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> “Influence peddling remains a critical tool in the fight against domestic and international corruption. It addresses less visible, yet equally harmful, forms of collusion that undermine transparency and the integrity of public administration.”

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Corruption of Foreign Public Officials

The inevitable risks when legitimate fiduciary relationships are criminalized.

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Introduction

Over the past decade, the Public Prosecutors' Office of Milan has been particularly active in investigating and prosecuting high-profile cases involving both Italian and foreign multinationals and their senior executives for alleged corruption of high-ranking foreign public officials, including foreign heads of state, ministers of energy and of petroleum and attorneys general.

The most significant cases are undoubtedly those known as *Eni Algeria* No. 25303/2010 RGNR and *Eni-Shell Nigeria* No. 54772/2013 RGNR. In these proceedings, investigations began in 2011 (for Algeria) and in 2013 (for Nigeria), followed by prosecutions in 2015 and 2017 respectively. The cases were subsequently tried before the Court of First Instance and the Court of Appeals of Milan. Ultimately, they were adjudicated – also with rulings from the Italian Court of Cassation – in December 2020 for Algeria and May 2024 for Nigeria.

A brief analysis of these cases, which concluded with an acquittal on the merits, now final and binding, for all defendants, underscores some unique features of the Italian legal framework and approach to foreign corruption. These include the recently amended offense of influence peddling, particularly in terms of enforcement.

THE ENI ALGERIA AND ENI-SHELL NIGERIA CASES: THE OUTCOME OF A DECADE OF INVESTIGATING AND PROSECUTING ALLEGED CORRUPTION OF FOREIGN PUBLIC OFFICIALS

1. The Italian legal framework and the Prosecutors' allegations In both the Algeria and Nigeria cases, the primary criminal offense alleged and subsequently charged by the Italian Prosecutors was that of "*corruption for an act contrary to official duties*", as provided by art. 319 of the Italian Criminal Code ("ICC") in force at the time. According to this provision, "*the public official who, in exchange for omitting or delaying (or having omitted or delayed) an act of his office, or for performing (or having performed) an act conflicting with the duties of his office, receives for himself or for a third*

party money or other things of value, or accepts a promise of such things, is punished with imprisonment" from six to ten years.

The indictments also referenced two additional criminal provisions: art. 321 ICC, which extends the punishment pursuant to art. 319 ICC (directed only to public officials) to a private briber, and art. 322 *bis* ICC (para. 2, no. 2), which extends to foreign public officials the offense originally dictated only for domestic officials (commonly referred to as "international corruption").

In essence, in both the Algeria and Nigeria cases, the Italian Prosecutors alleged that the top managers of these companies had entered into a corrupt agreement with foreign public officials. According to these allegations, the bribers purportedly promised to pay, and did pay, considerable sums of money to foreign public officials through third-party intermediaries, in exchange for actions contrary to their official duties.

2. The Eni Algeria case

In the *Eni Algeria case*, charges were brought against Eni S.p.A. and its subsidiary (at the time) Saipem S.p.A., along with their respective CEOs, other managers of both companies and Saipem's agent in Algeria. The charges related to the adjudication by Eni-Saipem of seven tenders/ contracts in Algeria between 2007 and 2010 for over EUR 8 billion, as well as the acquisition by Eni in 2008 of the concession for the exploitation of the Algerian oilfield "MLE" (Menzel Ledjmet East). The charges also involved agency commissions allegedly paid by Saipem to its agent over the years in question, for a value of about EUR 198 million. The payments were allegedly subsequently channelled (at least in part) to the Algerian Minister of Energy and to representatives of the Algerian State-owned company Sonatrach, who were in charge of the tenders, in exchange for the violation of tenders' adjudication procedures.

The investigations began in 2011 and involved extensive evidence collection in various jurisdictions by the Public Prosecutors' Office of Milan, including Algeria, the United States, Switzerland, United Arab Emirates (UAE), Lebanon, Hong Kong, and Singapore: dozens of witnesses were interviewed, a significant number of banking documents were obtained through letters of request to the various states, and freezing orders for considerable sums were enforced. Pre-trial custody orders were also issued against some of the

defendants, several of the alleged key-elements of the accusations widely reported by the press in advance of the trial.

