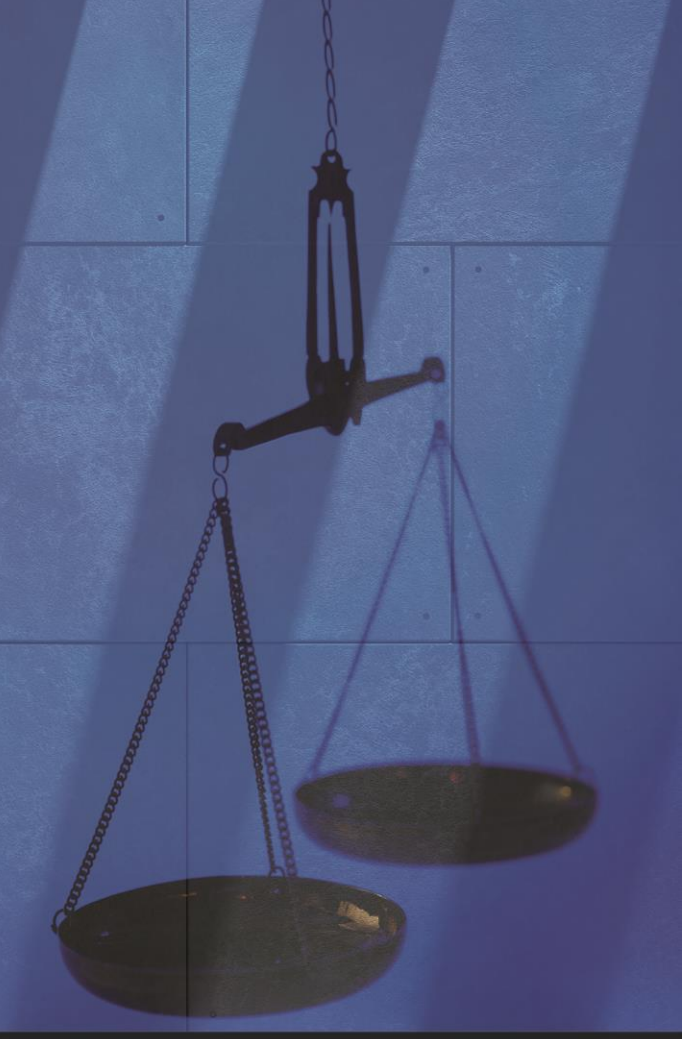

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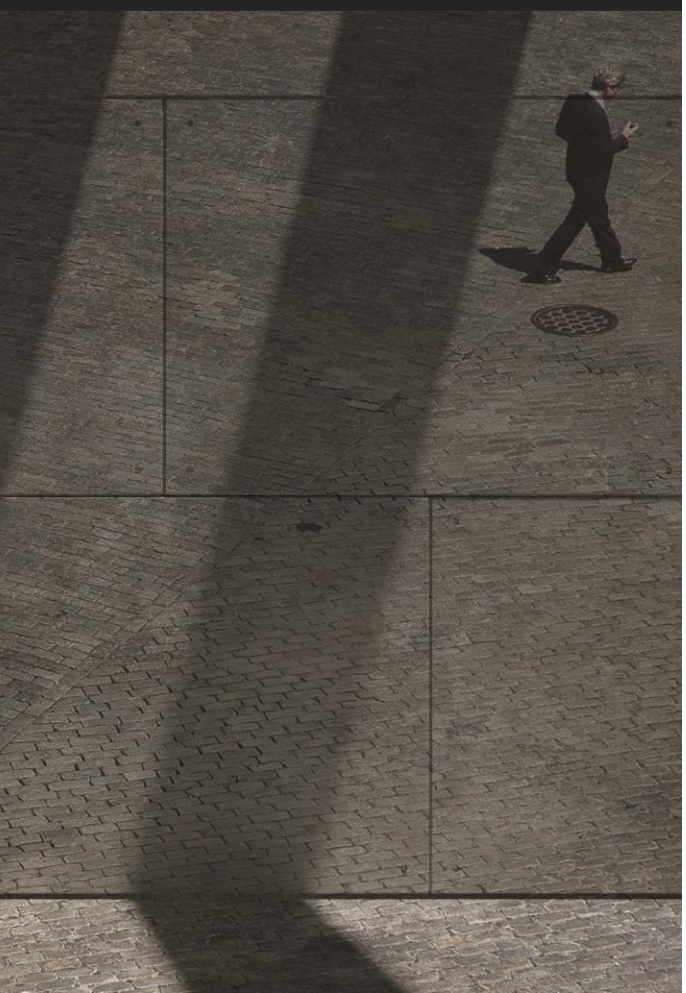

Implementing the OECD Anti-Bribery Convention

Phase 4 Report:

Italy

This Phase 4 Report on Italy by the OECD Working Group on Bribery evaluates and makes recommendations on Italy's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 13 October 2022.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability and international co-operation, as well as covering unresolved issues from prior reports.

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Executive Summary

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions (Working Group) evaluates and makes recommendations on Italy's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details Italy's achievements and challenges, including in enforcing its foreign bribery offence, as well as progress made since its 2011 Phase 3 evaluation.

Since Phase 3, Italy has commendably strengthened its legislative framework to fight foreign bribery. Legislative improvements include lengthening the statute of limitations for natural persons, increasing the available imprisonment terms and disqualification sanctions, and introducing whistleblower protection. Despite daunting obstacles to obtaining convictions, Italian law enforcement officials continue to valiantly investigate and prosecute foreign bribery. In fact, Italy shows a significant level of enforcement with the pace of enforcement increasing since 2011. The creation of the 3rd Department in the Milan prosecutor's office to tackle foreign bribery signifies Italy's commitment to implement the Convention and is a good practice that should be maintained.

Nevertheless, the Working Group is seriously concerned that foreign bribery cases litigated in Italy have yielded a high number of dismissals. Almost all foreign bribery convictions are secured through *patteggiamento*, a form of non-trial resolution. In cases litigated in court, however, after one conviction in 2013, the last seven trials produced five full dismissals, one partial dismissal, and one conviction. Dismissals occur partly because the totality of circumstantial evidence is not considered simultaneously. Cases that may demonstrate bribery when viewed holistically risk being dismissed because of this narrow approach. Proof of all of the details of a corrupt agreement is also necessary. Requiring proof of foreign law adds another hurdle. The defence of *concussione* remains available, while a new one of effective regret could be interpreted as to serve no useful purpose in foreign bribery cases. Sanctions in practice for the offence of undue inducement need to be effective, proportionate and dissuasive. Legislative amendments and training are needed to rectify these deficiencies.

The Working Group is also particularly concerned about Italy's legislation for holding companies accountable for foreign bribery. Corporate fines are so low as to be unfit for purpose. The statute of limitations is much shorter for companies than for individuals. While Italy has commendably introduced whistleblower protection, protection in the public sector is not yet comprehensive; in the private sector it is even weaker. Confiscation has increased since Phase 3 but is not systematically imposed and does not always fully disgorge the gains of the crime; interdictive sanctions are never imposed.

Italy also needs to improve the detection and awareness-raising of foreign bribery. It should develop a comprehensive national strategy to fight foreign bribery. The monitoring of Italian and foreign media needs to be strengthened, since numerous reported allegations of foreign bribery were undetected. Further efforts are needed to raise awareness of foreign bribery and the Convention among Italian officials, accountants and auditors, and small- and medium-sized enterprises. Foreign bribery should be specifically addressed in Italy's national money laundering risk assessment, as well as explicitly addressed in guidance and typologies provided to entities subject to anti-money laundering regulations. Italian authorities should also proactively encourage companies to adopt anti-corruption compliance programmes.

On a further positive note, substantial investment has been committed to digitise and modernise the judiciary; seeing through these efforts could allow Italy to reduce endemic delay in the justice system. Italy has made concerted efforts to strengthen its legal and policy framework for mutual legal assistance and extradition. It has increased tax audits and co-operation between tax and Italian law enforcement authorities, resulting in the detection of three foreign bribery cases. Italy has commendably promoted the Convention, significantly contributed to anti-corruption efforts in multiple international fora and led capacity building programmes. An Inter-institutional Table of Anti-corruption Co-ordination has been set up at the Ministry of Foreign Affairs and International Co-operation. The annual Italian Business Integrity Day is an innovative awareness-raising effort. Extending the event to corruption-prone countries and sectors will enhance its impact in fighting foreign bribery.

The report and its recommendations reflect the conclusions of experts from Germany and United States and was adopted by the Working Group on 13 October 2022. It is based on legislation, practice data and other materials provided by Italy, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit to Italy in April 2022, during which the evaluation team met representatives of Italy's public and private sectors, prosecutors, judiciary, media, and civil society. Italy will report in writing in two years on the implementation of all recommendations and on its enforcement efforts.

Introduction

1. In October 2022, the Working Group on Bribery in International Business Transactions (Working Group) concluded its fourth evaluation of Italy's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) and related instruments.

1. Previous evaluations of Italy

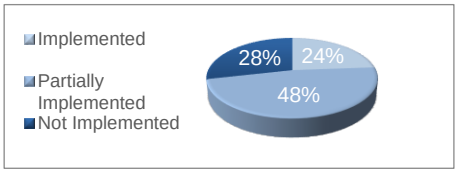
2. The Working Group conducts successive phases of peer-review evaluations to monitor all Parties' implementation and enforcement of the Convention and related instruments. Since Phase 2, evaluations have included an on-site visit to obtain governmental and non-government views in the evaluated country. The evaluated country may comment on but not veto the evaluation report and recommendations. Evaluation reports are published on the OECD website.

Table 1. Working Group evaluations of Italy

2001 Phase 1 Report
2004 Phase 2 Report
2007 Phase 2 Follow-up Report
2011 Phase 3 Report
2014 Phase 3 Follow-up Report

3. Italy's last full Working Group evaluation in Phase 3 yielded 21 recommendations. In 2014, the Working Group concluded that Italy had fully implemented 5 recommendations, partially implemented 10, and not implemented 6 (see Annex 2).

Figure 1. Italy's implementation of Phase 3 recommendations



2. Phase 4 process and on-site visit

4. The monitoring process is based on principles agreed by the Parties. Phase 4 evaluations focus on the cross-cutting issues of enforcement, detection and corporate liability. They also address outstanding recommendations from previous evaluations and changes to domestic legislation or the institutional framework. Phase 4 takes a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements. This report therefore does not revisit issues that were not deemed problematic in previous phases and have not been affected by subsequent developments.

5. The evaluation team for this Phase 4 evaluation of Italy was composed of lead examiners from Germany and the United States, as well as members of the OECD Anti-Corruption Division.[1] After receiving

[1] Germany was represented by Dr. Felix Burkhart, Counsellor, Legal Division, Federal Ministry for Economic Affairs and Climate Action; Dr. Juliane Müller, Regional Court Judge, Berlin Regional Court. The United States was represented by Mr. Charles Cain, Chief, FCPA Unit, Securities and Exchange Commission; Mr. Andrew Gentin, Acting Chief, Corporate Enforcement, Compliance & Policy Unit, Fraud Section, Criminal Division, Department of Justice;

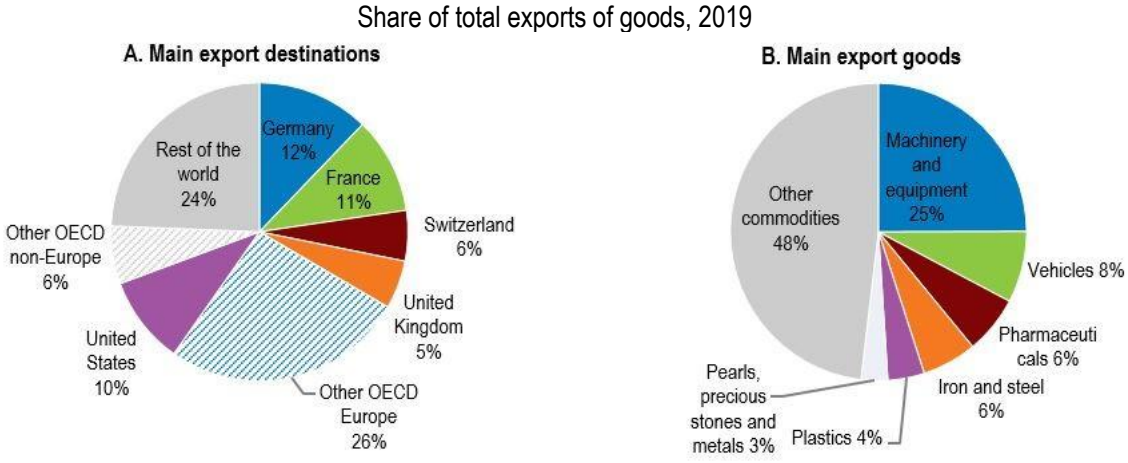
Italy's responses to the standard Phase 4 questionnaire and country-specific supplementary questions, the evaluation team conducted an on-site visit in Milan and Rome on 4-8 April 2022. Due to the COVID-19 pandemic, part of the evaluation team participated in the on-site visit virtually. The evaluation team met representatives of the Italian government, legislature, law enforcement and judiciary, independent supervisory authorities, public notaries, the private sector (business associations and companies; lawyers; and auditors), as well as civil society (non-governmental organisations, academia and the media) (see Annex 3 for a list of participants). The evaluation team expresses its appreciation to all on-site visit participants for their openness and contributions.

3. Italy's economy and foreign bribery risks

6. Italy has a population of 59 million and the 6th highest GDP of the 44 Working Group countries. The economy consists of a manufacturing sector located mostly in the north and an agricultural sector mainly in the south. The informal economy accounts for around 14% of employment.[2]

7. In terms of trade, Italy ranked 8th in the Working Group for exports of goods and services in 2019. The top exported goods were machinery and equipment (25%); vehicles (8%); pharmaceuticals (6%); and iron and steel (6%). The main export destinations were Germany (12%); France (11%); US (10%); Switzerland (6%) and UK (5%). The major imports were manufactures (69%); fuels and mining products (17%); and agricultural products (12%). Trade in commercial services represented 21% and 17% of exports and imports, mainly related to travel. Italy was the world's 10th largest arms exporter in 2016-2020. In 2019, the main destinations were Egypt, Turkmenistan, UK, US, and France.[3]

Figure 2. Exports by main destinations and main goods



Source: OECD (2021), International Trade by Commodity Statistics database

8. Regarding foreign direct investment (FDI), Italy in 2019 had USD 557 billion in outward FDI stocks, ranking 13th in the Working Group. The top destinations – Netherlands; Spain; US; Germany; France;

and Mr. David Last, Chief, FCPA Unit, Fraud Section, Criminal Division, Department of Justice. The OECD Anti-Corruption Division was represented by Mr. William Loo; Ms. Corinna de Vathaire de Guerchy; and Ms. Lucia Ondoli.

[2] Istituto Nazionale di Statistica; OECD Data; OECD (2019), Economic Survey: Italy, Chapter 1.

[3] Sources: OECD Economics Department based on OECD national account data; OECD (2021) Economic Survey: Italy, p. 21; WTO Trade Profiles 2019; UNCTADStat, General Profile: Italy.

Luxembourg; and UK – accounted for only 50.2% of the total. Some of these may be "pass through" countries for investment destined for other jurisdictions. Other FDI destinations include countries with a notable level of corruption, e.g. Russia (2.5%), UAE (2.4%), Brazil (2.4%), Chile (2.4%), Algeria (2.2%), China (2.2%), Romania (1.8%), Egypt (1.7%), India (1.2%), Türkiye (1.1%), Saudi Arabia (1%) and Serbia (0.8%). Most investment was in services and manufacturing (54% and 28.8%). Smaller but perhaps more corruption-prone are other sectors such as mining and quarrying (1.9%), and electricity and gas (1.3%).[4]

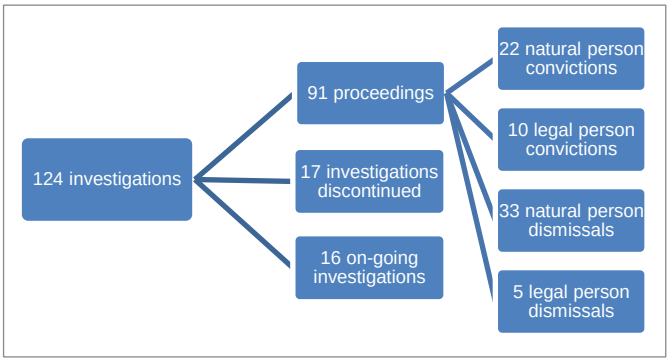
9. Micro, small and medium-sized enterprises (SMEs) are at risk of committing foreign bribery. Italy's SMEs account for 99% of companies, 67% of overall value-added in the "non-financial business economy", and 78% of employment. Many SMEs are internationally active. In 2019, Italian businesses with 50-249 employees generated USD 128 billion in exports, behind only Germany and the Netherlands in the OECD and WGB. SMEs' significance in exports to non-EU countries is even greater, ranking first among EU countries in 2017 in terms of the number of exporting enterprises and total value of exports.[5]

10. State-owned or controlled enterprises (SOEs) are at risk of committing foreign bribery. In 2018, the state participated in 8 510 economic entities employing 924 068 people. Six of the ten largest Italian companies by revenue were SOEs. SOEs are internationally active, with some 29.7% of their workforces outside of Italy. Many operate in risk sectors such as energy, transportation, aerospace, large engineering systems and distribution networks.[6] Several foreign bribery investigations have implicated SOEs.

4. Foreign bribery enforcement since Phase 3

11. Italy has a significant level of foreign bribery enforcement compared to other WGB members, considering the size of its economy as well as the level of international trade and investment. It has had at least 124 investigations and 91 proceedings for foreign bribery in 1999-2022, yielding convictions of 22 natural persons and 10 legal persons. The pace of enforcement increased since 2011 (i.e. after Phase 3), with 90 investigations and 72 proceedings, yielding 14 and 8 natural and legal person convictions.[7]

Figure 3. Italy's foreign bribery cases 1999-2022



Note: Cases may include multiple defendants. Figures include convictions and acquittals that are pending appeal.

12. Of concern, however, is the number of dismissals after trial. Post-Phase 3 enforcement efforts have produced almost twice as many acquittals of natural persons (27) than convictions. Another 5 legal persons have also been acquitted. Almost all convictions were secured through *patteggiamento*, a form of non-trial resolution. The first foreign bribery case litigated before the courts resulted in a conviction in 2013. The next five trials resulted in four full acquittals and one

[4] OECD data; Bank of Italy, "Italy's direct investment by counterpart country".

[5] Istituto Nazionale di Statistica; OECD Data, Exports by business size; European Commission (2019), SBA Fact Sheet: Italy; European Commission (2020), "The Role of SMEs in Extra-EU Exports", p. 10.

[6] Instituto Nazionale di Statistica (Istat) (30 December 2020), Le participate pubbliche in Italia – anno 2018; Commissione Imprese e Sviluppo (1 July 2020), Missioni Strategiche Per Le Imprese Pubbliche Italiane, pp. 15-16.

[7] Information provided by Italy during this evaluation and the Working Group's annual collection of foreign bribery enforcement data. Figures include cases pending appeal. Data on investigations and proceedings cannot be verified.

partial acquittal. The seventh trial was also unsuccessful after the court ruled that it lack jurisdiction. Just before the adoption of this report, an eighth (fast-track) trial resulted in the conviction of one individual for one count of foreign bribery, but the conviction is not yet final. Furthermore, the outcome against three co-defendants in the same case is yet to be determined as they await trial for two counts of foreign bribery and other offences. The report does not examine the reasons for judgement in the last two cases. The reasons in one of the cases were provided only days before the adoption of this report and the other is not yet available. (See Annex 1 for summaries of enforcement actions concluded after Phase 3.)

Commentary

The lead examiners commend Italy for its increasing foreign bribery enforcement efforts since Phase 3. These efforts have produced a notable number of convictions, almost all of which were secured through patteggiamento. Litigated foreign bribery cases, however, have yielded a high number of dismissals, as explained in Section B.1.a at p. 34.

A. Detection of the foreign bribery offence

A.1. Strategy for fighting foreign bribery

13. Italy does not have a comprehensive national strategy to fight foreign bribery. The National Anti-Corruption Authority (ANAC) adopted a National Anti-Corruption Plan (PNA) to co-ordinate the anti-corruption programmes in the public sector (PTPC).[8] But this concerns *domestic* corruption. For foreign bribery, Italian authorities have raised awareness of the Convention at the international multilateral level in fora such as G7, G20 and the OECD. This includes co-chairing the G20 Anti-Corruption Working Group, promoting the Convention to G20 members that are not in the Working Group, collecting national questionnaires and adopting a progress report on foreign bribery policy, and developing capacity building programmes in the EU framework. They also refer to legislative amendments impacting the implementation of the Convention, such as on the foreign bribery offence, *concussione* and the statute of limitations. Italy adds that "the legislative efforts are reflected in an enforcement-oriented approach resulting in the opening of investigations and trials". While law enforcement is undoubtedly essential, it does not eliminate the need for a comprehensive approach that also encompasses prevention, detection and awareness-raising. As further explained in the sections below, the overall result is that few government bodies have initiatives that focus specifically on foreign bribery (e.g. efforts by MAECI and in the area of public advantages, Sections A.5, A.11 and A.12). The efforts of those that do are fragmented and uncoordinated.

