Dr. Pietro Maria Sabella Jul 23 9 min read

ENI & SHELL ACQUITTED IN ITALIAN BRIBERY COURT CASE

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Eni & Shell Nigerian bribery case, the acquittal verdict of the Milan Court of Appeal is definitive. There is no shortcut to attribute criminal liability for the commission of transnational corruption under Italian criminal law.

On the 19th of July 2022, the Italian Court of Appeal of Milan upheld the acquittal of Eni, Shell, and their executives in the Nigerian corruption case.

Taking into consideration the media echo and the emerging interesting legal profiles concerning the challenges commonly faced in relation to the ascertainment and attribution of criminal liability for complex transnational corruption cases, this report includes an overview of and offers some comments on the case (*photos by Martin Katler and Keming Tan on Unsplash*).

The case, which represented one of the oil industry's biggest international bribery court cases, involved two multinational companies operating in the energy sector, Eni S.p.A. and Royal Dutch Shell plc, some of their top managers, the Nigerian government, as well as intermediaries.

The two companies and some of their top managers had been accused of international corruption for paying a bribe of $1.1 billion to the Nigerian government, through certain intermediaries, to acquire the exclusive license to explore the so-called OPL 245 block to find hydrocarbons.

OPL 245 (Oil Prospecting Licence 245) covers a defined deep-water offshore area (over 1,000 m bsl), approximately 150 km off the Niger Delta. In practice, one of the richest potential oil fields in the country.

Case Background

The fact began in 1998 when the military government of Sani Abacha granted a license to extract oil to the Nigerian company Malabu Oil - set up five days before the award - which was including the former Oil Minister, Dan Etete, and one of Abacha's sons (Mohamed Abacha).

Following the fall of Abacha and without providing any warning or giving a reason for its decision, on 2 July 2001 the Nigerian government revoked the granting of exploration rights in favor of Malabu Oil because of

"suspected anomalies in the awarding of the contract, assigned without a proper call for tenders" and reallocated these rights to the Nigerian Petroleum Corporation (NNPC, that is the state oil company).

In 2002, the NNPC called for tenders in search of a private partner able to contribute with technological expertise and capital. The contract was awarded to Shell, which paid a signing bonus of 210 million. At this point, OPL 245 was supposed to be managed in a partnership between NNPC and Shell.

In 2003, Malabu reacted by filing numerous lawsuits against the government and Shell, demanding the effectiveness of the former allocation of OPL and the unlawfulness of the earlier revocation, and the subsequent nullity of the attribution of the grant to Shell. Three years later, the Nigerian government, NNPC, and Malabu entered into a settlement agreement and OPL 245 was again allocated to Malabu, which committed to pay the government the signature bonus that Shell had previously paid. As a result, Shell reacted by suing the Nigerian government.
In 2007, to break the dispute, Malabu started negotiations with Shell and tried to look for another international operator to develop the exploring and future exploiting of the block. That is why Malabu has contacts with the Nigerian Agip Exploration (NAE), which is Eni's local subsidiary. At that time, no formal agreement was signed because of the generalized uncertainty of the situation.

In late 2009, Malabu hired Emeka Obi, a representative of Energy Venture Partners Ltd. (EVP), to search for international buyers interested in acquiring 40 percent of the block. As a result, negotiations with NAE (that means Eni) were resumed.

On 18 June 2010, the Nigerian President, Goodluck Jonathan, confirmed the awarding of OPL 245 to Malabu, on the condition that the company paid the signature bonus of $210 million, which had not yet been paid due to the pending court cases. The final deadline for payment was set in the summer of 2011.

During this period, being aware that Malabu and Shell were still engaged in litigation, Eni had discussions both with EVP, on behalf of Malabu, and with Shell for the acquisition of OPL 245. In October 2010, NAE (Eni's subsidiary) made an offer to EVP to acquire 100per cent of OPL 245. EVP deemed it unsatisfactory and rejected it.

Some weeks later, negotiations stalled once again when Mohammed Abacha (former President's son) appeared before the Federal High Court in Abuja claiming his rights to a 50 percent interest in Malabu. Abacha cautioned Shell, Malabu, and Eni against continuing talks.

In November 2010, since the significant loss of income provoked by the delay in the business operations, the Nigerian government entered negotiations with Shell, Malabu, and Eni to find a definitive solution. The solution given was that the government would be the only party in contract with Eni and Shell; at the same time, the Nigerian government would have settled the legal disputes with Shell and Malabu by paying the latter compensation for giving up the rights to OPL 245.

