Remarks by Alberto Maritati, Under Secretary of State for Justice, Italy

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Combating Corruption at the Domestic and International Level

It is an honour for me to represent the Italian Government on the opening day of this extraordinary international event organised to celebrate the tenth anniversary of the signing of the OECD Anti-Bribery Convention.

The initiative for this particular form of "celebration" is the result of one of my first trips to Paris to participate in the periodic meetings of the Working Group.

In the Working Group, as some of you will remember, I wished to draw attention to a point that I still consider to be of special importance – in particular after a period during which our participation in the work of the Working Group was not entirely satisfactory – namely, that Italy has a long history of fighting corruption, a history that has roots in a now distant past. It is this in-depth knowledge of the problem, which has unfortunately been gained through sad events that have involved our governing class over years past, but which has also developed through the commitment of a careful and well-informed judiciary, that makes our country, in my opinion, a key player in the fight against corruption.

The commitment to combating corruption in Italy is longstanding even though, unfortunately, it has known difficult periods; today, I believe that the watershed has been passed and that alongside the great efforts being made by the judiciary, there is now a strong commitment on the part of the Government to develop a broader range of direct measures to combat corruption, both in legislative terms – I will discuss later the recent legislative changes – and in administrative terms.

Corruption, it is now recognised, poses a challenge to the modern State.

The modern State is essentially based on the following principles:

- bureaucratisation of the State administration.
- rationalisation of administrative action.
- depersonalisation of offices.

Corruption, on the other hand, disseminates a private conception of public office since the holders of public powers act as genuine "bosses" who sell, for undue compensation, the functions of their office.

The globalisation of the economy and markets and the globalisation of the opportunities for corruption have also led to an increase in international and supranational organisations and the emergence, together with categories of international and supranational civil servants, of *new categories of persons vulnerable to corruption*.

We must be aware of the fact that combating corruption has an impact on the following:

- the democratisation of political systems and the expansion of human rights worldwide.
- the "sustainable development" of the countries of the third and fourth world.
- competition between businesses at the national and international level.
- the fight against organised crime.

All of this underscores the need for a shared international strategy among all law-abiding, advanced States that is in line with, among others, the strategy developed by the OECD, which in recent years has become the leading source of anti-corruption instruments in areas such as international business transactions, governance and development.

The OECD has helped Member and non-Member countries on every continent to strengthen strategies to combat corruption effectively by developing adequate standards in strategic public and private areas.

Today's programme has a special significance for me since, as a former public prosecutor, I am not only able to welcome you but also to participate actively, making my personal contribution, in the work that will involve colleagues who are engaged on a daily basis in combating corruption, a problem that undermines the economy and subverts justice worldwide.

This event, in my opinion, is not only an opportunity to highlight the significant successes achieved in the global fight against corruption and reaffirm the commitment of all States to this goal, but it is also an effective tool for launching a new phase of co-operation and integration in this difficult field.

As you all know, the Conference will culminate with the adoption of the final statement that will formalise the shared responsibility of all Member and non-Member countries and the collective commitment of delegates to promoting initiatives aimed at combating the bribery of foreign public officials.

I think that this is an important political result of this event, but I must also say that I hope that the Conference will not only achieve a political outcome of real significance, but also a further significant result that will ensure on a stable basis ongoing liaison and co-ordination between the legal practitioners who face every day a wide array of obstacles in such an important and sensitive field.

The added value of this event, in fact, is that two very important forums have been included within this International Conference of Ministers: the prosecutors' meeting and the experts' meeting, which have been given the task of reinvigorating the activities of the OECD Anti-Bribery Group, making it possible to show what has been accomplished thus far and the areas in which a major joint effort is still required.

The OECD Convention signed in 1997 and the two recommendations require all 30 Member countries and the seven non-member economies to implement a broad series of legal and programmatic measures aimed at investigating, prosecuting and punishing the bribery of foreign public officials or anyone holding a public office or exercising a public function in a foreign country.