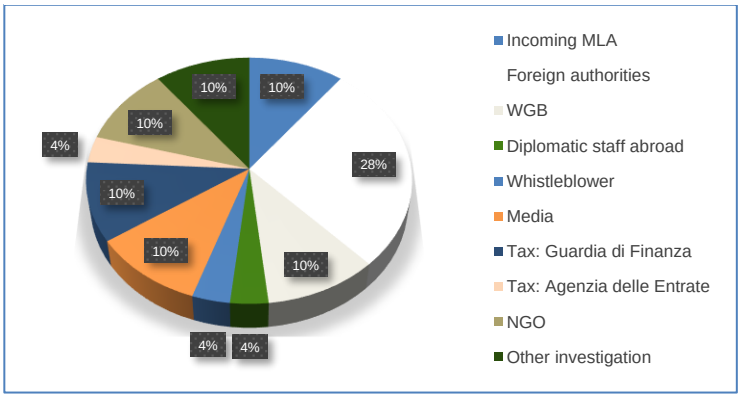
Commentary

The lead examiners are concerned about the absence of a comprehensive approach to fight foreign bribery, which may be why few government bodies have initiatives that focus specifically on this offence. They therefore recommend that Italy develop a comprehensive national strategy to fight foreign bribery that identifies the sectors and activities in Italy that are at risk of foreign bribery, and which specifies measures for addressing those risks. These measures should encompass prevention, detection, awareness-raising and enforcement, including those identified in this report below. The strategy should also designate the bodies responsible for implementing these measures, and mechanisms for assessing the measures' effectiveness.

A.2. Sources of foreign bribery allegations

14. Italy provided information on the sources of the allegations that led to 29 of its foreign bribery enforcement actions since Phase 3. The information does not cover all post-Phase 3 cases, but the dataset is sufficiently large for the purposes of this evaluation. The data show a fairly diverse range of sources. Most cases, however, were not proactively discovered by Italian authorities but were instead brought to their attention by other sources. Information provided by foreign authorities is by far the largest single

Figure 4. Sources of foreign bribery allegations



[8] Autorità Nazionale Anticorruzione (2021), Piani Triennali di Prevenzione della Corruzione e della Trasparenza (PTPC) and Piano Nazionale Anticorruzione (PNA) 2021-2023.

source of allegations (28%). As explained below, some sources such as the media and overseas diplomatic staff generated relatively few allegations. External auditing has not yielded any allegations at all. Companies have not disclosed potential foreign bribery to the authorities, possibly because Italy does not have a policy to encourage self-reporting.

A.3. Detecting foreign bribery through media reports

15. The number of foreign bribery cases detected through the media could have been higher. Media reports were the source of only 3 of the 29 (10%) post-Phase 3 foreign bribery enforcement actions for which information was available. In 6 other cases, the foreign and Italian media initially reported the allegations. However, Italian authorities did not react to these reports and subsequently became aware of the allegations from other sources. In another 9 cases, Italian authorities were presumably unaware of the allegations even though the Working Group had already discovered them through its own media monitoring. A spectrum of media outlets in Italy and abroad had reported on these cases.

16. Insufficient media monitoring may explain the limited number of investigations deriving from this potentially powerful source. Italy states that the Press and Institutional Communication Service of the Ministry of Foreign Affairs and International Co-operation (MAECI) constantly monitors the national and foreign press. Individual embassies and overseas missions also monitor the media. This raises two issues. First, MAECI has not forwarded any media reports of foreign bribery allegations to law enforcement (the single referral from MAECI did not originate from a media report). MAECI is therefore either not aware of the relevant media information, or not systematically forwarding the information to judicial authorities. (MAECI's reporting obligations are considered in Section A.5 at p. 14.) Second, MAECI's remit extends to numerous topics far beyond foreign bribery. The attention of its media monitoring service is hence naturally diverted to many other issues. Meanwhile, Italian law enforcement and anti-corruption authorities with a keener focus on foreign bribery do not monitor the media themselves.

Commentary

The lead examiners are encouraged that Italian authorities have initiated some foreign bribery investigations based on media information. However, the number of cases detected through this source could have been higher. Numerous reported allegations of foreign bribery have slipped through the net. The lead examiners therefore recommend that Italy ensure that the Italian and foreign media is regularly monitored for foreign bribery allegations and that all relevant media reports, including those provided by the Working Group, are forwarded immediately to law enforcement.

A.4. Detecting and reporting foreign bribery by Italian public officials

17. Italian public officials are not a significant source of detecting foreign bribery cases. Of the 29 cases for which information is available, just 3 were detected by tax officials and 1 by diplomatic staff. Officials in other parts of government did not detect any of the remaining cases.

18. The duty on public officials to report foreign bribery has not changed since Phase 3. Officials must report a criminal offence that is prosecutable *ex officio* (e.g. foreign bribery) of which they become aware while performing their duties (CCP Art. 331). Reports must be made to the prosecutor or judicial police. Breach of this duty is a criminal offence punishable by a fine of EUR 30-516 (CC Art. 361). The penalty increases to one year's imprisonment for a judicial police officer or agent. It further increases if the unreported crime is "against the personality of the State" (CC Art. 363), though this likely refers to the Italian State and hence does not apply to foreign bribery. These provisions are enforced, with over 13 convictions for failure to report a crime on average annually in 2014-2019. A failure to report may also be a disciplinary offence.

19. Italy has reminded public officials of this reporting obligation (Phase 3 Recommendation 6(a)). The National School of Public Administration (*Scuola Nazionale dell'Amministrazione*, SNA) offers courses to public officials. Italy states that these courses are "based on and aim to strengthen the awareness of public officials of their fundamental duty to detect and report illegal activities and in particular criminal offences (including foreign bribery)." The SNA states that courses on integrity and anti-corruption remind attendees of their reporting obligation. Some courses focus on whistleblowing, which applies mainly to an Italian official reporting wrongdoing in the workplace.

20. Recent positive steps have been taken to raise awareness of foreign bribery among Italian public officials. Italy describes at length SNA training on domestic corruption and anti-money laundering which does not address foreign bribery. The SNA mentions one seminar on "Corruption Prevention in a Transnational Perspective" that reportedly addresses foreign bribery. More recently, the SNA started courses for all public officials on fighting and preventing foreign bribery. Italy also states that training on "international corruption" is provided to officials of the National Anti-Corruption Authority (ANAC). But ANAC is responsible for public sector transparency, integrity and procurement. Its work thus encompasses *passive* foreign bribery, i.e. foreign companies bribing Italian officials. It does not have a role in fighting *active* foreign bribery, i.e. Italian companies bribing foreign officials." Awareness-raising for diplomatic and tax officials are described in Sections A.5 at p. 14 and A.10.c at p. 25.

21. An Inter-institutional Table of Anti-corruption Co-ordination (*Tavolo inter-istituzionale di Coordinamento Anticorruzione*) has been set up at the Ministry of Foreign Affairs and International Co-operation (MAECI). This initiative convenes government bodies and law enforcement authorities involved in fighting corruption,[9] as well as civil society organisations and the private sector. Its purpose is "to translate the innovative proposals that have come up in multilateral fora and national contexts into regulatory and organisational measures aimed at strengthening the effectiveness of the judicial response to corruption". The Inter-institutional Table also works "to ensure an adequate co-ordination of Italy's participation in the Anti-Corruption Strategies of International Organisations, in country evaluation exercises". The Inter-institutional Table's role is mainly co-ordinational in nature. However, it also contributes to raising awareness and promoting exchanges.

A.5. Detecting and reporting foreign bribery through overseas diplomatic missions

22. MAECI, which oversees Italy's embassies, consulates and representative offices, is the source of only one foreign bribery enforcement action since Italy became a Party to the Convention in 1999. That case, reported in 2014 by the Italian ambassador of an embassy in a foreign country, involved an Italian Minister allegedly bribing foreign public officials while overseeing Italian-funded projects abroad. The prosecution is on-going.

23. MAECI has made some efforts to raise awareness of foreign bribery among its officials. An internal conference in 2016 included an event on the "fight against corruption, economic growth and activities of Italian companies abroad". Subsequent conferences in 2017-2020 appear more relevant to domestic corruption and the integrity of MAECI officials. Training provided to MAECI officials in 2011-2014 covered foreign bribery but has since been discontinued. Currently, MAECI in collaboration with the SNA trains officials before overseas postings, which includes a course on international governance and corruption. Awareness-raising in the private sector is described in Section C.5.a at p. 80.

[9] Including the Ministries of Justice, Interior, Economy and Finance, and Economic Development; ANAC; Department of the Public Administration; Bank of Italy/UIF; Agency of Customs and Monopolies; *Guardia di Finanza*; *Unioncamere*; AGCM; ISTAT; AGID; CONI; CONSIP; Office of the Prosecutor General at the Court of Auditors; and National Anti-Mafia Prosecuting Bureau.

24. The framework for MAECI officials to report foreign bribery allegations has not changed since Phase 3. All MAECI officials are subject to the duty to report that applies to all public officials (see para. 18). In addition, Legislative Decree 71/2011 requires embassy and consular personnel to report suspicions of crime directly to law enforcement. The Phase 3 Report (para. 155) described Circular 4/2011 and two cables in the same year reminding foreign missions to report foreign bribery. No measures have been taken since. In this evaluation, one official stated that an Italian diplomat would report allegations of crime through diplomatic channels to the Rome Public Prosecutor's Office pursuant to the Circular.

Commentary

The lead examiners recommend that Italy take additional measures to raise awareness of foreign bribery among public officials including those working abroad, and of their duty to report this crime to law enforcement.

A.6. Whistleblowing and whistleblower protection

25. Under Anti-Bribery Recommendation XXII, countries should establish "strong and effective legal and institutional frameworks to protect and/or to provide remedy against any retaliatory action to persons working in the private or public sector who report on reasonable grounds suspected acts of bribery of foreign public officials in international business transactions and related offences in a work-related context." Recommendation XXIII.C.v asks countries to encourage "companies to implement frameworks for the protection of persons reporting potential violations of law, as well as channels for reporting, including as part of an internal controls, ethics and compliance programme or measures for preventing and detecting bribery of foreign public officials, and to take appropriate action based on such reporting".

26. The Phase 3 Report (para. 158 and Recommendation 7(a)) asked Italy to implement whistleblower protection in the public and private sectors. In response, Italy enacted Laws 190/2012 and 179/2017. Further legislation to transpose the EU Whistleblowing Directive 1937/2019 was expected by December 2021 but has yet to be enacted. As explained below, the current regime has strengthened protection for whistleblowers in the public and private sectors. However, there are questions about the scope of coverage, types of prohibited reprisals, and adequacy of remedies.

27. Italy states that, since Phase 3, one foreign bribery case originated from a whistleblower who was an employee of the company under investigation. The report led the *Guardia di Finanza* to conduct a tax audit of the company. Any individual is entitled to report foreign bribery to the prosecutor or judicial police (CCP Art. 333; Phase 3 Recommendation 6(b)).

A.6.a. Whistleblower protection in the public sector

28. Protection for public sector whistleblowers is contained in LD 165/2001 Art. 54bis. This provision applies to public employees who report unlawful conduct of which they became aware because of their employment relationship. These include employees of public administrations and state-controlled enterprises. Also covered are employees and collaborators of companies supplying goods or services and carrying out works in favour of a public administration. Protection applies to reports made through a range of channels, including to judicial authorities and the National Anti-Corruption Authority (ANAC). The employer has the burden of proving that an adverse measure against the whistleblower is not retaliation. Whistleblowers reporting within the "modalities and channels provided for the purposes of eliminating the offence" are shielded from liability for breach of state, professional, scientific and commercial secrecy, as well as for disloyalty towards an employer (Law 179/2017 Art. 3). Protection is denied or withdrawn if a court finds that the report amounts to slander, defamation or any other criminal offence, or that the reporting individual is civilly liable for acting with wilful misconduct or gross negligence.

29. The categories of eligible whistleblowers are limited, however. Not all persons working for a public administration are eligible for protection. Under Law 179/2017, persons with temporary work relations,

such as interns and trainees, are not protected employees. ANAC's 2021 Whistleblowing Guidelines explain that such persons are not covered because they are not "public-sector employees".[10] In addition, anonymous whistleblowers are ineligible for protection, even if such reports can be considered by public administrations and law enforcement.[11]

30. A further limitation is the purpose of reporting. A report must be made "in the interest of the integrity of the public administration". There is thus some doubt over whether, for example, protection is available to a person who reports a genuine act of corruption solely out of spite or disgruntlement against the employer. ANAC's Guidelines acknowledge "considerable difficulties" in determining whether a report is made in the interest of the whistleblower or of the integrity of the public administration.[12] Nevertheless, they provide that, once the public interest is ascertained, "the additional reasons, including personal ones, that led the whistleblower to submit the report are to be considered irrelevant". However, this approach is not reflected in the legislation. Italy also refers to administrative tribunal decisions for the proposition that a whistleblower's motive is irrelevant if the report protects the integrity of the administration.

31. The types of prohibited retaliation may also be narrow. Whistleblowers cannot be "sanctioned, demoted, fired, transferred, or subject to any other organisational measure linked to the reporting and having negative effects, directly or indirectly, on his/her working conditions". ANAC states that it has applied this provision to cover not only acts and measures, but also behaviours and omissions.[13] Nevertheless, the provision would only apply to "organisational" measures and behaviour; actions of an individual to coerce, intimidate or harass a whistleblower may not be covered. Italy states that a whistleblower in these cases can resort to civil litigation to obtain redress. It adds that labour legislation ensures "a very timely procedure". Regardless, the need to resort to the courts rather than ANAC underscores the incomplete nature of the current whistleblowing legislation.

32. The remedies against retaliation are also limited. The only remedy is that a discriminatory act or retaliatory measure is voided and, in case of dismissal, the whistleblower is reinstated in his/her work place (Arts. 54bis(7)&(8)). A dismissed employee thus risks being reinstated to a work environment that has become toxic. The public administration may – but cannot be obliged – to transfer the whistleblower to an equivalent position. The remedy of voiding is also ineffective against retaliatory acts such as harassment. The whistleblower is not compensated for lost income while litigating to void the discriminatory act. Italy states that remedies for harassment and financial compensation are available in civil proceedings under labour law, and labour courts can issue interim orders terminating the measures if the complaint is *prima facie* founded. However, this again defeats the purpose of comprehensive whistleblowing legislation.

33. ANAC can impose administrative sanctions for retaliation but these too may be insufficient. The individual who retaliates can be fined EUR 5 000 to 30 000. The entity's "responsible officer" can also be fined EUR 10 000 to 50 000 for inadequate reporting procedures or a failure to verify and analyse reports (Art. 54bis(6)). The maximum fines may not be sufficient to deter the most senior managers or officials. Fines are not available at all against the entity itself, which in some cases can be a state-owned enterprise. Sanctions imposed in practice are also too low. ANAC refers to four of its decisions in this evaluation.[14] The whistleblower in one case was a military official who suffered three days of confinement as retaliation. Another was suspended twice without pay totalling 22 days, and a third for 10 days. Despite these serious

[10] ANAC Resolution 469/2021 (Whistleblowing Guidelines), Part I, Section 1.

[11] ANAC Whistleblowing Guidelines, Part I, Section 2.4.

[12] ANAC Whistleblowing Guidelines, Part I, Section 2.2.

[13] ANAC Whistleblowing Guidelines, Part I, Section 3.2.

[14] ANAC Decisions 782/2019, 761/2020, 1118/2020 and 1119/2020.

acts of reprisals, ANAC imposed the minimum EUR 5 000 fine in all cases. Victims did not receive compensation, which as mentioned above requires them to bring separate civil proceedings.

Commentary

The lead examiners commend Italy for enacting its provisions in 2012 and 2017 to protect whistleblowers in the public sector. However, these provisions raise issues as to their scope of application, types of retaliation covered, remedies and sanctions available. Italy states that civil legislation addresses some of these shortcomings. But this merely underscores that the whistleblowing legislation is not adequate enough and not comprehensive yet. The expected transposition of the EU Whistleblowing Directive – if it covers reports of foreign bribery – would be an opportunity to rectify these deficiencies. The lead examiners therefore recommend that Italy enhance its framework to protect and/or provide remedy against any retaliatory action to whistleblowers in the public sector, in line with Anti-Bribery Recommendation XXII.

A.6.b. Whistleblower protection in the private sector

34. Whistleblower protection is not mandatory for private sector companies. Italy's corporate liability law (LD 231/2001) sets out the mandatory components of an acceptable organisational model, which is essentially a compliance programme. Since 2017, these mandatory elements include a confidential channel for company managers and employees to report unlawful conduct; a ban on retaliation and discrimination against whistleblowers; and sanctions against those who violate these rules, as well as against whistleblowers who submit an unfounded report intentionally or with gross negligence. The provisions on secrecy described in para. 28 also apply. However, a company is not legally obliged to have an organisational model. The absence of a model merely means that the company cannot benefit from the "organisational model" defence when prosecuted (see Section C.2 at p. 74). Business associations confirm that protection does not apply to reports made outside the company's channels.

35. The motive and content of the report restrict the protection available. As in the public sector (see para. 30), LD 231/2001 Art. 6(2bis) requires organisational models to facilitate the reporting of wrongdoing "for the purpose of protecting the integrity of the entity". There is therefore again doubt over whether protection applies to a person who reports a genuine act of corruption solely out of personal interest or spite. In response, Italy repeats its argument under public sector whistleblowing that ANAC and case law interpret the provision more broadly. The case law, however, does not directly concern whistleblowers in the private sector. Italy contends that the case law would be applied to the private sector but this has yet to occur. Furthermore, protections only apply to "detailed reports of unlawful conduct […] based on precise and consistent elements of fact". This sets a fairly high threshold, both for protection to apply to a whistleblower and for a company to respond to a report. Italy's business community lobbied for this requirement;[15] there is no corresponding provision in the public sector rules.

36. LD 231/2001 Art. 6 prohibits "acts of retaliation or discrimination" against a whistleblower. Private sector whistleblowers have two avenues of redress:

(a) "Discriminatory" (but presumably not "retaliatory") measures may be reported to the National Labour Inspectorate for measures under its jurisdiction (Art. 6(2ter)). The Inspectorate may order the employer to end the discriminatory measure. The provision does not define "discriminatory". Italy does not provide statistics on reports made to the Inspectorate.

(b) "Retaliatory and discriminatory measures", including dismissal and change of responsibilities, are invalid. The onus is on the employer to prove that a measure is unrelated to the whistleblower's report (Art. 6(2quater)).

[15] See Confindustria (January 2018), La disciplina in material di whistleblowing, Nota illustrativa, p. 3.

37. These provisions are too restrictive for several reasons. First, remedies are available only for retaliatory or discriminatory "measures". This could again exclude conduct such as harassment, intimidation, denial of promotion, or refusal of privileges. Italy disagrees but does not provide supporting provisions or case law. Second, resort to the National Labour Inspectorate only applies to "whistleblowers referred to in Art. 6(2bis)", i.e. those who report through a company's organisational model. But as mentioned above, companies are not obliged to have such models. Third, for "retaliatory" measures, "invalidity" under Art. 6(2quater) is the only remedy. This has similar shortcomings to the remedy of "voiding" a discriminatory or retaliatory act in the public sector (see para. 32). Finally, Art. 6(2bis)(d) states that an organisational model must provide for sanctions to individuals who retaliate but does not specify the penalties. For companies without a model, sanctions such as fines imposed by ANAC are not available. The company also cannot be sanctioned.

38. A final concern is a need for whistleblowers to rely on the courts. Only a court can enforce the invalidity of retaliatory measures. As with public sector whistleblowing, Italy states that many other shortcomings are also addressed in civil and labour law. But resort to the courts could be impractical. Italy states in response that labour courts can order interim relief and also ensure "a very timely procedure". Regardless, requiring a whistleblower to bring litigation merely underscores the absence of efficient remedies for retaliation.

Commentary

The lead examiners welcome the adoption of Italy's first provisions on whistleblower protection in the private sector. They find, however, that these rules contain serious limitations. Protection is much weaker for a whistleblower in the private sector than in the public sector. Those in a company without an organisational model are not adequately protected. The same is true for whistleblowers reporting outside the company's channels, or if the report is deemed insufficiently detailed and substantiated. Even when the provisions apply, the whistleblower has limited protection from and remedies for retaliation. Again, the expected transposition of the EU Whistleblowing Directive – if it covers reports of foreign bribery – would be an opportunity to rectify these deficiencies. The lead examiners therefore recommend that Italy urgently adopt an enhanced, strong and effective framework to protect and/or provide remedy against any retaliatory action to all private sector whistleblowers, in line with Anti-Bribery Recommendation XXII.

A.6.c. Awareness-raising and statistics

39. Italy has partially implemented Phase 3 Recommendation 7(b) on raising awareness of whistleblower protection mechanisms. In the public sector, ANAC has trained its personnel and held events in universities and with the private sector. It co-founded the European Network of Whistleblowing Authorities. The National School of Administration and ANAC developed training for public employees, and often train a network of officers responsible for anti-corruption in the public administration created by Law 190/2012. In the private sector, the business association Confindustria adopted new guidelines on organisational models in June 2021. It also published an illustrative note on the new whistleblowing rules. The guidelines underline the importance of communication to personnel and of training on the content of the organisational models. Italy reports that Confindustria has also organised several seminars at the national and local levels for disseminating the new guidelines to companies. But it appears that there have not been efforts to raise awareness among potential whistleblowers (e.g. employees).