Finally, on the 29th of April 2011, Eni, Shell, and the Nigerian Government signed a Resolution Agreement that transferred the rights to OPL 245 to Eni and Shell. This agreement included settlements made solely between Eni and Shell and the FGN, represented by the Ministers of Petroleum, Justice, and Finance. As part of this agreement, Shell and Eni paid $1.3 billion (the price plus the signature bonus) to an escrow account opened by the Nigerian Government with JP Morgan in London.

During the same period, the Nigerian government paid Malabu $1.092 billion as compensation for revoking the rights to OPL 245. Only after the payment, Malabu dropped its complaints against the Nigerian Government.

Shortly afterward, the broker Emeka Obi sued Malabu in a London court demanding $215 million in damages because of the agreement signed and not finalized a year earlier. The judge then froze a Nigerian government trust account at JPMorgan in London, into which $1.1 billion had been paid by Eni and Shell. A judge in London allowed Emeka Obi to receive a mediator's fee of $112 million instead of the $215 million requested. The London court in a such way recognized that Obi had brokered the deal.

In the meantime, however, it seems that $801 million had disappeared from JPMorgan's account and, after a long tour of banks in Lebanon and Switzerland, ended up at Malabu.

In 2013, Re:Common (an association committed to fighting corruption), the British NGO The Corner House and the British/American NGO Global Witness, and Dotun Ioko, a Nigerian citizen based in the United Kingdom, filed a petition with the Department of Justice and the Securities and Exchange Commission (SEC) in the United States, as well as with the Metropolitan Police Service (MPS) in London, requesting an investigation in the acquisition of the OPL 245 block by Eni and Shell. In short, these NGOs claimed that the settlements and licenses on OPL 245 were based on a corrupt scheme involving not only multinationals but also secret services, intermediaries of various kinds, and some international banks. All these requests for investigation have been closed because of a lack of evidence in relation to the perpetration of the corrupt practices allegedly operated by Shell and Eni. In the same year, these NGOs sent a petition to the Public Prosecutor's Office of Milan.

The Italian Criminal Trial

In Italy, the Office of the Public Prosecutor of Milan, on the other hand, argued that the final part of the negotiations by which ENI entered the settlement concerning OPL 245 exploration was based on a corrupt agreement. The Italian prosecutors alleged that some $1.1 billion was siphoned off to politicians and middlemen, including Etete who acquired the field in 1998 when he was oil minister under military ruler Sani Abacha.

Specifically, the sum of $1,1 billion deposited at JP Morgan to conclude the agreement between the multinationals and the Nigerian government was allegedly diverted to various banks in Lebanon and Switzerland, and, at the end of the settlement, some of it went back to some representatives of the multinationals and to intermediaries who lobbied to close the agreement to transfer the license for OPL 245.

For this reason, in 2017, these multinational companies, some of their top management, and some intermediaries were charged with international bribery under Article 322-bis of the Italian Criminal Code, which punishes cases of corruption of foreign states' public officials, and a trial started before the Tribunal of Milan.

In the Italian legal framework, the *actus reus* of bribery is laid down in articles 318 and 319 of the criminal code which, in brief, punish a public official who unduly accepts the promise or receives, for himself or a third party,

money or other benefits in order to exercise his functions or powers or to perform any act contrary to his or her official duties.

The Public Prosecutor's Office allegedly deduced the existence of the corruption of certain Nigerian officials, some of whom acted as intermediaries, from the documents, communications and e-mails exchanged between the parties during the negotiations. More specifically, from the prosecutorial perspective, the transit of the sum of $1,1 billion initially deposited at JP Morgan and then passed through various banks and in favor of various persons, would have demonstrated the existence of the bribe, or rather the economic instrument through which Eni and Shell favored certain persons to obtain the license.

The Judicial Decision

However, on 9 June 2017, the Court of Milan acquitted Eni, Shell, and their chief executive managers. The Tribunal of Milan focused on the criterion for evaluating evidence (e-mail, documents, etc.), taking an opposite stand from the request made by the Public Prosecutor's Office, according to which, since it was a matter of "*corruption at the highest level*", and since it was "***difficult to find evidence in foreign countries***", judges should have

> *"lowered the claims in the evaluation of circumstantial evidence in terms of precision, non-equivocal nature, and convergent seriousness, resistant to logical objections beyond any reasonable doubt, proposing a kind of special criminal law that sees the burden of proof lightened due to the difficulty of carrying out investigations for the peculiarity of the crime to be judged."*

Basically, according to the judges of the Tribunal of Milan, the Public Prosecutor's Office evaluated the evidence available singularly and not as a whole, without carrying out an overall assessment of Eni's and Shell's conduct, which appeared unrelated to the activities carried out by the intermediaries to close the agreement.