The trial before the Milan Court of First Instance began in 2016 and ended in September 2018. While the court acquitted Eni S.p.A. and its managers, Saipem S.p.A., its managers and agents were convicted, with sentences ranging from four years and one month's imprisonment to five years and five months' imprisonment, plus the confiscation of EUR 198 million as proceeds of crime and other fines for Saipem.

Appellate proceedings commenced in 2019 before the Milan Court of Appeals and were concluded in January 2020 with the acquittal of all the defendants for not having committed the crime (judgment no. 286 of January 15, 2020, with grounds issued on April 15, 2020). The acquittals were finally confirmed by the Court of Cassation in December 2020.

3. The Eni-Shell Nigeria case

The same charges of international corruption were brought against Eni S.p.A. and Shell Plc, along with Eni's CEO, Shell's executive director, other managers of both companies, the former Nigerian Minister of Petroleum, and other international agents and consultants. The charges were in connection with the purchase by the Nigerian subsidiaries of Eni and Shell of an oil prospecting license for the Nigerian oilfield "OPL 245" in April 2011 for a total of USD 1.3 billion. Of this amount, USD 1.092 billion were destined to the seller of the license, the Nigerian company Malabu, and USD 207.96 million were allocated to the Federal Government of Nigeria as a so-called "signature bonus". The charges also concerned the alleged payment of a large part of the sums above, about USD 800 million, to high-ranking Nigerian public officials who had approved the transaction, including the Nigerian President, Minister of Petroleum and Attorney General. The alleged payments were made in exchange for the officials' purported performance of acts contrary to their official duties, specifically the signing of the so-called "resolution agreements" with the Eni and Shell groups and the company Malabu in April 2011, which effectively transferred the license to Eni and Shell.

The investigations began in 2013 and involved extensive acquisition of evidence by the Public Prosecutors' Office of Milan in various jurisdictions, including Nigeria, USA, United Kingdom, the Netherlands, Switzerland, on an

even larger scale than the in Algeria case. Similarly, investigations involved interviews by the Public Prosecutors' Office of Milan of dozens of witnesses, the collection of a considerable number of banking documents from foreign countries, and various search and seizure operations, phone tapping and freezing orders for considerable amounts. As in the *Algeria* case, many of the alleged key elements of the accusations were widely reported by the press in advance of the trial.

The trial against most of the defendants ("main trial") began in 2018, and concluded in March 2021 before the Milan Court of First Instance with the acquittal of Eni and Shell and all of their respective managers, on the grounds that they had not committed the crime of international corruption (judgment no. 3055 of March 17, 2021, with grounds issued on June 9, 2021). In a spin-off of the same case in September 2018, two businessmen who had opted for the "fast track trial" were sentenced to four years' imprisonment, and assets for over USD 110 million were confiscated. However, they were subsequently acquitted in June 2021 by the Milan Court of Appeal for not having committed the crime of international corruption (judgment no. 4960 of June 24, 2021, with grounds issued on September 22, 2021). With respect to the main trial, the Milan Court of Appeal confirmed the acquittal of the defendants in July 2022, and in May 2024 the Court of Cassation rejected a civil action for damages filed by the Nigerian Government against the same defendants.

4. The final assessment of the Italian courts

In both the Algeria and Nigeria cases, the Italian courts upheld the consolidated interpretation of case law, also applicable to domestic corruption, according to which "*it is indispensable to obtain compelling evidence, beyond reasonable doubt, of the conclusion of a corrupt agreement, which represents the essence of the criminal offence of proper corruption, both domestic and international*" (see *inter alia* Court of Cassation, Section IV, judgment no. 41768 of June 22, 2017. The courts therefore found that there was no evidence to support the allegation that the managers and businessmen had entered into a corrupt agreement with the foreign public officials. They also concurred that there was no evidence of unlawful payments being made to the foreign officials or of those officials performing acts contrary to their duties.

It is precisely in these 'grey areas', highlighted especially in the Algeria case, where *compelling evidence, beyond reasonable doubt* in domestic or international transactions involving a third party (intermediary) is lacking, that influence peddling falls within scope of consideration, as this article will discuss below.

INFLUENCE PEDDLING: A CRITICAL CHALLENGE IN THE FIGHT AGAINST CORRUPTION

Influence peddling, or "trafficking in influence", has become a significant issue in the fight against corruption, both in Italy and internationally.
In the Italian legal system, the crime of trafficking in unlawful influence, as outlined by art. 346 *bis* ICC, is a relatively recent one, having been introduced only twelve years ago. However, it has already undergone several amendments, reflecting both the complexity of the norm and its central role in modern day society.