40. Statistics indicate a substantial level of whistleblowing at least in the public sector, with a steady increase in recent years. In 2019, ANAC received more than 800 reports, 21.2% of which concerning allegations of corruption, maladministration and abuse of power. ANAC referred 143 reports to the competent authorities in 2019 and 116 in 2020. Data on whistleblowing reports made not to ANAC but to individual public administrations are not available. Likewise are statistics on reporting in the private sector.

Commentary

The lead examiners welcome the awareness-raising and training initiatives undertaken by ANAC as well as the growing number of reports in the public sector. However, the lead examiners are concerned about the apparent lack of awareness-raising for private sector whistleblowers. They therefore recommend that Italy further raise awareness and provide training on (a) the implementation of adequate measures for protecting reporting persons in the private sector, and (b) the protection and remedies available for private sector whistleblowers.

A.7. Self-reporting by companies

41. Italy does not have a policy to encourage companies to self-report foreign bribery to the authorities. Not surprisingly, no foreign bribery cases have been detected through this source. Measures described by Italy do not address self-reporting. Sanctions for corporate liability are reduced if a company eliminates or mitigates the consequences of an offence, prevents future wrongdoing, and pays compensation (LD 231/2001 Arts. 11, 12, 17). These provisions do not expressly provide that self-reporting mitigates sanction, however. Nevertheless, Italian authorities state that self-reporting is a crucial factor to be considered by judges in determining corporate sanctions. A company is also not liable for an offence the completion of which it voluntarily prevents (Art. 26(2)). But self-reporting necessarily applies only to offences that have been completed. Large "public-interest entities" are required to publish an annual statement on topics such as corporate social responsibility which may include anti-bribery policies and bribery incidents (see para. 53). However, such publication serves a different purpose than reporting offences to law enforcement. It is also highly unlikely that companies would disclose a bribery incident that is unknown to law enforcement in this manner.

42. Participants from various sectors at the on-site-visit would welcome the creation of a self-reporting programme. A proper programme should clearly specify the incentives and consequences for companies to self-report, according to prosecutors, company representatives and business associations. One association believed that self-reporting is not compatible with the Italian legal system in which it is not possible to negotiate the outcome of a prosecution with the prosecutor. But this seems to overlook the availability of non-trial resolutions through *patteggiamento* (see Section B.6.a at p. 66).

Commentary

Self-reporting is an important source of detection of foreign bribery cases. The lead examiners therefore recommend that Italy consider measures to encourage persons who participated in, or have been associated with, the commission of foreign bribery, to supply information useful to competent authorities for investigating and prosecuting foreign bribery, and ensure that appropriate mechanisms are in place for the application of such measures in foreign bribery investigations and prosecutions, as per Anti-Bribery Recommendation X.iii.

The lead examiners also note that the current sanctions against legal persons for foreign bribery are too low (see Section C.3.a at p. 74). Italy should therefore ensure that a legal framework for self-reporting nevertheless leads to effective, proportionate and dissuasive sanctions against legal persons for foreign bribery.

A.8. Detecting foreign bribery through anti-money laundering measures

43. The Phase 4 evaluation is concerned with anti-money laundering (AML) measures that are relevant to foreign bribery, in particular preventing and detecting foreign bribery and the laundering of the proceeds of this crime. The money laundering offence is discussed in Section B.5.a at p. 63.

A.8.a. National money laundering risk assessment

44. Italy has not fully assessed the risk of money laundering predicated on foreign bribery. Its most recent money laundering National Risk Assessment (NRA) in 2018 found an inherently high risk of money laundering with corruption among the predominant predicate offences.[16] However, the NRA did not explicitly address foreign bribery. The Bank of Italy (BOI) and financial intelligence unit (*Unità d'Informazione Finanziaria*, UIF) explained at the on-site visit that the NRA distinguished between domestic and foreign crimes, focusing primarily on the former. Suspicious transaction reports (STRs) do not contain data on specific crimes, including foreign bribery. The *Guardia di Finanza* adds that "international criminals" do not often use the Italian financial system to launder money from abroad.

45. Indeed, non-Italian public officials laundering their ill-gotten gains in Italy might be relatively infrequent. More likely, however, is the risk of Italian companies and individuals bribing non-Italian officials and money laundering associated with this activity. Italy has had at least 90 criminal investigations and 72 proceedings against Italian entities for foreign bribery since Phase 3 (see para. 11). This suggests a much higher frequency and risk of foreign bribery-related money laundering than is reflected in the NRA.

Commentary

The lead examiners are concerned that Italy has not fully assessed the risk of money laundering predicated on foreign bribery. The lead examiners therefore recommend that Italy properly consider money laundering predicated on foreign bribery in its future national money laundering risk assessments.

A.8.b. Suspicious transaction reporting

46. As in Phase 3, a broad range of "obliged entities" including banks, other financial institutions, and non-financial businesses and professionals are required to submit suspicious transaction reports (STRs). Reports are submitted to the UIF within the Bank of Italy pursuant to Art. 6 of LD 231/2007 (AML Law).

47. Guidance on STR reporting does not specifically address foreign bribery. The UIF has issued numerous guidance on red flag indicators and anomaly schemes on topics ranging from abuse of public financing to tax evasion. In response to the COVID-19 pandemic, recent typologies covered corruption and fraud in the provision of medical equipment and supplies. The Bank of Italy has issued guidance to financial institutions under its regulation. None of these documents specifically mention foreign bribery. Italian authorities state that these documents contain red flag indicators of financial activities related to both domestic and foreign corruption, especially where politically exposed persons hide themselves behind corporate structures, intermediaries and trusts.

48. The number of STRs continues to increase. From 2014 to 2019, STRs increased by 47%. The number of STRs analysed by the UIF also increased by 40%, reaching 106 318 in 2019. Italy states advanced customized IT tools and updated procedures have increased the effectiveness of UIF's financial analysis. In December 2019, the UIF had approximately 150 employees, including 88 in the Suspicious Transactions Directorate responsible for analysing STRs and 61 in the Analysis and Institutional Relations Directorate. The UIF organises internal training, including courses on corruption which refer to potential foreign bribery activities, and participates in conferences but its staff have not received foreign bribery-specific training. Obliged entities state that they receive feedback from the UIF to improve the STR process. The UIF also affirms its commitment to fine-tune the quality of STRs through consultation with law enforcement. It provided supporting information in five foreign bribery enforcement actions since Phase 3 (see Section B.3.b at p. 52). Italy adds the *Consiglio Nazionale del Notariato* will introduce a platform for

[16] Ministry of Economy and Finance (2018), National Money Laundering and Terrorist Financing Risks Assessment Drawn up by the Financial Security Committee.

information sharing among notaries, which might further strengthen the Italian AML system.[17] Notaries account for more than 90% of the total STRs submitted by designated non-financial businesses and professionals.

49. The UIF had not detected any foreign bribery cases through STRs in Phase 3 (para. 112). Phase 3 Recommendation 8 asked Italy to maintain statistics on STRs that result in or support bribery investigations, prosecutions and convictions. In Phase 4, statistics that are available are not comprehensive. The UIF has contributed to the detection of foreign bribery in various cases, for example STRs have resulted in tax audits through which foreign bribery was discovered. Furthermore, one of the STRs in these cases was submitted by a foreign bank to its domestic financial intelligence unit which forwarded the report to Italy's UIF.

Commentary

The lead examiners acknowledge the UIF's role in contributing to the detection of foreign bribery, and the good practice of sharing information between UIF and its foreign counterparts as well as with Italian authorities. Nevertheless, they recommend that Italy provide guidance and typologies to obliged entities that explicitly address foreign bribery, as well as training to UIF staff specifically covering this crime. They also reiterate Phase 3 Recommendation 8(c) and recommend that Italy maintain comprehensive statistics on STRs that result in or support bribery investigations, prosecutions and convictions. These statistics could be used in future National Risk Assessments and aid in developing foreign bribery specific typologies and providing feedback to obliged entities.

A.8.c. Politically exposed persons (PEPs)

50. Preventing money laundering by foreign politically exposed persons (PEPs) is relevant to the implementation of the Convention. Art. 7 covers the laundering of the proceeds of foreign bribery "without regard to the place where the bribery occurred". The Convention thus covers non-Italian officials who receive bribes from foreign companies and later launder them in Italy.

51. Italy addresses this risk by requiring financial institutions to carry out enhanced due diligence measures in their relationships with PEPs (AML Law Art. 24). These include the identification of PEPs and the source of their wealth; obtaining senior management authorisation to establish a client relationship; and enhanced ongoing monitoring of the relationship.

A.9. Detecting foreign bribery through accounting and auditing

52. Foreign bribery cases have not been detected by accounting or auditing professionals despite some developments in the applicable framework since Phase 3.

A.9.a. Accounting standards

53. Accounting requirements are set out in the Civil Code, tax laws and legislation implementing EU directives. The International Financial Reporting Standards apply, for both annual and consolidated financial statements, to publicly traded companies in regulated markets, as well as certain banks, financial intermediaries, and insurance companies.[18] Since 2016, large "public-interest entities" must publish non-

[17] Italy will implement a notarial Datawarehouse for AML purposes containing the records of all Italian notaries. The Datawarehouse has a specific algorithm to detect phenomena potentially linked to foreign bribery. The algorithm, which will be shared with competent authorities, may further improve the detection of foreign bribery concealed in real estate transactions or through the misuse of corporate vehicles.

[18] Regulation (EC) 1606/2002; LD 38/2005, Arts. 2-4.

financial statements on their activities' social and environmental impact and risks, which include anti-bribery matters.[19]

A.9.b. Entities subject to external audit and auditing standards

54. Anti-Bribery Recommendation XXIII.B.i asks countries to consider whether requirements on companies to submit to external audit are adequate. In Phase 3 (paras. 117-121), external audits were excluded for some non-listed companies that are not required to prepare consolidated accounts. The Working Group decided to follow up this issue (Follow-up Issue 13(h)).

55. Italy explains that the categories of companies subject to external audit have not changed since Phase 3 despite a 2016 modification. Statutory auditing obligations are set out mainly in the Civil Code and LD 39/2010. Audited entities are: (a) joint-stock companies (*società per azioni*, spa) that are required to draw up consolidated accounts; (b) "public interest" entities (PIEs), which include companies issuing securities admitted to trading on a regulated Italian or EU market, banks, and certain insurance companies; (c) entities subject to the "intermediate regime", which include non-listed companies issuing financial instruments to the public, stock-broking and investment firms, financial intermediaries, and electronic money institutions; (d) entities controlling, controlled by or affiliated with a PIE or "intermediate regime" entity; and (e) all publicly-controlled joint-stock companies. Italy states that approximately 60 000 companies were audited in 2019.

56. Individual auditors or audit firms registered in the Registry of Statutory Auditors conduct statutory auditing.[20] LD 39/2010 defines the duties of statutory auditors, which include general independence and objectivity obligations (Art. 10). Heightened obligations and controls are imposed on auditors of "public-interest" and "intermediate regime" entities (Arts. 17 and 19ter). Registered auditors must receive continuing training and are bound by specific rules on ethics and professionalism (Arts. 5 and 9).

57. In December 2014, the "ISA Italia" principles were introduced to implement the International Standards on Auditing (ISAs) for accounting periods starting in January 2015. ISAs 240 and 250 require auditors to detect material misstatements in a company's financial statements due to fraud or non-compliance with laws and regulations.

58. Italy has not sufficiently raised awareness of foreign bribery among accountants and auditors. Phase 3 Recommendation 9(b)(i) asked Italy to "engage in awareness-raising activities with auditors, including through providing training regarding the detection of indications of suspected acts of foreign bribery". Efforts taken since do not specifically cover foreign bribery, however. Training offered to registered auditors[21] "includes anti-corruption law" generically. The National Council of Chartered Accountants held activities only on corporate offence prevention models, money laundering, and terrorism financing. Accountants and auditors describe training on international standards and reporting of suspicious transactions. Training on foreign bribery red flags was not mentioned. One auditor says that training on ISAs and fraud detection would also cover corruption but gives no specifics. The Bank of Italy and financial intelligence unit issued guidance to accountants and auditors. Italy states that the indicators described in the guidance can capture foreign bribery and related financial flows. Nevertheless, the guidance concerns the reporting of suspected money laundering, not foreign bribery *per se*. Auditors of PIEs and "intermediate regime" entities receive continuing training by CONSOB on anti-money laundering, including STRs.

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[19] Directive 2013/34/EU as amended by Directive 2014/95/EU; LD 139/2015 and LD 254/2016. Italy states that this requirement will apply to a wider range of companies under a new EU Corporate Sustainability Reporting Directive.

[20] Civil Code, Art. 2409bis, and LD 39/2010, Arts. 1(f-*bis*) and 11.

[21] The Ministry of Economy and Finance is responsible for the training of registered auditors, states Italy.

Commentary

The lead examiners welcome Italy's adoption of the International Standards on Auditing. They note, however, that external auditors have not detected any foreign bribery cases. Training and awareness-raising since Phase 3 covered corruption generally but not the detection of foreign bribery specifically. The lead examiners therefore reiterate Phase 3 Recommendation 9(b)(i) and recommend that Italy train external auditors on the detection of foreign bribery.

A.9.c. Reporting foreign bribery to management and competent authorities

59. Anti-Bribery Recommendations XXIII.B.iii-v ask countries to (a) require external auditors to report suspected foreign bribery to management and, as appropriate, corporate monitoring or governance bodies; (b) encourage companies that receive such reports to respond actively and effectively; and (c) consider requiring external auditors to report suspected acts of foreign bribery to "competent authorities independent of the company, such as law enforcement or regulatory authorities". Countries that permit such reporting should "ensure that auditors making such reports on reasonable grounds are protected from legal action."

60. Multiple provisions require reporting to an audited company. Auditors, including those of entities other than PIEs and "intermediate regime" entities, must communicate material misstatements of financial statements due to fraud or violations of laws and regulations to management and the bodies in charge of governance (ISA Italia 240(40ff) and 250(22ff)). Statutory auditors of PIEs and "intermediate regime" entities have a further obligation to report "suspected irregularities, including fraud, to the audited entity, and invite it to investigate the matter and take appropriate measures to deal with such irregularities and prevent any recurrence in the future".[22] As in Phase 3 (para. 122), suspicions of "any violation of the law, including foreign bribery" must also be reported to the company's internal audit board. The audit board must in turn "carry out inquiries and communicate the results to the directors" (Civil Code Art. 2409septies). It can also call a shareholders' meeting if it becomes "aware of censurable facts of considerable gravity" that requires prompt action (Civil Code Art. 2406(2)).

61. Multiple provisions also govern reporting to competent authorities. As in Phase 3 (para. 123), auditors of companies that are listed or whose securities are widely distributed should report any facts "deemed to be censurable" to CONSOB, Italy securities regulator (LD 58/1998 Art. 155). This includes "any irregular or illicit facts committed by persons or boards of the company arising from violations of any laws and regulations or rules established in the company's by-laws which may have a material effect on the accounting."[23] The internal board of statutory auditors must also report irregularities found as part of its supervisory activity to CONSOB (LD 58/1998 Art. 149(3)). Where a "PIE and "intermediate regime" entity fails to respond to suspected irregularities including fraud, the statutory auditor shall report to the competent authorities (EU Regulation 537/2014 Art. 7). Auditors must also report to competent authorities any information which may bring about "a material breach of the laws, regulations or administrative provisions which lay down, where appropriate, the conditions governing authorisation or which specifically govern pursuit of the activities of such public-interest entity" (Art. 12).

62. Only auditors of a PIE or "intermediary regime" entity who report to competent authorities are expressly shielded from legal action. Such reports in good faith "shall not constitute a breach of any contractual or legal restriction on disclosure of information".[24] Similar provisions do not exist for auditors of other entities, however. Italy states that general principles of Italian law protect auditors who report in good faith to competent authorities criminal offences they become aware while performing their functions. Legal provisions or supporting case law are not provided, however. Italy also states that an audited entity can

[22] EU Regulation 537/2014 Art. 7(1); LD 39/2010 Art. 19ter.

[23] CONSOB, Comunicazione SOC/RM/93002422 del 31-3-1993 and SOC/RM/93009748 del 19-11-1993.

[24] EU Regulation 537/2014, Arts. 7(3) and 12(3); LD 39/2010, Art. 19ter.

"revoke" an auditor only with "just cause" (Civil Code Art. 2400 and Ministerial Decree 261/2021 Arts. 3-4). Nevertheless, these provisions do not shield an auditor from legal action.

63. Italy has not raised awareness of these provisions on reporting foreign bribery and protection from legal action as requested by Phase 3 Recommendation 9(b), which could have contributed to the lack of reports of foreign bribery in practice. As mentioned at para. 58, training for accountants and auditors covers corruption generally but does not specifically address foreign bribery. The reporting of this crime was also not mentioned. Italy states that CONSOB received 77 reports of irregularities in 2014-2017 from internal boards of statutory auditors of listed companies, of which 14 concerned suspected corruption but not foreign bribery. Accountants and auditors also submitted 327 and 30 STRs respectively in 2014-2019, but these concern suspected money laundering, not foreign bribery.

Commentary

The lead examiners reiterate Phase 3 Recommendation 9(b)(ii)-(iii) and recommend that Italy (a) ensure that all auditors – not only those who audit a PIE or "intermediate regime" entity – who report foreign bribery on reasonable grounds to competent authorities are expressly protected from legal action, and (b) raise awareness among accountants and auditors of their duty to report foreign bribery and the protection for those who report.

A.10. Detecting foreign bribery through tax authorities

64. In Phase 3, the Working Group praised Italy for setting up a framework for auditing taxpayers and for undertaking efforts to improve the exchange of information with law enforcement authorities. It considered that the impact of these measures on the detection of foreign bribery should be followed up once there had been sufficient practice. (Follow-up Issue 13(f)).

65. Italy has significantly increased the number of tax audits since Phase 3. Italy's *Agenzia delle Entrate* (revenue agency) and *Guardia di Finanza* (financial police) conduct tax audits. Tax audits are carried out in a targeted manner based upon the analysis of various sources of information, including databases, intelligence activities and considerations of economic indicators of tax evasion, fraud and the underground economy. Large companies with a turnover exceeding EUR 100 million are audited within a year of filing a tax return. Audits are conducted based upon a specific risk analysis of the sector and, if available, the risk profile of the individual company, its shareholders, subsidiaries and information obtained from previous tax returns. From 2015-2019, the *Agenzia delle Entrate* conducted on average 300 000 audits per year, including 4 500 on multinational companies. Over the same period, the *Guardia di Finanza* conducted on average 100 000 audits per year, 1 450 on multinational companies. This is a significant increase from Phase 3, when the *Agenzia delle Entrate* audited only a few thousand taxpayers annually. The *Agenzia delle Entrate* keeps statistics on criminal complaints reported to law enforcement authorities arising from tax audits. Data from 2015-2019 indicate that reports by the *Agenzia delle Entrate* resulted in criminal charges against multinational companies. None of the charges, however, was foreign bribery.

A.10.a. Foreign bribery cases detected through tax audits

66. Three foreign bribery cases have been detected through tax audits since Phase 3. In the Electrical Systems (Kazakhstan) Case, the UIF (financial intelligence unit) received and analysed an STR. It then informed the *Guardia di Finanza* which audited a company in Lombardy. During the tax audit, the *Guardia di Finanza* identified suspicious transactions of approximately EUR 20 million paid to companies in three overseas jurisdictions. The *Guardia di Finanza* sent a tax audit report to prosecuting authorities. The subsequent investigation ascertained that the suspicious payments were bribes paid through intermediary companies abroad for the benefit of public officials in Kazakhstan.

67. The second case, Logistics (DRC & Niger), the UIF again received and analysed an STR which was then forwarded to *Agenzia delle Entrate* which audited a company based in Genoa and operating in the

logistics sector in various African countries.[25] The tax audits carried out on the company's 2009 and 2010 tax returns showed suspicious invoices from a supplier in the Ivory Coast. The *Agenzia delle Entrate* notified the prosecutor in 2014, which initiated a tax investigation and subsequently uncovered foreign bribery through additional investigative measures. In the third case, the UIF received an STR from a foreign counterpart in 2016. The UIF referred the matter to prosecution authorities, who commenced an investigation into tax offences. Cross agency co-operation resulted in *Agenzia delle Entrate* conducting a tax audit in 2018. Following receipt of the tax audit report, the prosecution expanded the investigation to bribery of Venezuelan public officials.

A.10.b. Reporting by tax authorities and co-operation with domestic and foreign law enforcement

68. As evidenced by the cases detected through tax audits, effective co-operation between agencies has resulted in the detection and successful prosecution of foreign bribery cases in Italy. Like all Italian public officials, Italian tax authorities are obliged to report to law enforcement any criminal conduct they become aware of in the discharge of their duties. In the case of tax authorities, the obligation extends beyond potential violations of taxation law to other criminal conduct. Tax authorities report suspicious facts that indicate a possible criminal offence to judicial authorities without the requirement of evidentiary thresholds.

69. Italy states that co-operation between tax and law enforcement authorities has led to an increase in investigations based on tax audits in the past ten years. Italian tax authorities state that they report suspicions of bribery to prosecuting authorities immediately. Their involvement in the investigation is not limited to reporting, however. The *Guardia di Finanza* is responsible for tax administration and investigating financial crimes. Therefore, they are well-equipped to detect and investigate foreign bribery offences. If they detect suspicions of bribery through an audit or tax investigation, they report to the competent PPO, who may then direct them to investigate. The prosecution may also task the *Agenzia delle Entrate* to conduct an audit or provide information as it did in one of the cases described in para. 67. In addition to the tax audits in the cases mentioned above, prosecuting authorities obtained information from tax authorities in two other foreign bribery investigations. Tax authorities state that the exchange of information is relatively informal and unimpeded by tax secrecy laws.