The fundamental characteristic of this instrument is the extraordinary effectiveness of its provisions, despite its distinctive characteristics as a convention: the OECD Convention, without requiring uniformity in its means of implementation, has a fundamental objective of ensuring, through the functional equivalence of the measures adopted, genuine competitiveness in the conducting of international business transactions.

This purpose is clearly shown by the importance it places on behaviour aimed at obtaining undue advantages in international transactions by promising, offering or intentionally giving – whether directly or through intermediaries – any pecuniary or other benefits to a foreign public official in order *to obtain or retain business or other improper advantage in the conduct of international business*.

The concept of foreign public official is very broad, encompassing any public function exercised on behalf of foreign country, a public agency or a public enterprise, or any official or agent of a public international organisation, with a scope of definition broad enough to take into account all the differences between individual countries and with a major introduction of a system of liability – not necessarily criminal – that is also applicable to legal persons.

The success of the OECD approach, and what distinguishes it from the many other international anti-corruption instruments (from the UN Merida Convention to the Conventions developed in the Council of Europe and the European Union), lies in the compelling mechanism of peer reviews (*i.e. evaluation by peers working at the same table*), which we can define as an extraordinary instrument of soft law inasmuch as it is based on an open method of co-ordination rather than on the imposition of external rules typical of techniques based on harmonisation. Instead, it is based on the willing adoption by all Member States of legal and enforcement mechanisms against corruption that are continually monitored in countries – the famous on-site visits of OECD officials and delegates – and which are in any case the subject of in-depth investigation in the Phases 1 and 2 that all signatory countries must undergo.

I believe that there is no better method of persuasion, from a political standpoint, and that each country has effectively made a wide range of fundamental efforts to adapt its own domestic legislation to the OECD Convention and Recommendations.

With regard to Italy, with Article 3 of Act No. 300 of 29 September 2000, the national legislature introduced Article 322 bis of the Criminal Code, extending the application of the legislation governing indictment for serious crimes against the public administration to specific types of actors operating in various reference international spheres so as to bring domestic legislation in line with the various instruments provided for in the international conventions that have been adopted, including the OECD Convention.

The legislative technique used did not consist of reformulating the concept of public official or person charged with a public service mission, but of extending certain offences – including active bribery and incitement to passive bribery – to the cases involving holders of foreign or international public offices.

Article 322-ter, also implementing the relevant provision contained in Article 3 of the Convention, next introduced the confiscation of the value or of the equivalent amount in cases in which it is not possible to confiscate the amount of the bribe or the proceeds of the crime.

With Legislative Decree No. 231 of 8 June 2001, implementing another important provision of the OECD Convention, the administrative liability of legal persons was introduced for offences of fraud against the State and bribery.

With regard to the provision contained in Article 322 bis of the Criminal Code, I explained at the outset that the fundamental characteristic of the act of bribery according to the OECD Convention – as is clearly specified in Article 7 of the Commentary – should constitute an offence irrespective of, *inter alia*, the "value" of the advantage or "its results", perceptions of "local customs", the "tolerance" of such payments by local authorities or the "alleged necessity of the payment" in order to obtain or retain business or another improper advantage.

However, beyond this observation and others that have also been made regarding the lack of harmony between the offence introduced by national and international legislators, for example regarding the lack of domestic legislation on the distinction between previous and subsequent corruption, I think that, with regard to the OECD Convention, the real difficulty for us has been the inclusion in the criminal code of the offence of "*concussione*", i.e. extortion by a public official.

In regard to this aspect, I can say then that I have personally experienced how effective the monitoring mechanism of the OECD peer reviews can be, for, during the final Phase 2 report, I sought to explain personally to the Working Group delegates the historic significance of the offence of *concussione* in Italy, and I underwent vigorous questioning from the colleagues seated around the table and from the Group's Chairman, who led me to look at this issue from the standpoint of competitiveness and the international economy and thus to rethink my positions and ask the Government to which I belong to make the necessary legislative change required to eliminate the offence of *concussione*, following intensive work that the Minister will discuss in depth tomorrow.

On the other hand, even domestic bribery is never an ordinary offence, for it frequently also has an international dimension that means that, because of its involvement with organised crime, this problem has now taken on a global dimension.

