

BRIBE, SWINDLE OR STEAL



Spotlight on Italy – Andrea Lo Galio

[00:00:08] Welcome back to the podcast Bribe, Swindle or Steal. I'm Alexandra Wrage, and today we have one of our "Spotlight" series with a spotlight on Italy. I'm in Rome with Andrea Lo Galio, a partner with TRACE'S long-standing partner law firm in Italy, Studio Legale Biamonti. Thank you so much for joining me, Andrea. It's a pleasure to have some time to talk to you. We are going country by country to look at recent trends - how things are changing, whether they're improving and, in this case, what makes Italy a little bit different from some of your neighboring countries. Why don't you just start with a broad overview of the corruption climate in Italy? How are things going?

[00:00:50] The first thing I may say, people starting to speak about the climate, that Italy has always played an important role in the corruption arena. Also, dealing with FCPA because with the Lockheed case, which was one of the reasons now which led to the adoption of the FCPA.

[00:01:07] Right, it takes us back 40 years now.

[00:01:09] Yeah, yeah, exactly. It took place badly in Italy, involving the highest government level. On the other hand, we also mentioned in all the very more recent case, the Siemens case. The origin of the case, it all started in Italy with Enel, so one of the public electricity companies. We have an important player in this arena.

[00:01:31] Actually, why don't you spend a minute talking about the origins of the Siemens case? Because I don't think most people know that it's turned out to be, until very recently, the record-holding anti-bribery case worldwide, and it started in Italy.

[00:01:43] The case was dealing with Enel Power, which was an important subsidiary of the Enel group and was related to an important bribe - I think it was more than millions of dollars, of euro - to managers of this company being bribed. The public prosecutor's office of Milan order started an investigation and started from this piece of investigation. It opened the door to the Siemen scandal that everybody knows. That was the origin. Then, clearly, this case was also important in Italy for one reason: because it was the first case which was applying this famous piece of legislation, this Legislative Decree 231, adopted in 2001, which following was the implementation of international convention, the OECD convention, introduced in Italy the corporate liability of companies.

[00:02:38] Because typically, European countries wouldn't allow - the legal systems wouldn't allow for corporate criminal conduct, just the conduct of individuals.

[00:02:48] Right, absolutely. The criminal offense was sanctioned only for individuals. This was the first case, and this was important because one of the decision it adopted was to say that Italy has jurisdiction also in cases of commission of these offenses by non-Italian companies in Italy. This was an important piece. The climate today in Italy, I would say that, in a way, it's business as usual. In terms of the impact of the corruption in Italian daily life, in the sense that if we look at figures, for instance, of corruption offenses reported or corruption cases reported in the media in 2016, we're speaking of more than 560 cases.

[00:03:33] And these are cases of Italians complaining about corruption in Italy.

[00:03:40] It's both. It's both domestic bribery, let's say, and also foreign bribery.

[00:03:45] Ah, okay.

[00:03:45] Clearly, if we have to make a distinction about the two categories, foreign bribery cases are very limited ones. Again, if you want to go in more specifically, these cases are generally related to involving the big Italian multinational groups, like ENI, Saipem and so on. Lastly, the most important case is involving both ENI and Royal Dutch Shell for alleged, let's say, bribes in Nigeria.

[00:04:16] The 500 complaints. Are you able to set that in some context for us? Is that much higher than previous years?

[00:04:26] We have to look at the statistics of the Ministry of Justice. If you've got the pending cases, the average - the trend is not decreasing. It's between 1000-1500 a year, pending cases. Of course, of all these cases, only a minority I've seen condemnation of indicted persons for various reasons. One of these is for the application of statute of limitation, which is not short by itself in Italy, but we have a structural problem in our justice system, meaning that it's difficult for public prosecutors offices on one hand and the courts to effectively investigate, prosecute and try all these kinds of cases. In terms of impact on the corruption in our society, in our economy, I would say that it is not a decreasing trend. Maybe, on one hand, we can say that things are not improving. Italy is a country where you run the risk of being easily confronted or exposed to corruption risk. It's for sure, for many reasons. I would say the first reason is a cultural one. Clearly, the system of value that probably allows now the commission of this kind of illicit behavior. Second, we are a country where there is a high level of tax evasion, which clearly explains also that both, it's a facilitating factor, let's say, for commission of bribery offenses; and also, we are a country where there is an important presence of very strong criminal organizations. This is something that is not to be forgotten at all, also because this kind of organisation - the mafia, whoever - are playing more and more an important role because they try to and are currently doing laundering all the proceeds of criminal activity, and these are huge flows of money, investing the clean economy. Another factor is the important weight of the public procurement in our activity and the economy.