70. In Phase 3 (para. 139), Italian authorities stated that they were negotiating the inclusion of the optional language in Paragraph 12.3 of the Commentary to Art. 26 of the OECD Model Tax Convention in their bilateral tax treaties. This language allows the sharing of tax information by the tax authorities in the contracting state with its law enforcement and judicial authorities on certain high priority matters, including corruption, money laundering and terrorism, when certain conditions are met. Since 2015, Italy has concluded or modified bilateral tax agreements with 13 jurisdictions.[26] It has also signed and ratified the amended Joint Council of Europe / OECD Convention on Mutual Administrative Assistance in Tax Matters, which entered into force in Italy on 1 May 2012 and contains a similar provision in Art. 22.4. The Italian tax authorities state that there has been significant increases in the exchange of information with other countries facilitated by these treaties, including instances of making and receiving requests to use tax information for non-tax investigative purposes.

A.10.c. Training and awareness-raising

71. *Agenzia delle Entrate*'s auditors do not receive foreign bribery specific training. However, auditors receive initial and ongoing training focused on identifying tax fraud indicators (red flags) recognised by

[25] The STR was initially sent to the *Guardia di Finanza* who referred the matter to the *Agenzia delle Entrate.*

[26] Andorra, Bermuda, Cayman Islands, Cook Islands, Chile, Guernsey, Gibraltar, Isle of Man, Jersey, Liechtenstein, Monaco, Switzerland and Turkmenistan.

international best practices. These include: economic transactions carried out in high corruption-risk countries, transactions that are unusual in the context of the activities of the taxpayer, transactions with unusual, vague or suspicious terms, or that result in unusual or unexplained benefits to the taxpayer's business, excessive payments made to an intermediary or consultant and expenses not recorded in financial records. While the training focuses on tax crimes, auditors also receive specific training to detect suspicious transactions and financial flows indicative of other crimes such as money laundering. Auditors report these suspicions to judicial authorities for in-depth investigation. However, during this evaluation, the *Agenzia delle Entrate* has not demonstrated a specific awareness of the foreign bribery offence, nor have they recently disseminated the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors to their auditors. However, after reviewing a draft of this report, the *Agenzia delle Entrate* stated it will disseminate the Handbook to tax auditors in autumn 2022.

72. The *Guardia di Finanza* provides training activities for its personnel in anti-corruption, including a course on "Tax audit and investigation techniques, aimed at countering international tax evasion, smuggling and corruption" at the School of Economic and Financial Police. It is not clear, however, if this course is taught only during initial training or if tax auditors receive regular training on detection of foreign bribery through tax audits.

Commentary

The lead examiners commend Italy on the increase in tax audits and co-operation between tax and law enforcement authorities, resulting in the detection of three foreign bribery cases. However, they note that the number of foreign bribery cases detected continues to be low, and that tax authorities lack specific awareness and training in detecting foreign bribery. The lead examiners recommend that Italy (a) raise awareness of the foreign bribery offence amongst tax authorities, and (b) further train tax auditors on the detection of foreign bribery.

A.11. Preventing and detecting foreign bribery through export credits

73. Italy's export credit activities are carried out by SACE S.p.A. as an export credit agency, and SIMEST S.p.A. as an interest rate support provider. SACE offers a broad range of support tools, including credit insurance and guarantees. SIMEST also supports companies' expansion abroad, through financing for internationalisation, export credits, and participation in company capital. The Ministry of Economy and Finance wholly owns SACE. SIMEST is a company of the state-controlled group *Cassa Depositi e Prestiti* (CDP).

A.11.a. Preventing and detecting foreign bribery

74. Since Phase 3, the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits (Export Credits Recommendation) was adopted to replace the previous 2006 version. Recommendations V-VIII describe the anti-corruption measures that export credit agencies (ECAs) should implement in the application screening, evaluation and decision, and post-final commitment.

75. SACE's internal policy and procedures appear to be largely in line with the 2019 Recommendation. In application forms and other documentation, exporters and applicants declare that they and persons on their behalf have not committed and will not commit bribery. They indicate current investigations or proceedings for bribery, as well as convictions or sanctions for bribery in the previous five years and debarment by multilateral development banks. When processing the application, SACE conducts reputational checks and corruption risk assessments. If issues are detected, it performs enhanced due diligence. SIMEST states that its standard application form requires the relevant counterparty to provide information about, *inter alia*: (i) potential relationships with third parties, individuals or countries subjected to international sanctions; (ii) compliance with the applicable legislation relating to bribery, corruption, AML, and corporate liability (LD 231/2001); and (iii) any related legal measure. Internal policies provide for preliminary due diligence on the same profiles. SIMEST conducts a compliance risk assessment for each

transaction. It also has internal policies to manage reputational risks related to "sanctions and embargoes", "foreign bribery or corruption", and money laundering. SIMEST also refers to its organisational model under LD 231/2001. However, such a model is generally a compliance programme for preventing offences by the company's employees, and not by the company's clients.

76. Despite the existence of these anti-corruption measures, SACE and SIMEST have not detected any foreign bribery case. It appears that at least four foreign bribery allegations emerged in projects supported by SACE (see Section A.11.c at p. 28). SACE learned of these allegations only after investigations had been opened by law enforcement authorities in Italy or abroad.

77. SACE and SIMEST provide training under their organisational models. As mentioned, however, organisational models under LD 231/2001 mainly target offences committed by the organisation's staff, not its clients. SACE generically reported that it organises annual training on "anti-corruption regulations". SIMEST did not provide further details on training.

Commentary

The lead examiners acknowledge that SACE's internal policy and procedures are largely in line with the Export Credits Recommendation. However, they note that, despite the existence of anti-corruption measures, Italy's export support agencies have not detected any foreign bribery case even though there have been allegations of foreign bribery in connection with projects supported by SACE. There is also not sufficient training on detection of foreign bribery. The lead examiners therefore recommend that SACE and SIMEST further raise awareness of foreign bribery among their staff and clients, and provide adequate training to staff on how to detect potential foreign bribery by conducting appropriate due diligence.

A.11.b. Reporting foreign bribery

78. Under Export Credits Recommendation IV(6), adherents should develop and implement policies and procedures "for disclosing credible allegations or evidence that bribery was involved in the award or execution of the export contract to law enforcement authorities." The obligation to report is reiterated in Recommendations VII(1) and VIII(1).

79. The Phase 3 Report (para. 168) stated that SACE employees are not public officials and hence not subject to the CCP reporting obligation (see Section A.4 at p. 13). Recommendation 12 therefore asked SACE to formalise procedures for reporting credible evidence of foreign bribery to law enforcement. SACE explains that, under its Know Your Customer Procedure, employees report suspicions of foreign bribery to the Litigation Department, which will "assess the opportunity to inform the judicial authorities, if there is credible evidence that bribery offences are involved in the context of the transaction." SACE states that if the litigation department finds credible allegations or evidence that bribery was involved in the award or the execution of the supported transaction, it shall report to law enforcement authorities. However, the provision itself only mentions a finding of "credible evidence", not also a credible allegation, and refers to assessing the "opportunity to inform" law enforcement, which suggests some discretion. Given the absence of a legal obligation to report, it would be important that such a provision be clearer and expressly state that all "credible allegations or evidence" of foreign bribery should be promptly reported to law enforcement, as required by the Export Credits Recommendation. SIMEST explains that under its organisational model, bribery offences should be reported to its Supervisory Body. As mentioned above, however, organisational models are usually designed to prevent offences committed by staff. SIMEST initially did not describe any internal policy for reporting suspicions to law enforcement, but later stated that in case of suspected violations of compliance, bribery, or money laundering legislation relating to any counterparty, SIMEST informs the competent authorities. As of July 2022, SIMEST submitted approximately 60 STRs to the competent authority.

Commentary

The lead examiners recommend that SACE and SIMEST ensure that their policies and procedures expressly establish the obligation to promptly report all credible allegations or evidence of foreign bribery to law enforcement authorities, and develop guidelines for staff on this issue.

A.11.c. Bribery discovered in a supported transaction

80. If an export credit agency becomes aware that bribery may be involved in a supported transaction, it should "undertake further due diligence". If a party is convicted of bribery in relation to a supported transaction, then the agency should "take appropriate action […] such as enhanced due diligence, denial of payment, indemnification, or refund of sums provided" (Export Credits Recommendation VIII(2)&(3)).

81. SACE reported that, if it believes bribery may be involved in a supported transaction, then it conducts further due diligence including the scrutiny of: (a) the implementation of the anti-corruption standard provisions; (b) the level, purpose and location of third-party commissions and fees; and (c) internal corrective and preventative measures, such as replacements, suspensions, and audit. The contract also provides for a denial of payment, indemnification or refund. Similarly, SIMEST explained that, in case of a "corruption event", its contracts provide for the interruption of payments, contract termination, and refunds. SIMEST agreements include clauses establishing that SIMEST may revoke all of part of its contribution in case of interim measures or a final conviction for criminal/administrative offences including foreign bribery.

82. It appears that at least four foreign bribery allegations have surfaced in projects supported by SACE. (SACE did not provide information on other suspicions that may have emerged in its supported transactions.) First, SACE supported a project for the construction of a natural gas plant in Algeria in 2009. For this and other projects, a company was prosecuted, and eventually acquitted in 2020 (Oil and Gas (Algeria) Case). The representative of another company involved in the project also entered into *patteggiamento* for foreign bribery in Algeria (Construction (Algeria) Case). Second, SACE guaranteed a loan for a project to build a power plant in the Dominican Republic by an Italian engineering company in consortium with a Brazilian and a Dominican company. The consortium allegedly paid bribes to Dominican politicians to secure the contract around 2014. The Brazilian company concluded settlements for charges of bribery committed in various countries including the Dominican Republic. In Italy, an investigation was opened against the Italian company in 2018. Third, SACE insured a project of an Italian company in Saudi Arabia around 2015. An investigation was later opened in Italy for foreign bribery in various countries including Saudi Arabia. The company eventually concluded *patteggiamento* in 2019 only for bribery of Algerian public officials (Construction Equipment (Algeria) Case). The other investigations were discontinued. Fourth, SACE provided support for construction projects of dams in Kenya. An Italian company allegedly bribed government officials for the projects. Kenyan authorities opened an investigation in 2019 and criminal proceedings are ongoing against some of the officials.

83. SACE reports enhanced due diligence and additional measures taken in response to these allegations. Concerning the first case, SACE explains that it became aware of the investigations only after the expiry of the cover. However, SACE carried out enhanced due diligence for subsequent transactions involving the company. In the other three cases, SACE refused to provide further support or instructed the lending bank to block the disbursements. As for enhanced due diligence, in two cases SACE verified that the company had set up an adequate organisational model and adopted internal corrective measures (i.e. the removal of the representatives allegedly involved in the offences). In one case, SACE launched an internal audit by its audit department, which confirmed compliance with the internal procedures. In all three cases, SACE states that it conducted further due diligence by seeking external legal opinions on the ongoing proceedings and keeping informed of their status. Despite the availability of these options in its procedures, SACE has not taken further due diligence measures into these transactions, such as verifying whether the commissions and fees paid were appropriate, making inquiries about the agents used, and

carrying out checks on amounts transferred abroad. SACE also does not extend due diligence to other parties involved in the transaction (e.g. joint-venture partners).

Commentary

The lead examiners acknowledge that SACE, after becoming aware of allegations of foreign bribery related to supported transactions, undertook enhanced due diligence and adopted further measures including suspending disbursements. However, additional due diligence measures could have been taken. They recommend that SACE take steps to explore further enhanced due diligence measures that could be applied in practice when suspicions of foreign bribery arise in connection with a supported transaction.

A.11.d. Denial of support as a consequence of foreign bribery

84. Anti-Bribery Recommendation IV.ix provides that public advantages "could be suspended or denied as a measure to combat foreign bribery in appropriate cases, and compliance incentives provided for appropriate remediation." This includes the denial of export credits.[27]

85. Where a prospective client has a bribery conviction, SACE states that it conducts "further due diligence". This includes verifying that "appropriate internal corrective and preventative measures have been taken", such as replacing or suspending persons involved in bribery, and conducting an audit. Any other appropriate measures "are identified on a case-by-case basis". SACE did not initially mention denial of support (i.e. debarment) as a potential remedy, but later explained that it may conclude that support should be denied after enhanced due diligence.

86. This issue came up in the Oil and Gas (Algeria) Case. An Italian court convicted the company of bribery in Algeria in September 2018. Three months later, SACE preliminarily agreed to provide support for a massive Russian gas project. In June 2019, SACE also agreed to support another gas project in Mozambique. The conviction in Italy was eventually overturned in January 2020, but an Algerian court has since convicted the company in February 2022. The parent of the company also settled charges with the US Securities and Exchange Commission that it violated the books and records and internal controls provisions of the Foreign Corrupt Practices Act. SACE states that, based on checks carried out and information provided by the parties involved in the transaction, "it was ascertained that the company had adopted (a) an adequate internal organisational and management system aimed at preventing the commission of corruption offences and (b) appropriate internal corrective measures (i.e. the removal of the company's representatives involved in the offences); (c) the convictions were not final judgments and the proceedings did not relate to the project supported by SACE". SACE also insists that the Export Credits Recommendation requires refusal of export support when the enhanced due diligence concludes that bribery is involved in the supported transaction. However, under the Anti-Bribery Recommendation, denial of support in other projects should also be considered when appropriate.

87. SIMEST states that it conducts a risk assessment when a potential client has a bribery conviction. A Reputational Risk Index is applied to each transaction, defining the approval and escalation process. In case a prospective client has a bribery conviction, SIMEST requires relevant documentation in order to properly evaluate the risks connected to the proposed transaction. If the risk is "High", its parent company *Cassa Depositi e Prestiti* (CDP) must be informed and involved "in order to adopt the most appropriate measure including denial of support". Like SACE, SIMEST seems to focus on whether there is a risk connected with the supported transaction itself. SIMEST also does not mention the option of providing compliance incentives for appropriate remediation.

[27] For example, see Netherlands Phase 4, paras. 282-284.

A.12. Preventing and detecting foreign bribery through official development assistance

88. Government agencies responsible for official development assistance (ODA) are "the first line of defence in preventing corruption and managing corruption risks in the disbursement of aid." The OECD 2016 Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (ODA Recommendation) calls on countries to encourage their international development agencies to ensure effective measures to manage risks of, and respond to, actual instances of corruption in development co-operation. To date, no foreign bribery cases have been detected by Italian officials involved in ODA, notwithstanding Italy's substantial ODA initiatives in corruption-prone countries.

A.12.a. Institutional set-up

89. MAECI is responsible for development co-operation oversight, decision making, co-ordination and international representation in Italy's support of sustainable development. The Directorate-General for Development Co-operation (DGCS) within the MAECI is in charge of planning and policy-making, country programming, multilateral policy, humanitarian assistance, and the provision of loans. The Italian Agency for Development Co-operation (AICS), established in 2014, is mandated to perform technical and operational activities related to the formulation, appraisal, financing, implementation, monitoring and evaluation of programmes and projects. It operates at the country level through its field offices. *Cassa Depositi e Prestiti* (CDP) is Italy's development finance institution. ANAC is responsible for the supervision and control of public contracts and their regulation within the limits of the public procurement law.

A.12.b. Italy's ODA programme

90. Italy has a significant ODA programme. In 2019, Italy provided USD 4.5 billion in ODA, equivalent to 0.22% of Gross National Income (GNI). The majority of ODA, approximately USD 3.3 billion, went to multilateral contributions, including contributions to the EU budget and European Development Fund (EDF). Bilateral aid of USD 1.4 billion was primarily distributed to Africa and the Middle East, with priority given to development projects related to social infrastructure and services (33% of bilateral ODA), refugees (28.3%) and humanitarian aid (7.2%). Italy also committed USD 264.9 million to promote aid for trade and improve developing countries' trade performance and integration into the world economy. In 2019, the top five ODA recipient countries were West Bank and Gaza Strip, Tunisia, Türkiye, Afghanistan and Ethiopia.[28]

A.12.c. Measures to detect and prevent corruption in ODA contracts

91. The Joint Committee for Development Co-operation, presided over by MAECI with representatives from the DGCS, AICS and the MEF, must approve all public calls for tender for development grants or disbursements of aid. The public procurement law LD 50/2016 regulates ODA-funded contracts. AICS has developed General Procedures for managing tenders and direct aid disbursements to NGOs and non-profit entities.[29] The General Procedures do not apply to for-profit entities. Before awarding a contract, authorities must undertake due diligence according to public procurement law and AICS procedures. Authorities consult the AVCPASS database maintained by ANAC (see para. 284), which contains information on criminal convictions and prior false declarations. An applicant is excluded from the tender process if past involvement in illegal activities, including providing false statements or manipulation of documents, emerges. In addition, AICS requires all grant applicants to self-declare any relevant prior convictions before signing a contract, as does the CDP before disbursing funds to private entities. Under Art. 2(4)(f)(ii) of the AICS General Procedures, a civil society organisation or non-profit entity convicted of foreign bribery is ineligible to participate in a public tender. However, only once a conviction is final.

[28] OECD (2021), Development Co-operation Profiles.

[29] See AICS (2020), General Procedures.

Art. 80(1) of the public procurement law also mandates that, under certain circumstances, an economic operator convicted of a foreign bribery offence must be excluded from a public tender. Economic operators who engage in serious professional misconduct that casts doubt on the integrity or reliability of the economic operator may also be excluded under Art. 80(5)(c) (see para. 282). However, this discretion is not mentioned in AICS's guidelines.

92. MAECI has adopted Ministerial Decree 92/2017, establishing general guidelines to regulate contractor selection procedures for the performance of contracts abroad. Under Art. 9(3) the grounds for exclusion from public tenders set out in LD 50/2016 Art. 80 also apply to contracts to be carried out abroad. In addition, a conviction under local legislation for the offences referred to in Art. 80, including foreign bribery, would be grounds for exclusion from the tender process. DGCS also uses the AVCPASS system to verify if individuals or companies have been convicted of corruption before signing a contract. However, the AVCPASS system does not contain records of convictions outside of Italy. Neither DGCS nor AICS check debarment lists of multilateral development banks before awarding a tender.

93. Italy funds development assistance in two ways, soft loans and grants. A contract between the successful bidder of an international tender for a development programme financed by a soft loan is signed between the Ministry of Finance in the recipient country and the CDP. The CDP disburses the amount indicated in the contract directly to the company that wins the tender. AICS oversees grants. NGOs or civil society organisations verified and registered in AICS's list of approved entities, the "Elenco", can apply for development grants. Italy states that all ODA contracts contain termination, suspension and reimbursement clauses for misconduct, misappropriation and corruption recognised by a judgement. Art. 17 of the standard contract between AICS and a non-profit entity contains the grounds for termination and refers to Arts. 20 and 21 of the AICS general procedures. Art. 21 provides that AICS can terminate a contract in the event of serious irregularities. There is no explicit mention of corruption. The CDP's contract does not contain a termination clause at all. It refers only to the suspension of disbursements in the event of default. Art. 16 states that Italian law shall apply. Under LD 50/2016 Art. 108(2)(b), contracting authorities must terminate a public contract if a conviction or sentence imposed under *patteggiamento* has become final for the offences referred to in Art. 80(1), which includes foreign bribery. It is of concern that neither the contracts themselves nor the law or AICS's procedures contemplate grounds for termination for corrupt practices that fall short of a final criminal sanction.

A.12.d. Sanctioning corrupt practices

94. It is not clear how MAECI, CDP or AICS would respond to the detection of allegations of foreign bribery or if an entity was charged with a foreign bribery offence during the performance of a development contract. Both the AICS general procedures and contract provide that AICS may carry out inspections and audits (Art. 10.2 and 16 General Procedures; Art. 13 standard contract). However, they do not outline the measures to be taken if the inspections or audits identify suspicious transactions or corrupt practices. Italy states that international audit firms carry out mid-term and final audits. These audits have never resulted in a report of foreign bribery.

A.12.e. Reporting and whistleblower mechanisms

95. In 2018, AICS adopted a Code of Ethics and Conduct and developed a three-year Anti-Corruption Plan. Under the Anti-Corruption Plan, all AICS personnel receive training on identifying corruption risks and implementing preventative measures. It is not apparent that the training contains specific information on identifying and reporting foreign bribery. The plan sets out a procedure for protecting whistleblowers who report illegal conduct. The procedure requires all staff to report all reasonable suspicions of criminal conduct they become aware of in the performance of their duties. Italy states that reports are made to law enforcement or AICS's internal compliance office. In 2021, AICS introduced new computer software that facilitates anonymous whistleblower reports. The software will soon be available in all 19 field offices in multiple languages.

A.12.f. Assessment of corruption risks in countries where assistance is provided

96. AICS's Anti-Corruption Plan assesses the different levels of exposure to the risk of corruption in AICS's specific operations and sets organisational measures to mitigate those risks. Italy states that it was developed following the ODA Recommendation and identifies four types of risk: compliance, financial, operational and strategic. AICS is required to report to the government on the observance of the plan.