Corruption is an offence that should rank among the most serious crimes, such as those involving weapons and drugs; it hurts the market and often operates in continuous contact with organised crime. This is because it is a key crime that is an indispensible tool for criminal organisations to achieve their planned criminal purposes since it can open the doors to all organised crime activities, acting as a global communication channel through trade and a breeding ground in which organised crime can operate.

Corruption is countered through economic and cultural growth and through political and judicial action, and it is no coincidence that the OECD is actively working on both of these fronts, firstly, by providing developing countries with tools for improving their own position on the global market, and secondly by developing a strong code of ethics that applies to the legislative, political and judicial sectors in all countries that are parties to the Convention.

With regard to judicial enforcement, I consider that Italy has always been in the forefront of fighting corruption through the courts; there is a genuine anti-corruption culture among our judges as corruption is an endemic problem that judges have come to know and combat with effective weapons.

At the international level, in my view, there is not only a need for fully qualified investigators, but also for co-operation tools that will enable them to work effectively.

The rigorous mechanism of peer reviews provided for by the Anti-Bribery Convention is indeed a unique and extraordinary tool on the international scene.

I believe, however, that the OECD can lead the Member Countries and the economies that are parties to the Convention to do more to integrate their respective forces in the fight against this terrible social, political and economic problem.

The Council of Europe has issued a Recommendation (No. 11 of 19 September 2001) that lays down several principles in the field of combating organised crime that are primarily aimed at ensuring the following: 1) a rapid response to all requests for assistance; 2) direct transmission of requests for assistance in cases of emergency; 3) co-ordination between police and judicial co-operation structures, establishing direct and rapid channels and methods of international co-operation and exchange; 4) joint police operations with the representatives of liaison departments and judges.

Obviously, this is in a European context and is also based on a legislative instrument such as the Recommendation, which is highly effective in this context.

I would like our future to consist of a similar and even stronger co-ordination, since it would be enhanced by the presence of a strong policy institution such as the OECD.

This will make it easier to shift the centre of gravity of co-operation from the implementation phase to the phase of co-ordinating investigations.

It is also for this reason that we have presented a bill to ratify the European Framework Decision, which has been approved by the Senate and will soon also be voted on by the Chamber of Deputies. This bill is aimed at establishing direct contact between public prosecutors working in related investigations and co-ordination between investigation teams; the bill, which also provides for the creation of joint investigation teams, currently concerns the

EU countries, but I believe that it can also provide an appropriate reference for stronger co-operation in the non-European international sphere.

It is for this reason that the government has decided also to extend such an effective form of judicial co-operation to non-European countries that are experiencing the same problems of combating crime in its most aggressive and rapidly expanding forms. In recent months, I have taken steps to propose to ten non-EU countries (in the Balkans and Central and South America) the same type of bilateral judicial co-operation agreement, which we intend to transform into genuine treaties within a few months.

In addition, the need for a comprehensive "overhaul" of the traditional judicial co-operation mechanisms has now become apparent not only in the EU, but has also become an objective of fundamental importance for the international community, as is shown by the adoption of two recent legislative instruments, i.e. the UN Convention against Transnational Organised Crime, signed in Palermo on 15 December 2000, and the Statute of the International Criminal Court, which was signed in Rome on 17 July 1998 and entered into force on 1 July 2002 following the deposit of the 60th instrument of accession.

The need for comprehensive approach to co-operation among the various competent authorities has arisen because of a new *modus operandi* in criminal organisations, and this necessarily implies co-operation in the investigation phase beyond the limited boundaries of the old territorial sovereignties and the admittedly necessary harmonisation of the various legislative systems.

It has been clear for some time now that the techniques used by organised crime to launder, conceal and re-use illegal profits have crossed international borders and that consequently the ability of investigators to follow the tracks of economic transactions and assets must be extended to the international sphere.

At a time when it is possible to conduct business transactions from one country to another in real time using electronic payment, even well-established judicial concepts such as that of *locus commissi delicti* contained in Article 6 of our Criminal Code are being undermined since

transactions can transit through computer facilities located in a State regardless of whether either of the parties to the transaction resides there or not.