[00:06:35] You just mean the prevalence of just how much public procurement is undertaken? Because there are so many state-owned entities?

[00:06:42] For an example: healthcare. 90% of the Italian market go through the public.

[00:06:49] OK.

[00:06:49] This is clearly something that you cannot avoid. You're a customer in this sector. 90% of the case is a public customer.

[00:06:58] You talk about fairly high levels of bribe demands. What does that look like for a company coming in to do business in Italy? Is it lower-level demands at customs, or is it getting permits, or is it right at the very highest level in order to secure a contract or some combination of those?

[00:07:17] It's a combination. You have a very, let's say, low-level corruption situation. Let's say, simply, you want to open a shop, so you need a license. You may be faced by a municipal officer asking for a bribe or favor, or it can be at much higher levels of government level. When I say government, I intend more local governments or regional, provincial and city-level.

[00:07:43] Rather than national.

[00:07:44] It happened in the past. We mentioned the Lockheed case, but clearly it's more difficult to be confronted with this kind of situation. But yes, at all levels. This is something that, unfortunately, we should make a difference between north, central and south of Italy. But again, this is a distinction that is, in a way, lowering due to the growing presence of the mafias also in the northern economy.

[00:08:11] So what is the distinction - I can guess - but what is the distinction you'd make between the north of Italy and the south of Italy?

[00:08:18] First of all, in terms of market, northern and central Italy are more important, interesting markets. The south, you are exposed to corruption, but all the kinds of risk and criminal activity. It's really even more a matter of personal security in the south. If we want to make, again, a distinction speaking about culture, clearly, let's put it this way - maybe a different tolerance again for this kind of behavior.

[00:08:47] I'm not clear whether you think it's improving at all. It doesn't sound like it's getting worse.

[00:08:52] I've spoken until now about figures, so the magnitude of the problem. In the Italian society, and also in the political arena, there is a growing sense of injustice regarding the corruption crimes. Corruption is part of the political agenda. There is a lot of pressure from the civil society. If we look at the legal framework, probably, as of today, Italy has one of the most comprehensive legal frameworks in terms of addressing corruption at 360 degrees.

[00:09:29] Yes, I would agree with that. The law is very rigorous.

[00:09:32] Yes, and it continues to improve. Now, we have a bill of law regarding whistleblowing. We have, this year, a new definition and sanctioning of commercial bribery. We have a new anti-money laundering legislation. The Italian parliament has adopted regulation - of course, applicable only to it regarding lobbying. Things are moving. Whether these changes are effective or not, it's another question. Probably, it's too early to evaluate.

[00:10:03] But it's interesting. You refer to public outrage, and we generally see that public outrage is the most important final step before real change. If politicians believe that they're going to be voted out of office over this issue, and if a free press is covering the issue, that's a good sign. On the other hand, these things can ebb and flow over time, so it's difficult to know, and the presence of organized crime, as you say, argues for greater entrenchment of a problem.

[00:10:33] Again, I mentioned values and culture. I'll give you a very recent example. Last Sunday, we had the regional election in Sicily. The coalition of, let's say, right-wing parties, including the Forza Italia, Berlusconi and so on, have won the election in the sense that the new president, the elected president of the regional assembly is from that coalition. But the strongest parties - this Movimento Cinque Stelle, this Five Star Movement - now they got 1/3, 34% of the vote, so it's strongest party in Sicily. Again, they are very strong and about integrity. Today or yesterday - I think yesterday - one of the newly elected members of the regional parliament of Sicily has been arrested for corruption.

[00:11:26] That didn't take very long.

[00:11:28] One of the things that is interesting is that a certain number of candidates for the winning party were facing allegations of criminal offenses. This has not impeded them from being candidates and from being elected.

[00:11:44] So that argues against my point.

[00:11:46] This means that in terms of awareness, everybody's aware. The way you react now when you're confronted with such kind of behavior is something else. From that point of view, I think Italy has a lot to do and to change, in particular, mentality.

[00:12:01] You're talking about - and I appreciate it - you're talking about the risks to companies or individuals within Italy - a shakedown, basically - of being asked for a bribe. Can you just comment on the behavior of Italian companies when they go overseas? Because sometimes those are very different things. We see that particularly in the Nordic countries. Within the Nordic countries, there are very low levels of extortionate demands, very low levels of bribery, but how companies from the Nordic countries behave when they're doing business in Russia or in Asia or elsewhere might be different. Is there a distinction between Italian companies operating in Italy and Italian companies operating overseas?