The problem that the Italian legislature sought to address with the introduction of the crime in 2012 is not insignificant. Influence peddling is not merely one of the many offenses that can be perpetrated against the public administration; it is also a critical issue in modern business models. It brings into question the inherent nature and boundaries of the activity (i.e. lobbying or representing interests in public decision-making processes), the role of those who engage in such activities, and – most importantly for the purpose of this article – what conduct should be targeted by the criminal legal system. While exploiting personal connections with public officials to gain undue advantages and undermining transparency, fairness, and trust in the public administration are quite clearly the objective of criminal sanctions, the challenge for lawmakers lies in addressing the "underworld" that surrounds this practice. That is a "slippery" environment populated by so-called "fixers", facilitators, or business brokers, who routinely interfere in public decision-making processes from a privileged position, using methods that lack transparency.

Through this norm, the legislature faces the arduous task of regulating not only the potentially ambiguous (though not necessarily unlawful) activities of intermediaries, but also the grey area between corruption and trafficking

in influence. As the Milan Court of Appeals noted in the mentioned *Eni Algeria* case – which concerned actions that preceded the entry into force of the trafficking in unlawful influence offense – "*the mere payment of large sums of money to an intermediary is not enough to establish with certainty, in the absence of further evidence, the actual commission of a corrupt act*" (judgment no. 286 of January 15, 2020, with grounds issued on April 15, 2020).

1. The international perspective on the role of the intermediary

"Intermediaries" play a pivotal role in the crime of influence peddling. They act as a bridge between a private party and a public official, using personal or professional connections to potentially exert undue influence over public decisions or acts, offering a private party the opportunity to gain undue advantages, such as contracts, concessions, or other favors.

Art. 346 *bis* ICC provides for two requirements of "unlawfulness" in the structure of the crime:

- the gift and promise must be undue, i.e. not owed,
- the mediation must be unlawful, *contra ius*, i.e. instrumental in distorting the work of the public agent, exploiting the credit enjoyed by the intermediary.

For mediation to have a criminal connotation, it must not be justified by a professional activity conducted within the limits established by law and in accordance with ethical duties and obligations i.e. that of representatives of business or professional associations. It follows that the unlawfulness of the conduct was made to depend on provisions that do not attain to criminal law, which take on a defining function, helping to outline the conditions in which the conduct is considered lawful.

At the international level, the Organisation for Economic Co-operation and Development (OECD) – which has placed considerable emphasis on combating influence peddling as part of States' broader anti-corruption efforts – has expressed a similar view, arguing that intermediation in international business transactions is not in itself an unlawful activity. In the Final Report on "Typologies on the role of intermediaries in international business transactions", issued on October 9, 2009, the organisation's "Working Group

on Bribery in International Business Transactions" highlighted that "*since there is no generally accepted definition in the context of foreign bribery*", there is a need to "*examine some legitimate reasons why intermediaries are used*" (Chapter 1, paras. 6 and 7).

The OECD further explained that over the past few decades, while exploring opportunities in new markets, companies often encounter unfamiliar cultural, legal, financial, and accounting challenges. Intermediaries with local expertise can assist by providing services like legal advice, market research, and logistical support, and can help identify business opportunities. Even large multinationals may need intermediaries to act as local representatives, especially in countries where laws limit the number of foreign employees. In some cases, using intermediaries may be legally required for conducting business in certain markets (Chapter 1, paras. 9 and 10).

The OECD has therefore encouraged countries to adopt clear legal frameworks to target those grey areas where personal relationships and informal channels of communication can be exploited for illicit gain. In this context, art. 346 *bis* ICC aligns with the OECD's broader goals of reinforcing anti-corruption measures and ensuring that influence peddling is treated as a serious offense with adequate penalties.

2. The Italian legal framework

With Law 190/2012, Italy followed up on the international commitments under the 1999 "Criminal Law Convention on Corruption" and the 2003 "United Nations Convention against Corruption", introducing the crime of trafficking in unlawful influence under art. 346 *bis* ICC. This provision was later reformed by Law no. 3 of January 9, 2019 ("Law 3/2019"). Most recently, with Law no. 114 of August 9, 2024 ("Law 114/2024"), the lawmaker significantly revised art. 346 *bis* ICC, whose complex structure is outlined below.