Nor can it be forgotten that large criminal organisations tend to infiltrate the weak links of the international chain developed to combat money laundering and other forms of economic and financial crime in order to invest their capital in or have it transit through countries with defective anti-corruption legislation.

However, even the minor legislative loopholes or blind spots in monitoring systems that can unfortunately be found even in the legislation of those countries that cannot appropriately be defined as "off shore" can favour the activity of international criminal organisations by interfering with the conditions of reciprocity that are indispensible for co-operation between different judicial systems or by making it difficult to conduct the checks and investigations required to prosecute certain types of criminal behaviour.

It is in fact the problem of the "growth of information asymmetries" that constitutes a dangerous breeding ground for the activities and development of criminal groups.

It is therefore obvious how important it is to have a rapid, effective and ongoing exchange of relevant information between the judicial and police authorities of the States involved in investigations and proceedings concerning transnational crime.

A significant example of how effective co-operation can be developed, which is also relevant to the future co-ordination of investigations within joint investigative teams, is provided by EU Council Decision 2003/48/JHA on the implementation of specific measures for police and judicial cooperation to combat terrorism, which requires member States to make accessible or available immediately "any relevant information" obtained in the course of investigations related to terrorist crimes.

There has been talk of need for transnational supervision that might take the shape of a sort of "federation of sovereignties" for combating organised crime. The OECD co-operation method is in fact an instance of such a federation, as it is grounded in all the States' collective commitment to ensuring legislative and judicial alignment.

For this reason, I think that it is fair to say that an irreversible process of change has successfully been launched aimed at transforming co-operation between States into co-operation between courts in a direction that can now be defined as transnational justice or even, as some have said, "integration between courts".

These trends seem to be emerging more definitely in the EU, where the principles of European territoriality and European citizenship are being affirmed within a common legal and judicial area in accordance with Article 31 of the Treaty and the results of the Tampere Summit, as it has recently been shown with the signature of the Brussels Convention of 29 May 2000 on Mutual Assistance in Criminal Matters.

Obviously, matters are more complex at the international level, yet it is at this level that the greatest problems arise in connection with a crime such as corruption, which is developing hand in hand with the expansion of the economy and offshore transactions.

Consequently, in this field too the approach to developing new forms of judicial co-operation should be based on a judicious combination of "modules" that would not only include the reciprocal recognition of measures adopted by the judicial authorities of other States, without government mediation or any special verification of their validity, but also the mutual exchange of information required for criminal cases that are interrelated at the international level, direct and rapid dialogue between the judicial authorities of the States concerned by a transnational investigation and, above all, "operational" co-operation consisting of spontaneous co-ordination of the investigative activities that must be conducted across increasingly "delocalised" territorial areas. A way can and must be found also to make this operational co-ordination a significant aspect of the OECD's activity.

It is in fact in this field that I see a new and important role for the OECD as a key hub for encouraging and interlinking the various prosecuting authorities and which should take a form that goes beyond Article 15 of the UN Convention, which simply stipulates that the competent authorities of signatory States should consult with each other as appropriate in order to co-ordinate their initiatives.

As many of you know, 2008 marks the conclusion of Phase 2 for all signatory States; this means that all countries have undergone an initial legislative review and a second legislative, administrative and judicial review of the implementation of the Convention and its related Recommendations.

It is now necessary to launch a new phase and develop significant new operating arrangements for the Anti-Bribery Working Group.

Obviously, the key priority of the Anti-Bribery Working Group is to continue to ensure the effectiveness of the mechanism for monitoring the implementation of the Convention by countries and to ensure that the Convention itself and the Recommendation remain cutting-edge tools in the fight against corruption.

However, it is becoming increasingly urgent to revise these tools in order to adapt them to the changing times.

I know that the Working Group is in fact working intensively on studying the means of renewing and adapting the existing tools in order to launch a further phase of review and monitoring that will go beyond the conclusion of Phase 2.