[00:12:45] Yes. The offense of foreign bribery has been introduced only in 2001. So, in a way, it's recent. In terms of perception, clearly it is perceived as an issue now by big multinationals for obvious reasons. But a bigger, exporting country - so with a lot of medium-sized companies working abroad or exporting - probably, they don't perceive it as a risk. Or, let's say that, put in another way, this is a risk because they believe they can run.

[00:13:16] A manageable risk or, on balance, a risk they're prepared to take.

[00:13:21] Yes.

[00:13:22] That's a good segue, though, into some of the cases that have involved Italian companies. Can you hit the highlights there for us?

[00:13:31] If you want to talk about international cases, the most recent one is the one I mentioned before - Royal Dutch Shell and ENI. Potentially, it may have a very strong impact because it involves top management of the two companies - at least for ENI because the current CEO, not yet indicted to my knowledge, but certainly under investigation - and we are speaking of an amount of bribes for hundreds of millions of dollars for acquiring the concession right of an important oil area in Nigeria together with Royal Dutch Shell. In Nigeria, the case involved the highest level of the Nigerian government, the president and one of ministry, the oil minister. It's a complex case because it's all about, as far I know, about the knowledge to now-big groups. The head of the effective counterparty, which was a local Nigerian company, was the first beneficiary of these concessions. Honestly, on one hand, it could appear as a very simple case because it's not a complex scheme. It's only a matter of where the \$1.3 billion have been paid and where the effective destiny of this amount of money is. The case, it's a very significant one because it's not the first one. Also, we have to say, it's not the first one involving ENI. It's not the first one involving a state-owned, state-controlled company. Now, we can also remember Finmeccanica - now Leonardo - Saipem, or the one we mentioned earlier, Enel. Clearly, all of these cases have been prosecuted by the public prosecutor's office of Milano, where there is enough, let's say, skills and resources to prosecute this kind of case. Also, we have to remember that it has competence on the case.

[00:15:34] It's interesting because we see that with the Munich prosecutor. After the Siemens case, there was the right level of expertise that had developed over time to take on the Daimler or case and the MAN case and otherwise. When you have individual prosecutorial officers within a country, developing enough expertise over time is a challenge.

[00:15:53] One thing you can speak now about domestic cases, we have several examples of cases involving multinational groups in Italy with these domestic issues. We have Pfizer. We have LENA group. We have several cases for maybe not high-level corruption cases or bribery cases involving millions and so on, but still involving this group. The reaction they had was to implement these model compliance programs according to, let's say, the Italian legislation. But this is also when we talk about risk. The risk is two-fold in Italy. Maybe this is one of the peculiarities of this jurisdiction. On one hand, you are exposed to a corruption risk. On the other hand, you are exposed to an enforcement risk. This means that Italy is certainly a peculiar jurisdiction where you are to be careful because the risk of being prosecuted is not low.

[00:16:49] I think that's a really interesting point, because they're usually at one end of the spectrum or the other. There's a very high level of corruption, and the reason there's a high level of corruption is because nobody is doing anything about it. Nobody is enforcing the laws. On the other hand, in countries where you aren't asked a great deal, there may be a high level of enforcement, so you're going out on a real limb. You have incredible risk. Italy does sound like a hybrid.

[00:17:15] Because corruption is one of the priorities of our judiciary system. In particular, one of the reasons being it affects heavily public spending. In a country where we have a problem of public debt, public deficits and so on, clearly, this is a way to address our public expenditure.

[00:17:39] It's interesting how often the pragmatic argument wins out over the ethics argument. I remember the president of Nigeria speaking at the event in London last year, and he wasn't concerned about what people wanted to say about Nigeria or who wanted to point fingers. He just wants their assets back, and it was a very powerful statement by him. "We're struggling and we need our assets back." It sounds like the government is taking commercial bribery seriously. There are high-level prosecutions against Italian companies - not just against foreign companies, which we see in some ways.

[00:18:14] When you say commercial bribery, it's about private, because if we speak about commercial bribing meaning bribery in the private sector, let's say we have stronger tools and weapons now. Clearly, more sanctions and more fines. Corporate entities are also liable and so on. But there is one restriction that this is an offense that can be prosecuted only following a formal complaint by the aggrieved party or subject or person. Otherwise, a public prosecutor cannot prosecute, so this is a heavy, serious limit. I do not consider that it is a priority, because as a prosecutor in Italy, you have a duty. It's a big difference with U.S., where you can decide to prosecute or not to prosecute when you have information.

[00:19:09] Sure, prosecutorial discretion is a big part of things.

[00:19:12] Yeah. In Italy, no. It's mandatory. You have to prosecute. But if we could give the choice to a public prosecutor between commercial bribery and bribery to corrupt, it would prosecute.

