials against any form of crimes, including organised crime and terrorism. In fact - despite the peculiar features of the offence of foreign bribery, within the broader category of economic and financial offences, and the critical issue related to the gathering of evidence for such crimes - the uniform nature of criminal jurisdiction precludes the adoption of different criteria for assessing the evidentiary material depending on the category of the offence.
3. A study on the evaluation of circumstantial evidence and evidentiary standards in the field of foreign bribery conducted among WGB members could be very useful in order to try to bring out homogenous and dishomogeneous situations and possible good practices.
4. Among the critical issues raised in the Phase 4 report is the need to prove the corrupt agreement and the actual destination of the money (or other utility) despite the fact that the ABC does not explicitly require the *pactum sceleris* (i.e. the agreement among the briber and the bribed person). However, it has been observed that the necessary presence of a corrupt agreement, even though not expressly provided for in the Convention, clearly emerges from the description of the conduct subject to the incrimination and constitutes - in the Italian legal tradition as well in other Countries - a fundamental requirement of the offence of corruption which, by nature, requests the participation of two persons.

5. The Public Prosecutor called upon to collect and examine the well ground of circumstantial evidence must in any possible manner consolidate the evidentiary framework, seeking any element that may strengthen the clues, also by making use of all the various instruments of international cooperation. To this end, agreements should be concluded to facilitate the exchange of information and documents among PPOs to combat the phenomenon. A further perspective of intervention could bring to the conclusion of specific bilateral agreements between States, in order to specifically increase judicial and police cooperation in the sector and direct it towards an effective recovery and distribution of confiscated assets.
6. With reference to preliminary investigations, connections between organised crime and international corruption have been detected and the need - also highlighted in the Phase 4 Report - for specific training in this regard has been pointed out. These connections also suggested the use of asset prevention measures against natural and legal persons involved in foreign bribery investigations, as already allowed by the Italian legislation (Article 4.1, lett. i-bis), Legislative Decree No. 159/2011).
7. It was noted that an increasing number of foreign bribery proceedings are handled through Non-Trial Resolutions systems (NTRs), as is the case in the United States and, more recently, in the United Kingdom and France. It was agreed that the introduction of NTR's in Italy would in any case entail the need to verify their compatibility in relation to the constitutional principle of mandatory prosecution and to entrust the judge with the resolution of criminally relevant facts, ensuring the guarantees of due process.
8. Perspectives for a reform in this direction should focus on legal persons, stemming from the existing legislation (Legislative Decree No. 231 of 2001) and the potential of the diversion mechanisms provided for therein, all functional to the recovery of the entity to legality; the possibility of cooperation with other jurisdictions is essential, both at the level of the collection of evidentiary material and at the level of sharing the proceeds of sanctions, which should be and remain effective, proportionate and dissuasive and accompanied by adequate compliance programmes.
9. The establishment within ANAC or other independent authorities (e.g. the Anti-Trust Authority - AGCM) of a specific department dealing with foreign bribery has been also suggested.
10. Changes in the legislative framework could provide an opportunity to revisit Article 322 bis C.C. on foreign bribery in order to improve its readability, clarity and ease of application.
11. Lastly, there was large consensus on the need to continue organising discussion and dialogue initiatives similar to the present one in order to further focus on the main issues stemming from the Report and the possible ways for solving them.