In this regard, I believe that a further step can and should be taken to provide for a stable, comprehensive and global form of co-ordination between public prosecutors that will fit in harmoniously with the valuable and essential work of the OECD.

Meetings held every two months that are limited to sharing in a *tour de table* the various cases faced by the judicial authorities of the different countries and that rely solely on the relevance of the questions asked by colleagues sitting at the same table as representatives of their respective States now seems, in my view, as useful as it undoubtedly is, to be too restrictive and insufficient.

It is necessary to launch a new phase that will integrate the already effective mechanism of peer reviews with a parallel strengthening of the role of the Working Group that will, however, entail a more in-depth judicial dialogue that will be sanctioned by the OECD as representing the

Convention's Member States, but that will become independent of the Organisation as it follows the paths of a new, intensive judicial co-operation.

What I have in mind is a periodical conference among public prosecutors that would be held on a regular basis and that, although it would act within the framework the objectives of the Working Group, would have its own independent identity.

In my view, this new phase could institutionalise what has been accomplished during these two days and thus establish a stable and operational link between public prosecutors that will facilitate co-operation in prosecuting crimes of corruption.

As I think is obvious, there would be no risk of conflicts or overlapping for, although the prosecutors already participate in the Working Group, they do so as representatives of the signatory States; the Group has a policy role and a role of monitoring the States' compliance with legislative and administrative standards in the fight against corruption.

However, the Conference that I am recommending is aimed at establishing systematic contact among public prosecutors of different nationalities so that they can examine together systematically the developments and transformations of transnational crime and in particular corruption, its emerging new forms and ways of operating, together with the problems encountered in cross-border co-operation and general problems in areas subject to corruption.

The results of these periodic meetings and the conclusions reached by the public prosecutors should then be assessed and adopted by the OECD, which obviously works in a context that is not only European and also bases its work on an instrument that acts as an international standard, such as the Recommendations, which are therefore highly effective in this context.

I would like our future to consist of a similar and even stronger co-ordination, since it would be enhanced by the presence of a strong policy institution such as the OECD.

This will make it easier to shift the centre of gravity of co-operation from the policy assessment phase to the phase of co-ordinating investigations.

As a result, the OECD will draw new momentum from an increasingly in-depth knowledge of new developments, enabling it to promote more easily a new legislative and administrative commitment on the part of the signatory States on the basis of the guidelines provided by the public prosecutors, which will be the result of the real knowledge and experience gained in their work together.

This process will also naturally promote in the individual States involved the development of prosecutors' offices specialised in combating corruption at various levels and in particular at the international level.

A truly global overview of the problem of corruption is the only approach that will make it possible to achieve effective results. In fact, to limit ourselves to an albeit frequent report on each individual national case of domestic or cross-border corruption can only provide a restricted vision of the problem of corruption.

I believe that this limited vision can only be overcome through a joint and collective overview and through the united efforts of the public prosecutors who are involved fighting corruption on a day-to-day basis.

As I pointed out earlier, the challenges posed to the international community by criminal activities that are increasingly adapting to globalisation are inevitably leading to forms of "operational" assistance that require ongoing co-ordination between the authorities of the States concerned and even joint operations based on agreements signed on a case-by-case basis but not necessarily as part of a centralised co-ordination activity.

However, the relationship between the OECD and the public prosecutors must become a two-way street: on the one hand, the former must push the latter towards new forms of co-operation that will enable them to overcome previous barriers, and on the other hand, the public prosecutors must provide the OECD with guidelines for a new more effective form of co-operation that will transcend national borders and develop a truly global dimension.

The OECD will continue to play its important role of providing encouragement to the individual States, which will be able draw on the results of the activity of the public prosecutors. There

will be no involvement, as is obvious and necessary, in investigative activities, but rather a productive synergy that can only be established through the concrete, day-to-day monitoring of the obstacles encountered in prosecuting a crime that is so pervasive throughout the social fabric as corruption.

In this way, the public prosecutors will be better able to marshal their forces to combat the problem of corruption and, at the same time, the OECD will gather from their work information that will enable it to guide more effectively the policy and legislative activity of the individual States.