Commentary

ODA authorities do not check debarment lists of multilateral development banks in the tender process or include an entity's inclusion on these lists as a basis for exclusion, contrary to Phase 3 Recommendation 11(a). In addition, and of more significant concern, Italian ODA contracts and institutional guidelines do not expressly contain explicit suspension or termination clauses where foreign bribery is alleged, but a final conviction has not been imposed.

The lead examiners recommend that Italy review its development co-operation contracts and provisions to ensure that, where allegations of foreign bribery are identified in the performance of an ODA contract, the contract may be suspended or terminated and public funds reimbursed.

B. Enforcement of foreign bribery and related offences

97. This section considers Italy's enforcement of its foreign bribery and related offences. It begins by examining the foreign bribery offence itself. This is followed by investigations, prosecutions and international co-operation in foreign bribery cases, and issues concerning the related offences of money laundering and false accounting. The section ends with the conclusion of cases, including non-trial resolutions, sanctions and confiscation. Corporate liability and sanctions are covered in Section C at p. 72.

B.1. Foreign bribery offence and defences

98. Criminal Code (CC) Art. 322bis(2) provides for four offences that apply to active foreign bribery by cross-referencing domestic bribery offences:

(a) The principal foreign bribery offence applies when a bribe is given or promised to a foreign public official (Art. 321). The offence is subdivided into two categories, covering bribery of a foreign public official for:

  (i) The performance of the official's functions or powers (Art. 318); and

  (ii) An omission or delay of an act related to the official's office, or the performance of an act contrary to the duties of his/her office (Art. 319).

(b) The incitement to corruption offence applies when a bribe is offered or promised but not accepted by a foreign public official. The offence is also divided into the two subcategories of incitement to perform functions or powers, and to breach duties (Art. 322(1) and (2)).

(c) A new undue inducement to bribery offence (Art. 319quater(2)) was enacted in 2012 to address concerns about the defence of *concussione* (see Section B.1.d at p. 43).

(d) A separate offence applies to corruption in judicial proceedings (Arts. 319ter, 321 and 322bis(2)).

99. These offences have been amended since Phase 3. First, Italy repealed a requirement in CC Art. 322bis(2)(2) that foreign bribery be committed to obtain "an undue advantage in international business transactions" or "an economic or financial activity". Second, CC Art. 322bis(1) now expressly covers the bribery of members of international parliamentary assemblies, and judges and officials of international courts. Third, CC Arts. 318 and 322(1) cover bribery in order that an official performs "his functions or powers" rather than "an act relating to its office". The official must also "unduly receive […] money or other advantage" rather than "receive […] an undue remuneration". Fourth, the lower prison term for bribery for an act already performed (Art. 318(2)) was repealed. Finally, CC Art. 320 applies to the bribery of any person charged with a public service, regardless of whether the person is a "public servant". Italy adds that the trading in influence offence (CC Art. 346bis) has been expanded to cover the influence of foreign public officials. Italy asserts that this offence can cover cases of opaque payments to an intermediary where there is insufficient evidence of bribery. A new offence of "passive foreign bribery" applies to foreign officials who take bribes in cases affecting the EU's financial interests (CC Art. 322bis (1)(5*quinquies*)).

100. Other post-Phase 3 developments raise serious concerns, especially the jurisprudence on the foreign bribery offence that has emerged. As mentioned at para. 12, after one conviction in 2013, the last seven foreign bribery cases that were litigated in Italian courts have resulted in five full dismissals,[30] one partial dismissal, and one conviction (which is not yet final). These court decisions raise serious concerns about the standard of proof and the courts' treatment of circumstantial evidence in foreign bribery cases. Some of the decisions also adopt interpretations of Italy's foreign bribery offence that are incompatible with

[30] One of which is not final.

the Convention. These problems are aggravated by an expanding requirement of the proof of foreign law. Issues also arise from the new offence of undue inducement as well as the defences of *concussione* and effective regret.

B.1.a. Standard of proof in foreign bribery cases

B.1.a.i. Treatment of circumstantial evidence

101. Foreign bribery cases often turn on circumstantial evidence. The briber and the bribed official are rarely caught in the act. Most cases are discovered long after the crime has been committed. Moreover, the bribe is most often paid through intermediaries to distance the briber and the bribed official from the crime. There is then no evidence that the parties negotiated the bribery agreement directly. Consequently, the bribery transaction must be inferred from the surrounding circumstantial evidence.

102. The law in Italy on circumstantial evidence is settled. A court can deduce the existence of a fact only from circumstantial evidence that is "serious, precise and concordant" (CCP Art. 192(2)). The court in the Helicopters (India) Case stated that this requires a two-step test. Each piece of circumstantial evidence must first be assessed individually. Those pieces that are considered "an object of autonomous evidence" would then be considered together to determine whether there is sufficient evidence to prove the crime.[31]

103. However, the application of this rule in practice has resulted in a very onerous standard of proof in foreign bribery cases because of a systematic rejection of circumstantial evidence. As mentioned above, the last seven litigated foreign bribery cases resulted in five full dismissals,[32] one partial dismissal and one conviction (which is not yet final). The treatment of circumstantial evidence was the principal reason for the acquittals in three of the cases: Helicopters (India), Oil and Gas (Algeria), and Oil Prospecting (Nigeria). (The acquittals in the remaining cases were for technical-legal reasons; the issue of circumstantial evidence did not arise.) In each of these three cases, instead of considering simultaneously the totality of the circumstantial evidence, each piece of circumstantial evidence is generally considered individually only. An alternative, exculpatory interpretation is adopted for each item, and excluded it from the final assessment.

104. One consequence of this approach is that large opaque payments to intermediaries have been rejected as evidence of foreign bribery. In the Oil and Gas (Algeria) Case, it was held that the enormous consultant fees paid by the company were for "lobbying". Even if this was true, fees of EUR 197 million in under four years would seem exorbitant for services of this nature. Also discounted was the absence of tangible work produced by the consultant, for the reason that lobbying activities "are difficult to document and frequently assume a confidential nature". Consultants also provide local information such as the "political strategies of the Algerian government" and the local "socio-political and economic dynamics". Despite there being no evidence that the consultant in this case provided such advice, or how such information could or did help the company win the contracts, the court nevertheless seemingly credited such conjecture when reaching its conclusion. In the Helicopters (India) Case, the company allegedly bribed an Indian official to obtain a EUR 556 million contract for 12 helicopters. Up to EUR 10.5 million were paid to the official's three cousins who had no expertise in helicopters and did not provide any tangible service or work product in return. The reasons for the acquittal did not explain the purpose of these payments, but rejected the idea they related to a bribe scheme.

105. Another example of the approach to circumstantial evidence is the reluctance to attribute a bribe to a foreign official. As mentioned above in the Helicopters (India) Case, the alleged bribe was traced to the official's three cousins. But it was held that payment to family members was not enough. Instead, there had to be direct evidence that the official received the bribe or was aware the bribe went to a third-party.

[31] See also Cass. Penale 8863/2020.

[32] One of which is not final.

In the Oil and Gas (Algeria) Case, it was held that the alleged bribe payments were made to a type of "facilitating agent" frequently used by large companies "to operate in very different countries for culture, legislation and administrative structure." But the intermediary in this case was not just any arms-length, commercial local agent: he was presented by the minister as someone extremely close to him ("like a son"). Furthermore, it was not noted that companies may also use local agents to pay bribes, too.

106. The reasoning in the above-mentioned cases also more readily draw exculpatory rather than inculpatory inferences from circumstantial evidence in a myriad of other situations. Examples include the Oil Prospecting (Nigeria) Case, where two companies paid USD 1.3 billion to acquire an oil prospecting licence. Half of the purchase money was laundered through multiple cash transfers to currency exchanges and then distributed, including to one official to purchase a USD 4.5 million property. It was nevertheless found that the property was compensation for legal services rendered earlier by the official when he was a practising lawyer. However, the judgment did not refer to any documentary evidence (e.g. invoices) of the services rendered or the debt owed. It is also undoubtedly odd to pay for legitimate legal services with a sale of real property funded by numerous small cash payments cycled through money exchanges. A single direct cash transfer from the debtor to the official would have been more logical. The debtor in this case certainly had the means to pay the official directly: he had just pocketed USD 400 million from the sale of the oil prospecting licence. In the same case, while internal company emails contained language suggestive of bribery, the reasons for the acquittals repeatedly adopted exculpatory interpretations of the correspondence.

107. Exculpatory inferences were also adopted in the Helicopters (India) Case. For instance, a document with purported bribe amounts and recipients was rejected because it referred to "the family" and not the official. It was also noted that the intermediary who authored the note said the figures were only an estimate. But it would seem that the document should have evinced at least an intention to bribe. It was further found that it was not the allegedly bribed official but his deputy who sat on the procurement board that set the contractual requirements. This implies that it was not sufficient that the official had influence over his deputy as his boss, and that there must be direct evidence that the official actually asked his deputy to change the procurement requirements.

108. Finally, exculpatory inferences that are arguably speculative and uncorroborated have also been drawn. For instance, in the Helicopters (India) Case, alternative interpretations to the intercepted conversations between the intermediaries were adopted. Yet, even the intermediary himself did not offer such interpretations in his testimony. In the Oil and Gas (Algeria) Case, the company had been excluded from energy projects in Algeria before winning seven major contracts over four years. The reasons for the acquittals said that this was not due to bribery but to specialised skills acquired by the company. But there was no evidence that the contracts were awarded to the company for this reason.

109. One litigated foreign bribery case that has resulted in (partial) convictions rested on direct and not circumstantial evidence. In the Logistics (DRC & Niger) Case, the offenders were already under investigation for tax offences. Wiretapping and eavesdropping in Italy then yielded evidence of foreign bribery. The intercepted communications showed in detail the bribery negotiations on Italian soil between the accused and foreign officials.

110. When asked about these cases during the evaluation, Italian judges unanimously refer to the test for circumstantial evidence in CCP Art. 192(2). All state that the provision applies identically to all cases of all offences in Italy. Several judges also state that difficulties in gathering evidence from abroad in foreign bribery cases do not merit a lower standard of proof. Few would disagree with these propositions. However, the collective body of circumstantial evidence presented in each of the three litigated cases resulted in convictions in some cases that were later overturned. Also, Italian prosecutors perceive that the standard of proof as applied is unduly onerous. One states that "foreign bribery cases have a higher and higher bar". Another prosecutor adds that courts in the past more readily accepted circumstantial proof of bribery. But the approach has "faded in recent times" and judges now "tend not to see the series but just the pieces".

111. A prosecutor's recent statements reinforce the conclusion that an onerous standard of proof applies to foreign bribery cases, and indicates that this view is held not only by judges but some prosecutors. The appeal of the trial acquittals in the Oil Prospecting (Nigeria) case was heard in July 2022. In conceding the appeal, according to media reports, the appellate prosecutor stated that there is a "thinness and absolute insignificance of the elements" of proof in the case, and that the evidence is "incongruous and insufficient", which suggests "different possible reconstructions that reflect the absence of certain facts at the basis of the accusation and not of a constructive agreement that does not indicate any way". As such, "there is no proof of a corruptive agreement, nor proof of payment of corruptive utilities".[33] Incidentally, the appellate prosecutor also made some ill-advised comments by describing the trial prosecutor's attitude as "neocolonialist" and that the indicted companies "had made the wealth of Nigeria".

112. After reviewing a draft of this report, Italian authorities point out that the cases mentioned above involved extremely complex facts and that lower courts entered convictions. This is true, but the fact remains that these convictions were overturned on appeal.

Commentary

The lead examiners are extremely concerned over the treatment of circumstantial evidence in some recent foreign bribery cases. They express the utmost respect for the independence of Italian judges, however, and do not criticise the outcomes of these cases. Nevertheless, the reasoning in these cases appears to demonstrate a troubling pattern. Each piece of circumstantial evidence may be examined in isolation and exculpatory explanations are assessed for that specific piece of evidence. Such explanations are by definition available in the abstract given the evidence's circumstantial nature. Once such exculpatory explanation is found, the piece of evidence is then rejected. By not considering the totality of the circumstantial evidence simultaneously, cases that could demonstrate bribery when viewed in a holistic context risk being dismissed instead.

The lead examiners therefore recommend that Italy provide training and awareness-raising to judicial authorities on the treatment of circumstantial evidence in foreign bribery cases.

B.1.a.ii. Proof of details of a corrupt agreement

113. Italy's principal foreign bribery offence requires proof of a corrupt agreement. It is an offence to give or promise money or other benefits that a public official "unduly receives" (CC Arts. 318-319 and 321). Courts in foreign bribery cases have held that this provision requires the prosecution to prove a corrupt agreement between the briber and the official. Italian judges and prosecutors who participated in this evaluation unanimously confirm that the corrupt agreement is an essential element of the offence. If the offer or promise of a bribe is not accepted, then the act amounts to a different offence of "incitement to corruption" (*istigazione*) (CC Art. 322). The Italian law is thus similar the Convention Art. 1 which prohibits the offer, promise or giving of any *undue* pecuniary or other advantage to a foreign public official, in order to obtain or retain business or *other improper* advantage in the conduct of international business.

114. The concern, however, is not the requirement of a corrupt agreement *per se* but the level of detail that must be proven. In the Helicopters (India) Case, both the first instance court and the Court of Appeal required proof of precisely where and when the agreement was made, and details of the act to be performed by the bribed official. The Court was equally critical of the lack of proof of the precise financial terms of the agreement:

> It is not possible to know who made the corruptive proposal to the public official, and not even its economic terms (and this since the beginning, when the charges were filed), when everyone can see that in a story like the present one, relating to a contract

[33] Il Fatto Quotidiano (19 July 2022).

> order of five hundred and fifty-six million euros, the corruption agreement must provide for precise financial references, to be defined at the outcome of a detailed negotiation.[34]

115. Participants in this evaluation confirm the high standard of proof that applies to the corrupt agreement. One Supreme Court judge states that the prosecution must prove details such as "the existence, object, nature and parties of the agreement". Three civil society organisations opine that the Italian courts have "set the bar for establishing such proof extremely high". The necessary evidence may be more readily available through wiretapping or surveillance in cases of domestic corruption but not foreign bribery. The courts' approach "had the effect of making it nigh on impossible to obtain a conviction in Italy for international corruption."

116. Italian authorities' response to these observations do not assuage the concerns. The Working Group indeed considered in the past that Italy's foreign bribery offence complied with the Convention. But this was before the spate of recent acquittals that created jurisprudence on the offence. Italy also states that proof of details of the corruption agreement is not required according to "well-established Italian case law".[35] This case law considered the domestic bribery offence which has the same elements as the foreign bribery offence. But the fact remains that courts hearing foreign bribery cases did not apply this case law. Finally, Italy argues that the doctrine of precedent does not apply under Italian law, and hence other courts may decide not to follow the Helicopters (India) Case. This may be too optimistic, since one Supreme Court judge and civil society organisations suggest that the approach in the Helicopters (India) Case is widely accepted. Italy also refers to case law extensively in this evaluation, which reflects the jurisprudential value of prior court decisions. Indeed, some of the Italian courts that heard foreign bribery cases have issued reasons for judgment that referred to earlier decisions in foreign bribery cases.

Commentary

The lead examiners are concerned about the standard of proof for the corrupt agreement in Italy's foreign bribery offence. In foreign bribery cases, Italian courts require proof of all of the agreement's details, such its date, place, parties and precise financial terms, as well as the exact act to be performed by the public official. The Convention Art. 1 does not mandate the proof of a detailed agreement to such a degree. Such precise evidence is rarely available in actual instances of foreign bribery, especially where the evidence is often located overseas. When the requirement to prove such details in Italy is coupled with the challenges of using circumstantial evidence (see previous section), foreign bribery is exceedingly difficult to prove. The lead examiners therefore recommend that Italy take steps to align the level of details about the corrupt agreement that must be proven for its foreign bribery offence with that seen in practice, by taking appropriate measures including training of judicial authorities, and if necessary amending its legislation.

B.1.a.iii. Liability based on recklessness, wilful blindness, or dolus eventualis

117. A person should be liable not only for knowingly bribing a foreign public official, but also if he/she is reckless or wilfully blind as to whether money paid would end up as bribes. Under Convention Art. 1, it is an offence "for any person intentionally to offer, promise or give any undue pecuniary or other advantage". The Working Group has stated that "intention" in this context covers recklessness, wilful blindness and *dolus eventualis*.[36]

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[34] Corte d'Appello di Milano Penale 9/2018, p. 218.

[35] Cass. Penal 3523/2011 and Cass. Penal 1/2014.

[36] For example, see Latvia Phase 2, paras. 194-197 and Recommendation 13(a), and Phase 3, para. 31 and Recommendation 1(a); Finland Phase 4, paras. 80-83 and Recommendation 3; Costa Rica Phase 2, paras. 197-201 and Recommendation 12(a).

118. In the Oil Prospecting (Nigeria) Case, the prosecution tendered evidence that the alleged bribers knew that the money which they paid to purchase the oil prospecting licence could end up as bribes. For example, the companies' executives negotiating the sale had abundant experience operating in Nigeria and were therefore familiar with the level of corruption in the country. Internal company emails mentioned that the licence holder would keep only a portion of the purchase money and "the rest goes to pay people off". Company correspondence stated that certain government decisions were "clearly an attempt to get a lot of money to [the Nigerian President] as a party to any transaction." Another internal email reported that the Minister of Oil offered USD 15 million to acquire the office. The company therefore likely believed that any oil deals involving the Minister could involve bribery as the Minister would need to recoup her investment.

119. The court found that this body of evidence was not sufficient for liability. It cites jurisprudence according to which liability based on *dolus eventualis* arises when there is an "acceptance of the risk of occurrence of a necessarily specific event, not directly intended although represented." Conversely, "generic representation of the dangerous situation as an effect of the action taken is not sufficient" for liability. In the Oil Prospecting (Nigeria) Case, there was only "abstract possibility to know the situation of the existence of an underlying corruption danger", which was not sufficient to find liability. The defendants were "at most aware of a generic danger, [which justifies] an abstract possibility to know the corrupt agreements."[37]

120. The court took a similar approach in the Electrical Equipment (Libya) Case. The executive of an Italian company hired a consultant to obtain business from Libya's state-owned oil company. She then approved 21 payments of fees to the consultant over 13 months totalling EUR 572 988. In his testimony, the consultant admitted to paying at least EUR 297 000 of the fees to Libyan officials. The consultant then procured a EUR 38.8 billion contract for the Italian company. The court found that the executive paid very large sums to the consultant without sufficient justification. It nevertheless acquitted the executive because there was "no proof of [her] awareness of the actual illicit destination of part of the sums received by [the consultant]". There was no consideration of whether the executive was wilfully blind or reckless that the consultant fees would end up with Libyan officials as bribes.

121. In response, Italian authorities cite recent case law that partially alleviates these concerns. In one Supreme Court case that did not involve foreign bribery,[38] an individual entrusted an intermediary to obtain procurement contracts in exchange for a monthly payment. The individual granted the intermediary "the authorisation to 'move freely in an area that we may agree on'". In upholding the individual's conviction, the Supreme Court held that the individual had "a full awareness […] of the high probability that the [intermediary] would commit acts of corruption".

Commentary

The lead examiners note that in a typical foreign bribery case an executive pays a consultant a large sum of money and asks the consultant to "do whatever it takes" to win a public procurement contract for the executive's company in a foreign country with widespread corruption. The consultant does not provide any other tangible work product or services in return. The executive also does not question how the consultant would spend the large sum of money that he/she receives. The executive is therefore reckless or wilfully blind to whether the consultant would use the money to bribe an official in the foreign country in order to win the contract. Under the Convention, the executive (and the consultant) should be liable for foreign bribery.

[37] Trib. di Milano Penale 3055/2021, Sections 9.3-9.4. As mentioned in Section B.1.a.i at p. 28, the Court also acquitted the accused because circumstantial evidence failed to prove the corruption agreement.

[38] Cass. Penale 23325/2021, Section 19.

Unfortunately, liability in such cases is uncertain in Italy. Courts have held that "abstract knowledge of corrupt agreements" is insufficient for liability. The approach is similar to the standard of proof for the corrupt agreement, where Italian courts require extensive proof of all of the agreement's details (see previous section). Whether more recent case law cited by Italian authorities will be applied to foreign bribery cases remains to be seen. The lead examiners therefore recommend that the Working Group follow up this issue.

B.1.a.iv. Origin of funds received by a bribed official

122. A requirement that the funds paid by a briber – and not an equivalent amount from another source – be transferred to the foreign public official compounds the problems with the standard of proof. In the Oil and Gas (Algeria) Case, the company allegedly bribed a foreign official through an intermediary. The money trail was not direct, however. In two instances, funds from the company were deposited and stayed in one account controlled by the intermediary. The intermediary then allegedly paid the official with funds from other sources in other accounts that he controlled. The court held that this was one of the reasons why foreign bribery was not proven. In the absence of direct evidence of a corrupt agreement, the actual sum of money provided by the briber must be traced directly to the corrupt official:

> For the completion of the corruption case (both internal and international), proof of the promise (accepted) or of the delivery of the promised utility (which is the prosecution's thesis in this case) must be provided and the more evanescent the demonstration of the corruptive pact, the more rigorous must be the proof of illicit bestowal from the corrupter to the corrupt.
>
> Only when a corruptive agreement in which the public official participates directly and which provides for the payment of the bribe to a trustee of the latter is proven, could the lack of provenance of the money paid by the corruptor to the official be considered irrelevant, based on the fungibility of money.[39]

123. Italian authorities' response to this issue does not eliminate the concerns. They state that "Italian law does not provide for the completion of the offence that the foreign (or domestic) public official receives exactly the same funds provided to the intermediary. There is no single case of domestic or foreign bribery where a court affirmed such requirement." However, the Milan Court of Appeal did not take this position in the Oil and Gas (Algeria) Case. The Court's ruling has also not been overturned or criticised by other courts. It remains part of Italian jurisprudence.