- *Relationship with corruption:* The legal provision in question serves as a subsidiary offense to the crimes of corruption for the performance of duties (art. 318 ICC), proper bribery (art. 319 ICC), corruption in judicial acts (art. 319 *ter* ICC), and international corruption (art. 322 *bis* ICC) and therefore penalizes preparatory conduct leading to the commission of these crimes.

- *Conduct*: In its original 2012 formulation, the offense only consisted in the exploitation of existing relationships with a public official, thus clearly distinguishing it from the offense provided by art. 346 ICC (false influence-peddling), where the offender falsely claimed influence with a public official.

Following the 2019 reform, acts previously classified as "false influence-peddling" could now fall under the new art. 346 *bis* ICC, which no longer limited the punished conduct to *exploiting existing relationships*, but extended it to *boasting about alleged relationships* with a public official, a public service officer, or equivalent foreign subjects.

Law 114/2024 further amended the structure of the conduct that serves as a prerequisite for the payment and/or promise. The current version of art. 346 *bis* (1) ICC uses the phrase "*intentionally exploiting existing relationships with a public official or public service officer* …". Therefore, the intermediary's relationship with the public official must be genuinely exploited and must actually exist, rather than merely being alleged. If the intermediary only claims the existence of the relationship, the act may, at most, constitute fraud, provided other requirements are met.

- *Money or other economic benefits*. The crime is committed by paying or promising to pay money or other economic benefits. The original 2012 version provided for the giving or promising of money or other economic advantages to the intermediary or third parties, while the 2019 version expanded the scope to include non-economic benefits (such as sexual services).

- *Price for the unlawful mediation*. In the "basic offense" under paragraph 1, *money or other economic benefit* are the price of the unlawful mediation with the public official, or compensation for the performance of its functions. The new art. 346 *bis* (5) ICC also provides for two aggravated circumstances, concerning the purpose of the payment and/or promise, namely if the act is committed "*in relation to the exercise of judicial activities*" or in view of compensating the public official for "*performing an act contrary to their official duties*".

- *Defining what constitutes "mediation"*. Art. 346 *bis* (2) ICC, as recently

amended, defines unlawful mediation as "*mediation to induce the public official or public service officer…to perform an act contrary to their duties that constitutes a crime and may result in an undue advantage*". Before Law 114/2024, case law had primarily defined what should be understood as mediation. For example, when a corrupt public official recruits and pays other public agents without the interference of an intermediary, the conduct could not constitute the crime of trafficking in unlawful influence (Court of Cassation, Section VI, judgment no. 16672 of February 7, 2023).

It should be noted that, in the absence of specific lobbying regulations, paid mediation is illegal if the agreement between the principal and the intermediary aims at committing a criminal offense likely to provide undue advantages to the principal. The mere use of a personal relationship between the intermediary and the public agent to achieve a lawful purpose does not constitute an offense (Court of Cassation, Section VI, judgment no. 1182 of January 13, 2022). In other words, the structure of the 'new' offense no longer requires that the agreement, and consequently the promise or payment, be aimed at the public official performing an act contrary to their official duties or omitting or delaying an official act. This scenario is now an aggravated offense under art. 346 *bis* (4) ICC, along with cases where "*the acts are committed in relation to the exercise of judicial activities*".

The definition in para. 2 of art. 346 *bis* ICC appears to be consistent with the most recent case law, which has held that the so-called "paid mediation" is *illegal because of the 'external' projection of the parties' relationship, of the ultimate objective of the 'influence' that was bought, in the sense that the mediation is unlawful if it is aimed at committing a criminal offense capable of producing advantages for the principal* (Court of Cassation, Section VI, judgment no. 1182 of January 13, 2022).

CONCLUSION

The introduction of the crime of influence peddling has generated extensive debate and criticism, particularly concerning the ambiguity surrounding the intermediary's role, the definition of "influence", and the evidentiary challenges involved. Proving a causal link between the payment of a sum of money and the actual influence exerted on a public official is often

complex. Additionally, the law may be perceived as overly broad, risking the criminalization of legitimate social and professional interactions that are integral to decision-making processes and fiduciary relationships.

Despite these challenges, influence peddling remains a critical tool in the fight against domestic and international corruption. It addresses less visible, yet equally harmful, forms of collusion that undermine transparency and the integrity of public administration.

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