The offense – affirms the Tribunal - requires the participation of all the competitors, not only intermediaries, in a corrupt agreement;

> *"it is not sufficient to prove an abstract participation in the executive aspects of the agreement (contrary act and payment of the bribe), but it is necessary to have personally contributed to the agreement in full awareness of bribing the public officials involved."*

In conclusion, according to the Tribunal, the attribution of criminal liability to the perpetrators would have resulted in an "unacceptable reduction of the burden of proof that lies with the Prosecutor's Office".

On this ground, the Tribunal stated that:

> "*the crime of international bribery, by referring to the rules on national bribery, does not allow to derogate from the evidentiary canons fixed by the procedural code that preside over the cases of national bribery and, in particular, to the decisional rule derived from the provision contained in the first paragraph of Article 533 of the Code of Criminal Procedure (that states the court shall condemn if the perpetrator is found guilty of the offense beyond any reasonable doubt); nor, moreover, the jurisprudence of the Supreme Court has never allowed any derogation from the strict principle that, in the context of criminal law, places the burden of proof on the prosecution.*"

In short, the Tribunal of Milan did not consider that there was sufficient evidence to believe that Eni and Shell had taken part directly in the bribery agreement and acquitted them, together with the top managers, because "*the fact was not committed*", which in the Italian legal system is a term used when prosecutors have not presented evidence that demonstrates the alleged criminal conduct without any reasonable doubt.

A Few Final Thoughts

What emerges from this landmark case is that the judges of Milan interpreted the criminal code and the criminal code procedures' rules in a strict way emphasizing the fundamental safeguards of a fair trial. However, the problematic and disturbing aspect that clearly emerges is represented by the vexed question highlighted several times by international experts and scholars that the legal systems of Western democracies are ill-equipped to ascertain and attribute criminal liability to legal entities and their executives in complex cases of transnational bribery, especially where the authorities of the foreign state in which the alleged bribe was paid (that are commonly enmeshed in the corruption scandal) unsurprisingly do not cooperate with the criminal investigations. For a discussion of this topic see Eva Joly, '*VIRTEU International Final Conference', Panel 4* (Corporate Crime

Observatory, 23 June 2022), Video recording at 07:00, Available at https://www.corporatecrime.co.uk/virteu-final-conference-day1-panel4.

The only viable solutions that have been adopted in recent years to try to solve such a critical impasse where prosecutions against companies and their managers have faced major, and in many cases insurmountable, obstacles, are lowering the burden of proof for the prosecuting authorities. It has been emblematic in that regard the introduction in the English legal system of the "failure to prevent corruption offence," which is provided by section 7 of the Bribery Act 2010. This innovative provision is conceived as a new form of corporate liability for omission that does not require knowledge, intention, or recklessness, and occurs when the commercial organization has merely failed to prevent a situation of corruption in business transactions. However, even if this approach has surely eased the work of anti-corruption prosecutors in England and Wales, still two main problems appear to be unsolved. Firstly, the English system also provides the investigated companies with the opportunity to enter into a settlement agreement, which is an instrument of diversion that may be seen as a way to avoid full criminal liability. Secondly, this offense is only applicable to legal entities so, unsurprisingly, the prosecution of corporate executives allegedly involved in the corruption schemes still faces major obstacles. Concerning the introduction of section 7 of the Bribery Act 2010 see Costantino Grasso, 'Peaks and Troughs of the English Deferred Prosecution Agreement: The Lesson Learned from the DPA between the SFO and ICBC SB Plc,' *Journal of Business Law*, Issue 5, 2016, pp. 388-408.

Access below the Italian judicial decision (first instance), Court of Milam, 7th Criminal Section, 9 June 2021 (hearing 17 March 2021), no. 3055 President Extender Dr. Marco Tremolada, Judges Extenders Dr. Mauro Gallina and Dr. Alberto Carboni.

Eni Shell Bribery Italian Judicial Decision 2021.pdf
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