124. The Oil and Gas (Algeria) Case raises a further issue of whether access to the bribe money is sufficient to prove the offence. The wife of the allegedly bribed official held powers of attorney (POAs) over several accounts of the intermediary and in which the alleged bribes were deposited. There was some disagreement over whether the POAs were exercised or in force when the payments were made. These debates did not matter in the end. According to the Court, a bribe is attributed to an official only when he/she has title over the bribe; mere access to or availability of the bribe is not enough.[40] Italian authorities point out that this finding was not the main reason for the Court's acquittals. The Supreme Court noted that the purpose of the POAs was never explained but nevertheless upheld the acquittals.

Commentary

The lead examiners are concerned that the requirement that the foreign official receive the exact same funds provided by the briber could make foreign bribery extremely difficult to prove. Intermediaries who facilitate bribery frequently have multiple shell companies and accounts for mixing funds and obfuscating money trails. Many corrupt officials engage intermediaries precisely for this reason. A further requirement that an official has title to and not mere access over the bribe

[39] Corte d'Appello di Milano Penale 286/2020, Section 6.2.7.1, pp. 198-201.

[40] Corte d'Appello di Milano Penale 286/2020, Section 6.2.7.4.2, pp. 206-207.

money has a similar effect. The lead examiners therefore recommend that Italy take steps to ensure that its foreign bribery offence is satisfied when funds are provided for the benefit of a corrupt official regardless of whether the foreign official actually receives the same funds provided by the briber, or whether the official has title and not mere access to the bribe, by taking appropriate measures including training of judicial authorities, and if necessary amending its legislation.

B.1.b. Elements of the foreign bribery offence

125. The Phase 3 Report did not express concerns about the elements of Italy's foreign bribery offence. Post-Phase 3 jurisprudence, however, raises two issues: a "corrupt agreement" between a third-party and a foreign public official; and an "active" vs. "passive" side intermediary.

B.1.b.i. Liability for a "corrupt agreement" between another party and a foreign public official

126. The Oil Prospecting (Nigeria) Case involved a triangular relationship. A Nigerian individual who was not a public official at the relevant time held an oil prospecting licence. He allegedly entered into a corrupt agreement with Nigerian officials in which the officials would facilitate the sale of the licence in return for a portion of the proceeds. Two foreign companies were then found as purchasers of the licence. Allegedly, the companies' purchase money went partly to the Nigerian individual who held the licence, and partly to the Nigerian officials as bribes.

127. The court held that the companies in this case cannot be liable for foreign bribery, even if the licence holder had a corrupt agreement with Nigerian officials. The companies were not parties to this agreement. The agreement had been made by the time the companies came onto the scene. More importantly, the companies would not be liable even if they were aware of this agreement and knew that the licence holder would use their purchase money to bribe Nigerian officials. This is because the bribery offence was complete once the licence holder and the officials reached the agreement. The companies' participation in the subsequent "executive phase" of the agreement, such as by providing the bribe money while knowing the existence of the prior corrupt agreement, does not amount to bribery. To be liable, it is necessary to "personally contribute to the agreement in full awareness of the objective of bribing the public officials involved". The court relied on two Supreme Court cases for this reasoning.[41]

128. This interpretation of Italian law made in the Oil Prospecting (Nigeria) Case would not conform to the Convention. Art. 1 of the Convention covers any person who gives an undue advantage through an intermediary to a foreign public official in return for the official's act or omission. If the companies in the case provided their purchase money knowing that it would pass through the licence holder to the Nigerian officials as bribes, then the companies' conduct would fall within Art. 1. By knowingly providing the bribe money, the companies would join and become parties to the corrupt transaction. Whether the officials had an agreement with the licence holder or the companies is irrelevant. The "corrupt agreement" is a requirement under Italian law but not the Convention.

129. Italian authorities' response is again insufficient to alleviate these concerns. They state the Court relied on Supreme Court jurisprudence that is factually distinguishable. Furthermore, drawing an analogy with the case law on statute of limitations, an offence of bribery is complete when the bribe is given, and not when it is merely promised. But like the issue of tracing the funds from the briber to the official (see para. 123), the Court's ruling in the Oil Prospecting (Nigeria) Case has not been overturned or judicially criticised. It remains part of Italian jurisprudence.

[41] Trib. di Milano Penale 3055/2021, Sections 5.4, 6.6.1-6.6.3 and 6.8. As mentioned in Section B.1.a.i at p. 28, the Court also acquitted the accused because circumstantial evidence failed to prove the corruption agreement.

Commentary

The lead examiners recommend that Italy take steps to ensure that liability for foreign bribery arises whenever a person offers, promises or gives a bribe to a foreign public official directly or through an intermediary, including where the person joins and becomes a party to a corrupt transaction after the official has entered into a prior "corrupt agreement" with the intermediary or another third party, by taking appropriate measures including training of judicial authorities, and if necessary amending its legislation.

B.1.b.ii. An "active" vs. "passive" side intermediary

130. The court in the Oil and Gas (Algeria) Case described a peculiar concept of categorising intermediaries as being on the "active" or "passive" side, with liability for foreign bribery applying only to cases involving the former. The foreign public official in this case asked the companies to negotiate the transaction with a close associate. The court noted that the official "repeatedly defined [the individual] as a trusted man, alter ego of the minister". A second individual was similarly described. The companies then allegedly paid these two individuals large "consultant fees", part of which was then allegedly passed on to the official as bribes. The court found that these two individuals were essentially representatives of the official; they therefore participated in the bribery as intermediaries in passive international corruption. Since passive foreign bribery is not a crime under Italian law, neither is intermediating such conduct:

> While in the perspective of domestic corruption it is not decisive to ascertain whether the intermediary contributes on the active or passive side of the corruption, since it is sufficient for him to integrate the conditions of the participation of persons in the crime, in the hypothesis of international corruption the contribution made to the conduct of passive corruption, since it is not related to a punishable fact (Art. 322(2)(2) of the Criminal Code only provides for active corruption), would be criminally irrelevant.[42]

131. No precedent or jurisprudence was cited for this approach. The court ultimately did not rely on this reasoning to acquit the accused in the case. Instead, it concluded that there was no corruption; which side the intermediaries were on was therefore immaterial.

Commentary

The lead examiners recommend that the Working Group follow up the issue of "active" vs. "passive" side intermediaries in foreign bribery cases.

B.1.c. Autonomous definition of the foreign bribery offence and proof of foreign law

132. Commentary 3 of the Convention requires a country's foreign bribery offence to be autonomous. In other words, a conviction for the offence must not require proof of the law of the bribed official's country. The Working Group questioned in Phase 3 (paras. 24-27) whether Italy's foreign bribery offence meets this requirement. Case law developed since Phase 3 confirms these concerns.

133. Initial doubts about an autonomous foreign bribery offence centre on the definition of a foreign public official. In 2009, the Supreme Court ruled that the foreign bribery offence requires a two-branch test. First, "the judge in a trial for foreign bribery shall ascertain 'ex officio' the rules of foreign law useful to determine whether the corrupt official was actually performing functions or activities equivalent to those of a public official or of a representative of public service." Second, this function must also be a public function under Italian law.[43] The first branch would seem to render the offence non-autonomous. But Italy argued in Phase 3 that "this does not go as far as requiring the 'proof' of the law of the official's country, but rather allows the judge to ascertain the case 'also' through proactive research of and reference to foreign law".

[42] Corte d'Appello di Milano Penale 286/2020, Section 6.2.2, pp. 154-156.

[43] Cass. Penale 49532/2009.

No authority was cited for this position. The Working Group decided to follow up this issue (Follow-up Issue 13(a)).

134. Since Phase 3, the non-autonomous definition of a foreign public official has been applied in two foreign bribery cases, in one case leading to an acquittal. In the Logistics (DRC & Niger) Case, the defendants allegedly bribed officials of OGEFREM, a Congolese public enterprise responsible for applying government bylaws on clearances of cargo destined for Congo.[44] The court held that OGEFREM employees were not public officials under Congolese law, and hence also not foreign public officials under Italian law. OGEFREM was also not state-financed. The conclusion is surprising, since the court noted that OGEFREM was established to meet the needs of general interest. The court thus did not apply a test of whether the allegedly bribed individuals performed functions of a public nature, as required by the Convention Art. 1(4)(a). (Italian authorities add that the Court also found the bribery was not proven, even if OGEFREM employees were public officials. The case is under appeal.) In contrast, in the Oil and Gas (Algeria) Case, officers of Algeria's state-owned national oil company allegedly received bribes. The trial and appellate courts applied the Supreme Court's two-branch test, "explored Algerian legislation", and found the bribe recipients were Algerian public officials.

135. Proof of foreign law has been expanded to a second aspect of the foreign bribery offence. As mentioned at para. 98, Italy's principal foreign bribery offence contains two subcategories: bribery for an official to perform official functions, and to act contrary to duties of office. Each subcategory attracts different sanctions. According to a Milan prosecutor, distinguishing between the two subcategories "is even more elusive in international corruption (CC Art. 322bis), given that the breach of official duties can only be assessed with regard to the legislation of the foreign country concerned."[45]

136. Proof of foreign law was required for this purpose in two cases. In the Logistics (DRC & Niger) Case, the defendants were convicted of bribery for the performance of official functions. The court declined to convict for the more serious offence of bribery for an act contrary to duties "given the difficulties in ascertaining the procedures established by the law in force in Niger." In the Oil and Gas (Algeria) Case, the trial court held that it was compelled to examine "the provisions of foreign law useful to determine the illicit nature of the alleged conduct". Such illegality clearly emerged "from the analysis of the foreign legislation mentioned and examined above, to which constant reference has been made, also in relation to the tender procedures […], under the principles of protection of competition and impartiality specifically indicated in the Algerian provisions […]".[46] The accused were eventually acquitted on other grounds, namely the insufficiency of evidence (see Section B.1.a.i at p. 34).

137. Of even greater concern is that the proof of foreign law has been extended from the definition of a foreign public official to the legality of the official's conduct. In another foreign bribery case, the Supreme Court partially annulled the pre-trial detention of an individual. Applying the reasoning of the 2009 two-branch test, the Court held that the lower court should have determined whether the foreign official's conduct was illegal under Tunisian law.[47]

138. During this evaluation, Italian authorities to varying degrees refer to a need to prove foreign law in foreign bribery cases. One prosecutor in a foreign bribery case states that this is "a problem" that requires "a first reconstruction of the sources of the law that are not easy to identify". A Supreme Court judge states that foreign law is "necessary" and a court "must make reference to it". However, foreign law is "not binding" because "we need to reclassify with an objective view point". This seems to merely affirm the 2009

[44] See Welcome to OGEFREM Invesco (last accessed on 25 March 2022).

[45] Fusco, E. (22 June 2017), "La sfuggente nozione di atto contrario ai doveri d'ufficio nei delitti di corruzione", Questione Giustizia.

[46] Trib. di Milano Penale 10074/2018, p. 55.

[47] Cass. Penale 45935/2015, p. 7.

Supreme Court two-branch test which requires a determination of foreign law in the first branch and Italian law in the second. Another prosecutor mentions a functional test for a foreign public official and believes that there is no need to prove illegality of the bribe recipient's conduct under foreign law. But she has not prosecuted a foreign bribery case personally and does not refer to the foreign bribery jurisprudence above. Italian authorities also refer to the Oil Prospecting (Nigeria) Case but the officials in the case included the President, Attorney General, ministers, and parliamentarians. Their status as foreign public officials was thus unassailable. Italy also cites the Oil and Gas (Algeria) Case. But the case referred to the Convention's definition of a foreign public official in state-owned enterprises, not Commentary 3 on an autonomous definition.

139. An Italian prosecutor who conducted a foreign bribery case also describes vividly the policy reason for the Convention's requirement of an autonomous foreign bribery offence. Proof of foreign law "is quite complicated", he states, especially "in a country with no [mutual legal assistance] conventions" with Italy. "Very often the legal system and [hence] the reconstruction of the case is different." This is "even more difficult with countries outside the European Union, and if the judicial authorities in the country are not independent". He was therefore unable to contact the authorities of the foreign country in his foreign bribery case, and was limited to seeking assistance from Italy's embassy in the country. The court ultimately found that the bribe recipient was not a foreign public official and acquitted the accused.

140. Italian authorities state that "Italian law does not require courts to prove foreign law but only to ascertain whether the foreign national who has received the bribe performs functions or activities corresponding to those of a public official or a representative of a public service according to CC Art. 322bis". But this ascertainment of the individual's functions or activities requires "a judge in a trial for foreign bribery [to] ascertain 'ex officio' the rules of foreign law", according the 2009 Supreme Court decision (see para. 133). Italian authorities also argue that the issue "has a very limited impact on the enforcement of foreign bribery" because foreign law is not necessary when "[the bribe] was made because of the official's functions". But the impact of this issue is far from minimal considering the growing number of foreign bribery cases where courts were obliged to determine foreign law.

Commentary

The lead examiners are seriously concerned that Italy's foreign bribery offence is not autonomous, contrary to Convention Art. 1 and Commentary 3. In 2009, the Supreme Court imposed a legal requirement to prove foreign law in foreign bribery cases. A line of subsequent cases has since applied this principle to areas such as the definition of a foreign public official and the legality of the official's conduct. This has resulted in acquittals in one case and the cancellation of pre-trial measures in another. The practical difficulties of proving foreign law, combined with the onerous standard of proof for the foreign bribery offence described above, make this crime almost unprovable in Italian courts. The lead examiners therefore recommend that Italy urgently amend its law to make its foreign bribery offence autonomous.

B.1.d. Defence of concussione and undue inducement

141. The Working Group has long expressed concern about the "*concussione*" defence to foreign bribery. At the time of Phase 3 (paras. 28-31), this defence provided that if a public official abused his/her status or powers to coerce or induce an individual to promise or give a bribe, the official was guilty of the *concussione* offence under CC Art. 317. But the bribing individual was considered a victim and not guilty of bribery. Phase 3 Recommendation 1(a)-(b) asked Italy to: (a) amend its legislation without delay to exclude the application of *concussione* as a possible defence to foreign bribery; and (b) assess any amendment to the application of *concussione* as a possible defence to foreign bribery independently of similar amendments dealing with the offence in relation to domestic bribery.

142. Italy's response was to narrow – but not eliminate – the defence via a 2012 legislative amendment:

(a) *Concussione* (CC Art. 317) now applies where a public official, by abusing his/her capacity or powers, coerces someone to unduly give or promise money or other advantage, to him/her or others. The word "induce" was deleted. As before, the official but not the briber is held liable.

(b) A new *undue inducement* offence (CC Art. 319quater) covers a public official who, by abusing his/her capacity or powers, induces someone to unduly give or promise bribes. In 2015 the provision was extended from public officials to "a person in charge of a public service". Unlike *concussione,* the briber is also guilty of undue inducement. The maximum penalty (3 years) is significantly lower than that for bribery (8-10 years for the principal offences), though the opposite is true for legal persons.

143. In 2014, the Supreme Court rendered an authoritative interpretation of the delimitation between *concussione*, undue inducement, and bribery (the "Maldera" case).[48] *Concussione* takes place when the official coerces an individual "by means of violence or - more frequently - threat, explicit or implicit, of an unjust prejudice". The individual does not receive any undue advantage. Undue inducement covers "persuasion, suggestion, deception […], moral pressure" on an individual who seeks an undue advantage. Bribery "presupposes the equality of the contracting parties and shows the absolutely free and conscious meeting of the parties' will."

144. The current *concussione* and undue inducement provisions raise two issues: (a) the scope of the residual *concussione* defence in foreign bribery cases, and (b) the standard of proof.

B.1.d.i. Scope of the current concussione defence

145. Italy states that the reformed *concussione* defence has not arisen and will not arise in foreign bribery cases. It asserts that the defence has been limited to "cases of abuses and harassment of public officials against private individuals, forced by means of violence or threats to pay undue sums of money, cases which are in fact related to occasional relations and are unrelated to economic transactions. […] The possibility that concussione could be invoked in the context of international economic transactions appears to be absolutely unlikely and abstract".

146. Case law casts doubt on Italy's categorical claim that *concussione* does not apply to international economic transactions. In the "Maldera" case (pp. 41-42), the Supreme Court gave an example of an official who threatens an individual with unlawful and arbitrary exclusion from a public tender. But the official also promises the award of the contract upon payment by the individual. Such a case would amount to *concussione* if the "undue advantage [from winning the contract is marginal] compared to the unjust prejudice threatened". In the Logistics (DRC & Niger) foreign bribery case, the company promised bribes to foreign public officials but was then excluded from a transaction. The trial court found that bribery occurred, but that "it is to be excluded […] that in this case [the company] was *concussa* [i.e. victim of *concussione*], having not yet achieved a precise right to obtain what it was incumbent on the basis of the rules and procedures provided."[49] This seems to imply that *concussione* may have been applicable had the company been refused something to which it was entitled. The court then goes on to restate the Maldera definition of *concussione* vs. bribery.

147. Italy's position may partly be based on a perception that the Convention applies only to "international economic transactions". However, the Convention does not use this term. Instead, it applies to foreign bribery "to obtain or retain business or other improper advantage in the conduct of international business" (Art. 1(1)). This includes, for example, obtaining "an operating permit for a factory which fails to meet the statutory requirements" (Commentary 5). Some *concussione* cases in Italy fall within this definition. In one case, a *Guardia di Finanza* official threatened to conduct prejudicial inspections and tax audits in return for

[48] Cass. Penale 12228/2014, pp. 49-51; see also pp. 32-34 (on c*oncussione*), and 20, 37-38 (on inducement).

[49] Trib. De Genoa Sentenza 1516/2020, pp. 51-52.

advantages.[50] Another *concussione* case involved a business obtaining legalisation of its establishment by hiring the law firm of a municipal technician's children.[51] Italy argues that these are "cases of petty corruption that took place under circumstances which cannot even remotely be imagined in cases of foreign bribery". However, the relevant point here is not the size of the bribe, but that *concussione* applies to cases involving "economic transactions". Some commentators also argue that *concussione* should apply where bribery is necessary to avoid a serious economic prejudice, or a "just" prejudice (e.g. a threat to report all tax violations).[52] Italy cites other commentators[53] but their writings do not categorically exclude *concussione* from "economic transactions". Italy adds that the court in the Electrical Equipment (Libya) Case stated that it would have convicted the defendant for undue inducement had the offence been enacted. But as Italy admits, undue inducement only "narrowed" – not eliminated – the scope of *concussione*.

B.1.d.ii. Standard of proof for concussione and undue inducement

148. The Oil Licences (Congo-Brazzaville) Case shows that in practice courts may tend to find *concussione* and undue inducement instead of convicting for active foreign bribery. The circumstances amounting to *concussione* and undue inducement are far from unusual. The case involved an Italian company paying bribes of between USD 77 and 163 million to renew several oil licences at favourable terms. The value of the licences increased by USD 968 million as a result. In its *patteggiamento* decision, the court accepted that there was undue inducement in the case. But this conclusion was based on only one fact: that the oil wells were controlled by foreign officials in a "substantially immature and dictatorial state, still lacking solid democratic institutions and transparent competition rules, centred on the figure of the president and controlled by a handful of lieutenants serving him and their own exclusive private interests". Considering how many countries in the world fit this description, undue inducement could be a frequent occurrence in future foreign bribery cases.

149. Rather unremarkable circumstances also underpinned a finding of undue inducement instead of active foreign bribery in the Electrical Equipment (Libya) Case. An Italian company allegedly hired a consultant to obtain business from Libya's state-owned oil company. The consultant contacted and eventually channelled EUR 420 000 to the son of Libya's then leader in exchange for a EUR 38.8 billion contract for the Italian company. The court acquitted the consultant of foreign bribery but stated that it would have convicted him of undue inducement had the offence been enacted at that time. The finding of "inducement", however, rested merely on a custom of gift-giving in Arab countries, and the "behaviour of [the leader's son], a dangerous and violent subject".

150. These cases also suggest that limited evidence is needed to prove undue inducement and *concussione*. In the Oil Licences (Congo-Brazzaville) Case, the company was unduly induced even though its officer who authorised the bribe received USD 23 million in kickbacks. In the Electrical Equipment (Libya) Case, the only evidence of undue inducement mentioned in the judgment is the accused consultant's statement that the leader's son was "a very bad person, venal", and who "on the occasion of various meetings I had with him [in Italy], even threatened me with death if I did not hand over the sums". There was no corroboration of this evidence, such as testimony from other witnesses who made the threats

[50] Cass. Penale 9429/2016.

[51] Cass. Penale 46401/2014. see also Castelnuovo, A. (27 April 2020), "Concussione Art. 317 codice penale".

[52] Collica, M. T., "La tenuta della sentenza Maldera, tra conferme e nuovi disorientamenti", DPC 2/2017, p. 195; Balbi, G., "Sulle differenze tra i delitti di concussione e di induzione indebita a dare o promettere utilità", DPC 1/2015, p. 143.