[00:19:26] What I was trying to avoid was a discussion of a patient and their doctor, that exchange, but in the business context. So we're seeing the Italian government step up in a business context, both going after the corporations and the government.

[00:19:41] No, you're right. In that sense, clearly, it's a priority. It's a priority and also an indicator of these priorities that we have now a real effective anti-corruption authority, without powers to prosecute but with important powers. The newly appointed head Raffaele Cantone is also maybe a positive indicator of the current climate has become a popular person. When you have, for instance, the banks in the north of Italy, there are some banks that is morally collapsed. A huge bundle of litigation may stand between former clients of the banks and the bank or the legacy of banks. In order to deal with this kind of litigation, it was proposed that the head of the anti-corruption authority, just to give the idea of the weight and the prestige of this person in a country where corruption again can be found at all levels.

[00:20:43] You spend a great deal of your professional life counseling corporations on how to avoid a broad range of compliance issues, but certainly antibribery. Distilling that, and not naming any names, what issues do you see come up most frequently, and what advice do you have to companies that are that are operating in Italy?

[00:21:09] Difficult question, because the point is that the way they may - first of all, not in a country like Italy because bribing may be a way of conducting business. Certainly, this is not the right way, but I'm not speaking only on an ethical point of view. This is self-evident, but the point is really that it's not the correct way to do it because of the risk you may face. On the other hand, you may implement a lot of programs. At the end, it's a matter of values to be transferred. So, certainly, one thing that is important is a choice of your collaborators and employees. This is something that you have to be extremely, extremely careful, as well as a choice of your business partners. Then, of course, you have a number of legal tools, systems, compliance programs you may have to or you simply must implement. It's important, but you really must be effective. Something evident, but you have to be effective. It's not only paperwork, not only pay record because it will be immediately perceived as such. To be well advised because, again, you have to make distinctions between Italy. In Italy, the region where you carry on business, it's important. My family came from the south - I feel allowed to mention that - but, clearly, doing business in the south of Italy is something different than doing business in other areas, northern areas, where you are more closer to continental Europe, by all means.

[00:22:42] I'm curious if there are any risks that are uniquely Italian. Years ago, when we held a workshop here, there was a lot of talk about - by European standards - very high expectations with respect to holiday gifts and hospitality. Has that culture changed?

[00:22:59] I am involved in the healthcare business, so I have clients. It's extremely difficult to change behavior, extremely difficult. You can have all corporate programs, anti-corruption policies and so on, capping the amount of gifts, dinners and so on. It's extremely difficult because, on the other side of the table, this is what they expect.

[00:23:22] The expectations are a big part of the problem.

[00:23:24] That's why we come back to the cultural problem. It's extremely difficult.

[00:23:30] We've seen that change, right? There was an expectation of that kind in Japan for years and years - late evenings, elaborate dinners, long evenings at karaoke bars and otherwise. Then there was enough fear, after a while, amongst government officials. They didn't want to be seen publicly at restaurants with clients. Is it not shifting here at all?

[00:23:52] Little by little because in particular, thanks to multinational groups, where they put a lot of pressure, they impose simply the adoption of certain procedures, policies and so on. In particular, from the international group, you see a lot of pressure from these sides. Let's say it's the supply side. For sure, behavior is changing, supported also by legislative changes. But again, people can be very creative in this area. The way to satisfy your counterparty, they find a lot of this. But, again, we are far away from being on the safe side.

[00:24:29] That's not very encouraging.

[00:24:31] I'm not negative, but it's just a matter of a bit of realism.

[00:24:35] No doubt that's helpful. I'm not sure that there's any simple piece advice for this, but my last question really is: You've emphasised the risk associated with organized crime, and that's very real here. Is there advice that you can provide, particularly to multinationals coming into Italy, to protect themselves against that risk? Or is it just something that they have to manage for the duration of their time here?

[00:25:03] One of the possible - the solution is to carry on very strong due diligence and investigations where you have to deal with a medium-sized company in certain areas. This, for sure. At this point, you cannot rely upon the usual instruments. Clearly, due diligence has to be carried on - access to information eventually to the police authorities and so on - because the point is not the fact of confronting criminal organizations as such, but to entities linked to this organization.

[00:25:42] So there is a way to navigate through the risk, and in it's in identifying your partners.

[00:25:46] Yes, particularly in the construction companies, service companies and so on, particularly for subcontractors, because you don't know who you are working with.

[00:25:57] Well that's good advice, generally, but it sounds like particularly good advice here in Italy. Thank you so much for joining me in Rome this afternoon, Andrea, and thank you for the support that you provide to the compliance community more generally.

[00:26:09] Thanks to you.