[53] Mongillo, V., "L'incerta frontiera: il discrimine tra concussione e induzione indebita nel nuovo statuto penale della pubblica Amministrazione", DPC 3/2013, p. 166; Mongillo, V., "Induzione indebita a dare o promettere utilità", in Canestrari, S., Cornacchia, L. and De Simone, G. (2015), *Manuale di diritto penale. Parte speciale. Delitti dei pubblici ufficiali contro la pubblica amministrazione. Delitti di corruzione*, pp. 197-200.

or independently observed the events. In neither case was there a requirement that the briber consider alternatives such as walking away from the deal or reporting the matter to Italian authorities.

151. Italy stresses that the cases above involve undue inducement and hence there is no concern about the standard of proof for *concussione*. But courts will likely take the same approach to both concepts since they are adjacent points on the same spectrum.

Commentary

The lead examiners acknowledge that Italy has reduced the scope of the concussione defence. Nevertheless, the defence has not been completely excluded from foreign bribery cases as recommended by the Working Group. The lead examiners are also concerned that in practice the standard of proof for concussione and undue inducement in foreign bribery cases may be very low. Many foreign bribery cases could therefore result in lower sanctions or even impunity.

The lead examiners therefore recommend that Italy take steps to ensure that the sanctions imposed in practice for undue inducement in foreign bribery cases are effective, proportionate and dissuasive, including by increasing if necessary the maximum sanctions available. They also recommend that the Working Group follow up on (a) the defence of concussione and (b) the standard of proof for undue inducement in foreign bribery cases.

B.1.e. Defence of effective regret

152. In 2019, Italy adopted an "effective regret" provision for several offences, including foreign bribery. Under CC Art. 323ter, offenders will not be punished if they (a) voluntarily report to the authorities, (b) within four months from the commission of the offence, (c) before learning that they are under investigation in relation to the same facts, (d) provide "useful and concrete information to secure the proof of the offence and identify the other perpetrators", and (e) provide to the authorities the benefit obtained from the offence, a sum of equivalent value to the benefit, or "useful and concrete" information for identifying the benefit's beneficial owner. The provision applies to natural and not legal persons. The provision has not been applied in practice, says Italy.

153. Italy explains that this provision aims to encourage perpetrators to co-operate with judicial authorities. It refers to the Explanatory Report to the Council of Europe Criminal Law Convention on Corruption, which mentions that "provision should be made for the granting of immunity or the adequate reduction of penalties in respect of persons charged with corruption offences who contribute to the investigation, disclosure or prevention of crime". Italy also states that the provision has a "strictly defined scope of application". The short timeframe for the reporting ensures that consequences of the crime are "neutralised", for example by stopping a public contract awarded because of bribery.

154. The main concern is a lack of justification for this provision in foreign bribery cases. The offender may escape liability by identifying any "other perpetrator". It is not clear whether this includes the bribed official. In many jurisdictions, this is the purpose of the effective regret defence, i.e. to allow the authorities to identify and prosecute corrupt public officials in their own public administration. But this policy reason does not apply in the foreign bribery context because the authorities receiving the report are unlikely to prosecute the foreign public official. The Working Group has therefore pointed out that in foreign bribery cases "the defence serves no useful purpose: the crime may come to light, but the offenders remain unpunished and the ends of justice are not served."[54] The Working Group warned Italy in Phase 3 (para. 33) that applying this defence to foreign bribery would raise issues. Italy adds that courts might

[54] Czech Republic Phase 3, paras. 28-32, 45-46 and Recommendation 1. See also Slovenia Phase 4, paras. 90-94 and Recommendation 7(b); Greece Phase 3bis, paras. 41-47 and Recommendation 2(d); Slovak Republic Phase 3, paras. 30-31 and Recommendation 1(c); Spain Phase 3, para. 39 and Recommendation 2(d); Portugal Phase 3, paras. 41-42 and Recommendation 2.

interpret CC Art. 323ter to only allow the defence if the offender denounces someone other than the foreign bribed official. But even if this is the case, there is no explicit requirement that the offender identifies another perpetrator who is more culpable or important to the criminal enterprise. It could seem disproportionate if an offender escapes liability by denouncing a minor or less culpable associate in the crime, e.g. an intermediary in foreign bribery.

155. Two additional points raise the question of whether effective regret should provide complete immunity from liability or merely mitigate sentence. First, it is unclear what constitutes "useful and concrete information to secure the proof of the offence". The defence would be more justifiable if the offender provides, for example, compelling evidence essential to proving a crime that is otherwise unavailable to the authorities. Information that is merely corroborative of or relevant to peripheral or uncontentious issues might not merit immunity. Second, the offender must report the matter before he/she knows that he/she is under investigation. The offender therefore escapes liability even if he/she reports a crime that is known to and is being investigated by the authorities. Such a self-report might indicate the offender's remorse and justify a lighter sentence. But granting immunity in such cases would not enhance crime detection.

Commentary

The lead examiners recommend that Italy take steps to ensure that under CC Art. 323ter (a) a person cannot be immune from liability by denouncing a bribed foreign public official or a less culpable individual in the criminal enterprise, (b) the defence applies only when a person provides compelling evidence essential to proving a crime that is otherwise unavailable to the authorities, and (c) the crime that is reported is otherwise unknown to the authorities.

B.1.f. Jurisdiction to prosecute foreign bribery

156. Post-Phase 3 jurisprudence may raise concerns about Italy's compliance with Convention Art. 4 requirement that Parties have territorial and nationality jurisdiction to prosecute foreign bribery. While the Phase 3 Report did not identify issues concerning Italy's implementation of these provisions, on 26 May 2022, a trial court acquitted one legal and three natural persons of foreign bribery in the Steel Pipes Supply (Brazil) Case. In its oral verdict, the court reportedly stated that the prosecution "should not have started due to a lack of jurisdiction in Italy".[55] This report does not consider the court's reasons for judgement that were provided only days before the adoption of this report.

Commentary

The lead examiners recommend that the Working Group follow up post-Phase 3 jurisprudence on Italy's jurisdiction to prosecute foreign bribery.

B.2. Investigative and prosecutorial framework

B.2.a. Bodies responsible for foreign bribery enforcement

157. The Public Prosecutor's Office (PPO, *Procura della Repubblica*) is part of the judiciary and responsible for conducting criminal proceedings. A PPO is attached to each court. There are thus 140 PPOs for the Ordinary Tribunals, 26 PPOs for Regional Courts of Appeal, and 1 PPO for the Supreme Court. The Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*, CSM) is responsible for hiring, assigning, transferring, promoting, and disciplining prosecutors and judges. Prosecutors direct the Judicial Police (*Polizia Giudiziaria*) to carry out investigations. The *Guardia di Finanza* in the Ministry of Economy and Finance investigates most foreign bribery cases since it specialises in economic and

[55] La Repubblica (26 May 2022); La Stampa (26 May 2022).

financial crimes. The *Arma dei Carabinieri* and the State Police (*Polizia di Stato*) are mainly responsible for maintaining public order but can be called upon to investigate economic crimes.[56]

B.2.b. Case assignment and co-ordination

158. CCP Arts. 8-16 set out a series of rules for determining jurisdiction over a case. Jurisdiction is given, in the order of priority, to the PPO (1) where the crime was committed, (2) where part of the act or omission last occurred, and (3) of the accused's residence, abode or domicile. For wholly extraterritorial offences, jurisdiction is first given to the PPO of the accused's abode, domicile, arrest or surrender; alternatively, the Rome PPO has jurisdiction. When jurisdiction cannot be resolved through these rules, it is given to the first PPO to enter the case in the Register of Criminal Notices (*Registro delle notizie di reato*). In a case with multiple accused or offences, conduct of the case is given to the PPO with jurisdiction over the most serious offence. These rules also apply to corporate proceedings (LD 231/2001 Art. 36(2)). If PPOs disagree on jurisdiction, then the Supreme Court PPO is the arbiter (CCP Arts. 28-32).

159. The Phase 3 Report (paras. 86-90) observed that related foreign bribery cases could be uncoordinated despite existing rules. CCP Art. 371 requires co-ordination among PPOs with jurisdiction over related cases, e.g. two cases with a common source of evidence; where the evidence in one case affects another; or where an individual in one case obtains or secures a profit for an individual in another. In practice, co-ordination is likely difficult because there is no central police or prosecutorial body that is informed of all foreign bribery cases. The Register is also not a searchable electronic database accessible by all prosecutors. Recommendation 4(d) therefore suggested that Italy consider creating a national database of cases that would allow a PPO to check for related cases.

160. Little has changed since Phase 3. There remains no central database of cases of foreign bribery or any crimes apart from organised crime and terrorism. Italy merely states that co-ordination is "already ensured by the strong co-operation among PPOs" and "the information shared within the Working Group". Another prosecutor adds that he inquires with other PPOs when starting a case. But this practice is not systematic or mandatory for all prosecutors. Nor is it practical or exhaustive for a country with 167 PPOs (see para. 157). A case can also be transferred at any stage, which could disrupt an investigation or proceeding.

161. In practice, a PPO has prosecuted some defendants in multiple foreign bribery cases, but this was for reasons of jurisdiction and not co-ordination, according to Italy. The Italian company in the Oil Prospecting (Nigeria) Case faced prosecution in five other cases. The Milan PPO conducted all of the proceedings. The Busto Arsizio PPO investigated an Italian company for foreign bribery in the Helicopters (India) Case and another case. One of the cases was transferred from Naples to Busto Arsizio, not because of prosecutorial co-ordination but at the request of the accused. Yet another part of the investigation ended up in Rome because prosecutors could not ascertain the location of the crime.

Commentary

The lead examiners are concerned that there remains no systematic co-ordination of foreign bribery cases in Italy. Italy did not implement one following its Phase 3 Recommendation 4(d) to consider creating a national database of all ongoing cases. A rising level of foreign bribery enforcement since Phase 3 further highlights the need for such co-ordination and makes this issue an even more pressing concern. The lead examiners therefore recommend that Italy create a national database of cases of foreign bribery and related offences that is accessible to all prosecutors.

[56] Constitution Arts. 104-105 and 112; Royal Decree 12/1941 Arts. 42, 52 and 70(1); CCP Arts. 51 and 55-59, LD 68/2001; Law 78/2000.

B.2.c. Specialisation within Public Prosecutor's Offices and police forces

162. In Phase 3 (paras. 79-80), Italy did not have law enforcement bodies specialising in foreign bribery. Certain PPO and police units specialised only in offences of corruption and against the public administration. Recommendation 4(c) thus asked Italy to consider establishing (i) specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; and (ii) working groups specialised in the foreign bribery offence within the PPOs that are the most likely to be involved in foreign bribery.

163. Some specialisation has since emerged in the Milan PPO. An informal group of prosecutors specialising in foreign bribery and other international economic crimes was created in 2014. In 2018, the group became the Milan PPO's 3rd Department on International Affairs - Transnational Economic Crimes. The Department is responsible for all transnational economic crimes including foreign bribery, money laundering and tax havens. It also handles incoming MLA requests involving these offences. It has handled more foreign bribery cases since Phase 3 than any other PPO. However, the CSM has cast doubt on this arrangement. It found that the assignment of files by subject matter is not set out in an organisational plan and infringes the rule that cases be assigned by "a sort of automatism".[57] Italy states that the CSM did not question the existence of specialised departments. That may be so, but the random assignment of cases could be viewed as fundamentally incompatible with specialisation.

164. There is no foreign bribery specialisation outside Milan. These other PPOs were responsible for 16 out of 33 post-Phase 3 foreign bribery enforcement actions for which information is available. As in Phase 3, most of these PPOs have working groups or departments specialising in corruption crimes, not foreign bribery specifically. Italy states that even small- and medium-sized PPOs have carried out successful foreign bribery investigations, which indicates their awareness of foreign bribery. The *Guardia di Finanza* has anti-corruption units. The unit in Rome supports the National Anti-Corruption Authority (ANAC) and thus focuses mainly on domestic corruption. Units in regional capitals investigate both foreign and domestic bribery.

Commentary

The lead examiners commend Italy for the creation of Milan PPO's 3rd Department which specialises in foreign bribery and other international economic crimes. As experience from other countries amply demonstrates, a specialised unit for the criminal enforcement of foreign bribery concentrates expertise and maximises efficiency in fighting this complex crime. The creation of this Department to enforce foreign bribery signifies Italy's commitment to implement the Convention. The lead examiners therefore strongly recommend that Italy maintain this arrangement. Issues concerning this Department's resourcing are discussed in the next section.

B.2.d. Prioritisation and resources

165. The Phase 3 Report (paras. 80-84) expressed concerns about the priority and resources given to foreign bribery enforcement. Italy did not prioritise enforcing foreign bribery at the PPO or national level, which risked inconsistency. All prosecutors and judges at the on-site visit emphasised a serious lack of resources in courts and PPOs. Italy was thus asked to consider "raising awareness at national level about the need to prioritise the investigation of foreign bribery offence", and "reinforcing the resources available in PPOs and tribunals to deal with foreign bribery" (Recommendations 4(c)(iii) and 4(c)(iv)).

166. Italy stated before the on-site visit that foreign bribery was considered a priority, but this was not completely clear. It stated that the heads of PPOs prioritise foreign bribery because the offence is listed in LD 271/1989 Art. 132-bis(f-bis). But the provision sets the priority for "the formation of hearing roles and in the discussion of processes", not investigations and prosecutions. Italy notes that the priorities provided

[57] Il Post (6 August 2021), "Alla Procura di Milano è "la fine di un'era".

for in Art. 132-bis, even though referred to formation of hearing roles, reflect an indication of the legislator as to the criminal offences to be investigated and prosecuted as a priority. However, the effectiveness of this somewhat obscure provision in raising awareness is unclear. Italy adds that PPO heads indicated in response to a survey that foreign bribery is considered a priority in compliance with the principles set out in Art. 132-bis.

167. At the on-site visit, the then interim-head of the Milan PPO took a more mitigated position on priority. The Milan PPO has identified some priorities and accordingly created departments, such as the 3rd Department on international economic crime. In his personal view, foreign bribery is one of many types of bribery and corruption in Italy. The offence requires significant attention, but investigations of this crime can be managed within the 3rd Department.

168. In terms of resources, Italian authorities report a substantial increase across the justice sector since 2018. Law 145/2018 increased the number of magistrates by 600 to 10 751. Thousands of administrative staff are being recruited. At the time of this report, judicial assistants have been recruited while other positions being filled. The *Guardia di Finanza* added 111 members in 2016-2020. In particularly complex investigations, a team of police investigators may be assigned to work exclusively with the prosecutor in charge of the case.

169. The Milan PPO's foreign bribery unit carries a sizable workload. The PPO's 3rd Department on International Affairs - Transnational Economic Crimes consists of a Deputy Chief Prosecutor and six other prosecutors. The Department is responsible for all transnational economic crimes. As of 25 May 2021, it had 113 cases. Foreign bribery is a minority of its cases: in 2018 and 2019, it received four times as many new money laundering and tax cases than foreign bribery, and almost nine times in 2020. The Department also handles incoming mutual legal assistance requests. In 2018-2020, it conducted an average of almost 1 100 MLA proceedings annually. In early 2022, the Department was also assigned some low level non-economic crime cases as part of efforts to balance the Milan PPO's overall workload.

170. Surprisingly, some prosecutors have complained that the 3rd Department has too *many* resources relative to other departments in Milan. One prosecutor reportedly said that there was an "anomaly" in the unit compared to other departments that also handle "serious and delicate crimes". Some thirty prosecutors also complained that the 3rd Department had "significantly lower workload" than other departments in the Milan PPO.[58]

171. Another prosecutor has also openly criticised the cost of the Oil Prospecting (Nigeria) case. The prosecution of two intermediaries was severed from the main proceedings. These accused were convicted in a summary trial in 2018 but acquitted in 2020 after the Milan Court of Appeal PPO conceded the appeal. During the appeal hearing, the prosecutor criticised the cost of the investigation, telling the Court that the case "led to this enormous use of resources and waste of resources."[59] Three ex-magistrates later wrote an open letter rebuking this statement of the appeal prosecutor.[60] One of them also gave an interview defending the decision to investigate the case.[61]

Commentary

As mentioned in Section B.2.c at p. 49, the assignment of responsibility for foreign bribery cases to Milan PPO's 3rd Department signifies Italy's commitment to fighting this crime. But this commitment is meaningful only if the Department is backed by sufficient resources. Investigations

[58] Il Fatto Quotidiano (3 August 2021); Libero Quotidiano (30 July 2021).

[59] Transcript of proceedings, Case 4479/19 R.G. (22 March 2021), p. 23; Domani (26 March 2021).

[60] Il Fatto Quotidiano (24 March 2021) "'Allarmanti perplessità per le critiche della pg di Milano sul costo delle indagini su Eni Nigeria'. La lettera degli ex magistrate".

[61] Il Fatto Quotidiano (28 March 2021), "Su Eni-Nigeria critiche ingiuste L'indagine dei pm era corretta".

and prosecutions of foreign bribery is very resource intensive for all Parties to the Convention. The lead examiners therefore recommend that Italy continue to ensure that resources provided to the Milan PPO's 3rd Department for foreign bribery cases are commensurate with the Department's workload.

B.2.e. Training

172. Italy describes several relevant training activities for prosecutors and judges, some of which cover specifically foreign bribery. The Italian School for the Judiciary (*Scuola Superiore di Magistratura*, SSM) offers courses every year on bribery, including foreign bribery. Each three-day course is attended by approximately 90 new and practising prosecutors and judges. Courses cover substantive law (particularly recent reforms) and investigative techniques, including transnational investigations and international co-operation. The SSM also offers courses on related matters such as financial crimes, corporate crimes, tax fraud and money laundering. The European Judicial Training Network provides additional training for judges and prosecutors. In 2013-2021, one course specifically covering foreign bribery was offered almost every year. An average of approximately 16 courses on related topics were also offered annually. As mentioned in the Commentary after para. 110, additional training on the foreign bribery offence would be beneficial.

B.3. Conducting foreign bribery investigations and prosecutions

B.3.a. Rules and time limits for investigations

173. The main rules and principles on criminal investigations and prosecutions are in the Code of Criminal Procedure (CCP). The same procedure largely applies to both natural and legal persons (LD 231/2001 Art. 34). All corruption offences, including foreign bribery, are prosecuted *ex officio*, i.e. a complaint is not necessary. The principle of mandatory prosecution applies: upon receiving an allegation of a crime (*notitzia di reato*), a prosecutor must enter the allegation in a register (*Registro delle notizie di reato*) and begin a preliminary investigation (*indagini preliminari*). The Judicial Police may assist in an investigation under the prosecutor's direction and supervision. Investigative measures that require judicial authorisation must be sought from a preliminary investigation judge (*Giudice per le indagini preliminary*, GIP). Once the preliminary investigation concludes, a decision is taken to dismiss the case (*archiviazione*), indict the accused (*esercizio dell'azione penale*), or seek further evidence. If an indictment is issued, a judge then holds a preliminary hearing to determine whether to commit the accused to trial.[62]

174. The time limit for the preliminary investigation may be insufficient. The investigation must be concluded in 6 months. It may be extended to 18 months in cases of "particular complexity" or "objective impossibility" of concluding the investigation without an extension. The limit is extended to 2 years in cases with a "multiplicity of connected facts", a large number of accused, or requiring investigation abroad (CCP Art. 405-407). Prosecutors need to apply for such extensions. Italy states that extensions are common in foreign bribery cases, presumably because of the need to seek mutual legal assistance (MLA). It also does not report of any foreign bribery investigations that have been terminated because of this limitation period. Nevertheless, even the maximum two years can be insufficient for securing MLA in complex foreign bribery cases. Prosecutors at the on-site visit described even taking foreign bribery cases to trial while MLA requests to foreign countries remained outstanding.

[62] CCP Arts. 55(2), 327-328, 335, 405-409, 415bis-429; Constitution Arts. 109 and 112; LD 231/2001 Arts. 58-59.

Commentary

The Working Group has stated in evaluations of other countries that a two-year limit for preliminary investigations is inadequate in complex foreign bribery cases.[63] They recommend that Italy amend the CCP to provide for an adequate period for preliminary investigations.

B.3.b. Investigative techniques

175. There are no significant issues concerning investigative techniques in foreign bribery cases. Previous Working Group evaluations did not express concerns. The CCP provides for general investigative techniques such as testimony of witnesses, suspects and experts (Arts. 194, 208 and 220); obtaining documentary evidence, including in digital form (Arts. 234-234bis); and the inspection of objects and places (Arts. 244-246). Judicial authorisation is required for search and seizure (Arts. 247-251); seizure and interception of correspondence and communications (Arts. 254 and 266-271); obtaining metadata from telecommunications services providers (Art. 254bis); and freezing assets (Art. 321). Since Phase 3, new provisions allow the planting of "trojan horse" software on computers and mobiles for the purposes of eavesdropping and interception of communications (Art. 266). Controlled deliveries and other undercover operations are available to judicial police belonging to specialised structures (Law 146/2006 Art. 9).

176. Bank secrecy can be lifted by a prosecutor without judicial authorisation if there is "a well-founded reason to believe that [the information is] pertinent to the crime" (CCP Arts. 248, 255 and 258). Law enforcement can access a national registry of bank accounts (*Anagrafe dei rapporti finanziari*). A second database contains contact points in financial institutions for executing demands for information (*Archivio Referenti per gli Accertamenti Bancari Penali*, ARPA). Data on lifting bank secrecy are not available. Italy states that "every day public prosecutors in Italy issue hundreds of decrees ordering banks to provide information and documentation". Orders are "usually [executed] in a very short period of time (few days or even hours)".

177. An item or asset can be frozen or seized as evidence (*sequestro probatorio*) or for preventive purposes (*sequestro preventivo*). In foreign bribery and corruption cases, a judge must seize assets subject to confiscation. A preliminary investigative judge orders freezing upon a prosecutor's request. In urgent circumstances, a prosecutor issues a freezing order that must be confirmed by a judge within 48 hours. Italy does not provide statistics on the usage of freezing but states that the practice is common.[64]

178. Italy provides information on the investigative techniques used in 19 foreign bribery investigations after Phase 3.

Table 2. Investigative techniques used in 19 post-Phase 3 foreign bribery investigations

Internet and public sources	12 (63%)	Electronic evidence	15 (79%)	Co-operation with domestic authorities	7 (37%)	Co-operating companies or individuals	4 (21%)
Government. databases	2 (11%)	Search and seizure	19 (100%)	Expert report	1 (5%)	UIF Reports	5 (26%)
Interviews	18 (95%)	Wiretapping	14 (74%)	Forensic audits	5 (26%)		

179. A corporate beneficial ownership registry was delayed. This information is supposed to be in a "special section" of the Business Register maintained by the Italian Chambers of Commerce. The registry was to become operational by 15 March 2021, but the Ministry of Economy and Finance published its

[63] Chile Phase 4, paras. 84-86 and Recommendation 4(a); Hungary Phase 4, paras. 87-90 and Recommendation 6(b). See also Peru Phase 2, paras. 116-118 and Recommendation 11.

[64] CCP Arts. 252 and 321; LD 231/2001 Arts. 34 and 53.

decree on the register in the Official Gazette only on 25 May 2022.[65] Obliged entities are expected to begin submitting information to the register by October 2022. The decree also gives law enforcement direct access to the information in the register.

Commentary

The lead examiners commend Italy for establishing the corporate beneficial ownership registry and recommend that the Working Group follow up the registry's implementation, including law enforcement's access to the registry.

B.3.c. Article 5 of the Anti-Bribery Convention

180. Art. 5 of the Convention provides that foreign bribery investigations and prosecutions shall be subject to the applicable rules and principles of each Party. These cases shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. Investigations and prosecutions must also be conducted independently and free from interference from executive governments.

181. Italian law provides for judicial and prosecutorial independence. The Constitution Arts. 101 and 104 state that the judiciary (which includes prosecutors) are autonomous, independent of any other power, and subject only to the law. The Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*, CSM) appoints, assigns, transfers, promotes and disciplines judges as well as prosecutors.

182. There is no indication that Art. 5 factors have influenced foreign bribery investigations and prosecutions in Italy. To the contrary, many of Italy's foreign bribery cases were potentially sensitive. Of the 51 cases in the evaluation questionnaire responses, at least 7 investigations or prosecutions alleged bribery of the president of a foreign country, his/her family members, or close associates. Many other cases implicated ministers of foreign governments. Several major Italian companies including state-owned enterprises have been prosecuted, as have some high-profile senior executives of these companies.

183. A collateral issue of alleged non-disclosure of evidence has embroiled the two trial prosecutors in the Oil Prospecting (Nigeria) Case. Part of the prosecution's case depended on the evidence from a company executive who co-operated with the authorities. Sometime after the oral trial began, one of the defendant's lawyers stated to the court that he had learned of a police report mentioning a video of the executive that would be relevant to the trial. The lawyer had come across information about the video while representing another client in a separate case. As stated in the judgment, the trial prosecutors informed the court that they had been "in possession of the document [i.e. video] for some time". However, they "deemed [the video] irrelevant" and hence did not disclose it to the court or defence. The court disagreed with the prosecutors and the video was disclosed. The court found that the video purported to show that the executive's co-operation with the authorities was motivated by personal gain. In its reasons for judgment, the court found that the video "proved to be extremely important to appreciate the intentions that animated [the executive]". The court harshly criticised what it deemed to be the prosecutor's decision of non-disclosure as "incomprehensible" since the video "brings extraordinary elements in favour of the accused."[66]

[65] LD 231/2007 Art. 21; Hogan Lovells (23 March 2021), "Delay in the establishment of the Italian UBO Register"; Ministry of Economy and Finance Decree 55/2022.

[66] Trib. Di Milano Penale 3055/2021, p. 326. Civil society representatives at the on-site visit and others have suggested that non-disclosure was justified because the defence already possessed the video. According to the court's judgment, the prosecution opposed disclosure on a different ground, namely irrelevance.

184. A record of the proceedings[67] indicates: some of the defence lawyers had access to police reports from a separate investigation with excerpts of a transcript of the video; and the defence stated that they did not intend to cross-examine the co-operating witness on the video.

185. After the court's acquittals in March 2021, the trial prosecutors were subjected to two proceedings due to the video's alleged non-disclosure. First, the Superior Council of the Judiciary (CSM) opened proceedings to consider transferring one of the trial prosecutors to a different PPO.[68] Second, the trial prosecutors initially received the video from a third prosecutor who had acquired it while investigating a separate case. The third prosecutor reportedly also provided certain text messages of the company executive. This third prosecutor apparently had urged the trial prosecutors to disclose this evidence to the court and defence in the Oil Prospecting (Nigeria) Case. The trial prosecutors declined. The third prosecutor described these events to the Brescia PPO in the context of another investigation against him.[69] The Brescia PPO then opened a preliminary investigation under the principle of mandatory prosecution (see para. 173). In June 2022, the Brescia prosecutor finished the investigation and reportedly concluded that there was sufficient evidence to indict the trial prosecutors for an offence of "refusal of official acts" (CC Art. 328). At the time of this report, the matter is pending a preliminary hearing before a judge to decide whether indictments should issue. Some non-governmental organisations and civil society representatives have voiced concerns about the potentially chilling effect of these proceedings on future foreign bribery prosecutions given the high-profile nature of this case. In addition, these organisations have pointed out the fact that the defence already had a transcript of the video prior to it being disclosed.

186. Four particular points are of note. First, Working Group evaluations assess a country's implementation of Art. 5 of the Convention. The disclosure of evidence in specific foreign bribery cases is generally beyond an evaluation's scope unless it raises Art. 5 concerns. Second, both proceedings against the trial prosecutors were initiated by members of the judiciary. This is thus not a case of executive governmental interference typically seen in some Convention cases. Third, Italian criminal procedural rules protect against frivolous accusations. Upon receiving an allegation of a crime, a prosecutor must start a preliminary investigation (CCP Art. 335; see Section B.3.a at p. 51). At the investigation's conclusion, the prosecutor does not have the power to terminate or continue with the case. Instead, if the prosecutor wishes to dismiss the case (e.g. because the allegation is unfounded), then he must file a reasoned request to a preliminary investigation judge (CCP Arts. 405, 408-409). Alternatively, the prosecutor requests the judge for an indictment. The judge then holds a preliminary hearing to decide whether to dismiss the case or commit the defendant to trial (CCP Arts. 416-433). This process has yet to run its course in the matter against the trial prosecutors in the Oil Prospecting (Nigeria) Case. Fourth, under the applicable rules, the appeal of the Oil Prospecting (Nigeria) Case was conducted by the PPO for the Milan Court of Appeal, not the trial prosecutors. The appeal prosecutor conceded the appeal; the case is now final (see para. 111).

187. One troubling aspect of the Oil Prospecting (Nigeria) Case concerns interference by the government of another Party to the Convention, not Italy. One of the alleged intermediaries of the bribery was a national of the Russian Federation. After the intermediary was charged with foreign bribery, Russia's Foreign Minister Sergei Lavrov handed a letter to his Italian counterpart during a meeting on 8 October 2018. The letter did not concern the provision of consular assistance to the intermediary as might be expected.

[67] Court Documents From the OPL 245 Investigation, https://aleph.occrp.org.

[68] Il Fatto Quotidiano (8 September 2021).

[69] Il Sole 24 Ore (10 June 2021).

Instead, it stated that the intermediary is a former ambassador of Russia. The letter then urged the Italian authorities to "demonstrate the reasonable approach" and drop the intermediary's charges:

> [The intermediary] is a well-known person, he held important positions in the state. In recent years he has collaborated with famous law firms and participated in numerous international projects.
>
> The Russian side is convinced that he did not commit any illegal acts. In this regard, we hope that the Italian Authorities demonstrate the reasonable approach and after the respective verifications they will find the possibility to change the status of [the intermediary] from the suspect to the witness.

188. The letter ultimately found its way to the trial court in the Oil Prospecting (Nigeria) Case, although there is no suggestion that it affected the case's outcome. The Italian Ministry of Foreign Affairs and International Co-operation (MAECI) sent a note to the Ministry of Justice (MOJ) asking for information about the case. The letter from Russia was annexed to the note. The MOJ in turn sent the note and letter to the trial prosecutors, who replied with a copy of the indictment listing the charges against all of the accused in the case. The trial prosecutors also gave the letter to the court. Their intention obviously was not to unduly influence the court, since they were seeking the intermediary's conviction. Nonetheless, throughout this chain of communication between the two Italian Ministries, prosecutors and judges, there was a lack of sensitivity to the fact that providing the letter (rather than MAECI just requesting information about the case) could be seen as an attempt to influence the outcome of the prosecution. This suggests the need for additional training on Art. 5 of the Convention.

189. Italy's response to this issue does not alleviate these concerns. It explains that "it often happens that foreign authorities, also through MAECI, legitimately request the MOJ to provide information concerning judicial proceedings involving their nationals". The MOJ in turn asks the judicial authorities for information. However, Russia was not seeking information about the case. The letter's sole request was to drop the charges against the intermediary. Italy also states that the letter was attached to the note from the MOJ to the prosecutors "because of a mistake". But such handling of a plainly inappropriate request in a most important and high-profile prosecution demonstrates lack of awareness of Art. 5 of the Convention.

Commentary

The lead examiners are seriously concerned that the Russian Federation sought to influence the outcome of the prosecution in the Oil Prospecting (Nigeria) Case. As a Party to the Convention, Russia is obliged under Art. 5 to ensure that foreign bribery investigations and prosecutions are conducted independently and free from executive governmental interference. This applies equally to foreign bribery cases in Russia and in other Parties to the Convention.

The lead examiners are satisfied that Russia's attempt to influence the Oil Prospecting (Nigeria) Case was not successful. To ensure that future foreign bribery cases remain to be free from potential undue foreign interference, they recommend that Italy raise awareness of Art. 5 among relevant officials, in order to prevent communications of this nature from being forwarded to judicial authorities.

B.3.d. Statute of limitations for natural persons and delay

190. This section deals with the statute of limitations for natural persons. The limitation period for legal persons is covered in Section C.4 at p. 80.

191. The statute of limitations for foreign bribery against natural persons has been a longstanding issue. In Phase 3 (paras. 99-107), the "base" limitation period for foreign bribery to perform duties was 6 years, and to breach duties was 8 years. Time begins to run when the offence is complete, or when the last bribe payment is made. Certain events suspend the limitation period, i.e. stop the running of time temporarily.

The period can also be interrupted, i.e. restart anew after the end of the interrupting event. But for first offenders, the period could be extended only up to an "ultimate" limitation period of 7.5 years for performance of duties and 10 years for breach of duties. All judges and prosecutors at the on-site visit stated that the limitation period was too short. Phase 3 Recommendation 4(f)(i) therefore asked Italy to urgently (i) take the necessary steps to significantly extend, including for "first time offenders," the length of the "ultimate" limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means.

192. The limitation period for natural persons has increased since Phase 3. As summarised in the table below, a series of legislative amendments has lengthened the base and ultimate limitation periods. Different periods apply depending on when the offence was committed. For more recent offences, the limitation period is suspended or interrupted pending appeal (CC Arts. 160 and 161bis). The Supreme Court and Court of Appeal must conclude an appeal in one and two years respectively, and 18 months and three years in complex cases (CCP Art. 334bis). For the principal bribery offence to perform duties, the base and ultimate limitation periods are now 8 and 12 years. Those for foreign bribery to breach duties are 10 and 15 years.

Table 3. Statute of limitations for foreign bribery for natural persons

Offence	Date of Offence														
	28/11/2012-13/06/2015 (L 190/12)			14/06/2015-02/08/2017 (L. 69/15)			03/08/2017-30/01/2019 (L. 103/17)			31/01/2019 31/12/2019 (L. 3/19)			After 01/01/2020 (L. 3/19 & L. 134/21)		
	B	U	A	B	U	A	B	U	A	B	U	A	B	U	AT
Principal foreign bribery offence - performance of functions or powers (CC Arts. 318, 321, 322-bis(2))	6	7.5	-	6	7.5	-	6	9	3	8	12	3	8	12	4.5
Principal foreign bribery offence - breach of duties (CC Arts. 319, 321, 322bis(2))	8	10	-	10	12.5	-	10	15	3	10	15	3	10	15	4.5
Incitement to bribery - performance of functions or powers (CC Arts. 322(1), 322bis(2))	6	7.5	-	6	7.5	-	6	7.5	3	6	7.5	3	6	7.5	4.5
Incitement to bribery - breach of duties (CC Arts. 322(2), 322bis(2))	6	7.5	-	6.7	8.4	-	6.7	8.4	3	6.7	8.4	3	6.7	8.4	4.5
Undue inducement (CC Arts. 319quater(2), 322bis(2))	6	7.5	-	6	7.5	-	6	9	3	6	9	3	6	9	4.5
Corruption in judicial proceedings (CC Arts. 319-ter, 321, 322bis(2))	10	12.5	-	12	15	-	12	18	3	12	18	3	12	18	4.5

B: Base limitation period; U: Ultimate limitation period; A: Appeals limitation period; AT: Appeals time limit. Figures in years.

193. Data provided by Italy show a large number of time-barred cases. In 2015-2019, charges against 31 natural persons in 8 foreign bribery cases, and against 3 359 persons in 775 domestic bribery cases, were time-barred. The most recent changes to the limitation period do not apply to these cases, however. The current 15-year ultimate limitation period for the principal foreign bribery offence to breach duties entered into force in 2017. Whether the amendment will resolve the problem for future cases will therefore not be known until possibly 2032.

194. Italy is also attempting to reduce delay by increasing judicial resources and efficiency. It has started to invest a significant portion of EU COVID-19 relief funds to hire 500 magistrates, 5 140 administrative officers in the judiciary, and 16 500 assistants to judges in first instance and appeal courts. Akin to law clerks in common law systems, these judicial assistants are young lawyers who support judges' preparatory work, such as studying case files, researching case law, drafting decisions etc. Approximately

half of the assistants began working in February 2022. Plans are also afoot to introduce digitisation into the judiciary.[70]

Commentary

The lead examiners commend Italy for its plans to significantly increase human resources and to introduce digitisation into the judiciary. Both initiatives may substantially reduce delays in proceedings in corruption and other cases that have long plagued the Italian judicial system. They therefore strongly urge Italy to see through these reforms. The lead examiners also commend Italy for increasing the limitation period for natural persons for foreign bribery.

B.4. International co-operation

195. In Italy, the applicable law and procedure for mutual legal assistance (MLA) and extradition differ depending on the requesting State. EU instruments and their implementing acts principally govern relations with EU member states, whereas bilateral or multilateral treaties or the Italian CCP governs relations with other States. The Ministry of Justice (MOJ) is the central authority for MLA and extradition.

196. Italy has introduced significant legislative and policy changes since Phase 3. In June 2015, the MOJ introduced an electronic filing system to record all incoming and outgoing MLA and extradition requests, including European Investigation Orders (EIOs) and European Arrest Warrants (EAWs). The system enables the MOJ to monitor the progress of requests and produce statistics. In 2017, Italy implemented the EIO and made substantial amendments to the CCP. In 2019, the MOJ welcomed an increase in resources and established a dedicated Directorate General of International Affairs and Judicial Co-operation that has actively entered into bilateral treaties and ratified protocols to multilateral agreements.

B.4.a. Bilateral and multilateral treaties

197. Anti-Bribery Recommendation XIX.B.i.a. encourages countries to enter into bilateral agreements or arrangements for MLA. Since 2015, Italy has entered into 6 bilateral extradition and MLA agreements, and signed 14 that are not yet in force.[71] Italy is now party to 32 bilateral agreements on MLA[72] and 31 bilateral agreements on extradition[73] that apply to foreign bribery cases, including with several countries that are not party to the Convention. The majority of those agreements require dual criminality (see Section B.4.b at p. 58).

198. Several multilateral agreements may be used to seek and provide extradition and MLA in foreign bribery cases. The Council of Europe Criminal Law Convention on Corruption came into force in Italy in October 2013. In 2019, Italy ratified the Third and Fourth Additional Protocol to the European Convention on Extradition (1957) and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1959). The Additional Protocols, which expedite and simplify the procedure

[70] Law 134/2021; LD 80/2021.

[71] Italy has recently entered into bilateral treaties on MLA and/or extradition with Kosovo, Kenya, UAE, Bosnia and Herzegovina, Serbia and Kazakhstan and signed agreements with Colombia, Nigeria, Armenia, Senegal, Kuwait, Cap Vert, Tunisia, Mali, Algeria, Niger, Gambia, Uzbekistan, Vietnam and Morocco.

[72] Italy has bilateral agreements on MLA with Albania, Argentina, Algeria, Australia, Brazil, Bolivia, Canada, Chile, Costa Rica, Ecuador, Japan, Kazakhstan, Kosovo, Kenya, Hong Kong (China), Lebanon, Mexico, Montenegro, Morocco, Nigeria, North Macedonia, Panama, Paraguay, Peru, People's Republic of China, UAE, US, Serbia, Switzerland, Tunisia, Uruguay and Venezuela.

[73] Italy has bilateral agreements on extradition with Albania, Australia, Argentina, Bahamas, Brazil, Bolivia, Bosnia and Herzegovina, Canada, Cuba, Costa Rica, Ecuador, El Salvador, Kazakhstan, Kosovo, Kenya, Lesotho, Lebanon, Montenegro, Morocco, Nigeria, North Macedonia, Paraguay, Peru, People's Republic of China, UAE, US, Serbia, Mexico, Tunisia, Uruguay and Venezuela.

for extradition and MLA, entered into force on 1 December 2019. Italy is also a State Party to the United Nations Convention against Corruption (UNCAC).

199. In the absence of a bilateral or multilateral treaty, Italy requests and provides MLA and extradition under the principle of "international courtesy" (i.e. comity) and applies the procedure in CCP Arts. 723-729quinquies (MLA) and CCP Arts. 697-722bis (extradition). Reciprocity is not a prerequisite.

B.4.b. Requirement of dual criminality

200. Italy is party to many bilateral and multilateral treaties that require dual criminality. To satisfy the requirement with non-parties to the Anti-Bribery Convention, Italy states that it relies on the fact that all countries with which they have concluded bilateral treaties are parties to UNCAC. UNCAC obliges its States Parties to ensure that the bribery of foreign public officials is an offence in their national laws.

201. In relations with the EU States, the law governing the EAW provides that surrender may be ordered in the absence of dual criminality, where the offence falls in one of the categories covered by Art. 2(2) of Council framework decision 2002/584/JHA and is punishable by a sentence of imprisonment of three years or more. Italy states that this list includes bribery and by extension foreign bribery. In fact, the wording is more general and says corruption. Similarly, Directive 2014/41/EU on the EIO, recognises the absence of dual criminality among the reasons for non-recognition or non-execution, as does the Italian implementing law. However, the requirement of dual criminality is removed for a similar list of offences as the EAW, including corruption, where the offence carries a penalty of imprisonment of three years or more (LD 108/2017 Art. 10(f); Directive 2014/41/EU Art. 11(g)). The European Convention on Mutual Assistance in Criminal Matters (1959) does not require dual criminality unless a Party makes a declaration, which Italy has not done.

B.4.c. Amendments to the Code of Criminal Procedure

202. In 2017, LD 149/2017 introduced several important amendments to CCP Book XI, which governs judicial relations with foreign authorities. The amendments simplify and speed up the procedure for incoming MLA, making it consistent with the procedure adopted for EIOs. Under the amendments, the MOJ must forward a request for MLA to the relevant prosecutor within 30 days of receipt. The previous requirement for judicial oversight by the Court of Appeal has been removed. The prosecutor is now the competent authority to determine the admissibility of the request and execute it, and is required to do so without undue delay (CCP Arts. 723, 724). Most of Italy's 26 Regional PPOs have specialised departments responsible for MLA and EIOs. Representatives of the Rome PPO state that they have 7 dedicated prosecutors specialised in responding to EIOs and MLA. Under the new procedures, responses are rapid, except for in complex cases, where there is often direct communication with requesting authorities and on occasion the creation of joint investigations teams (JIT). The Rome PPO adds that very few of the thousands of requests they receive per year are refused. Where the allegations or the scope of the request is unclear, it requests clarification and only refuses where strictly necessary.

203. The amendments codify the principle of mutual recognition in relations with EU member States, thereby ensuring that decisions and judicial orders made or issued by the competent authorities of other EU States are recognised and enforced in Italy (CCP Art. 696*bis*). The amendments also introduced several provisions to facilitate the admissibility of evidence provided and received through MLA. CCP Art. 725 provides that when executing the requested acts, prosecutors apply the provisions of Italian law. However, they may use the forms expressly requested by the foreign judicial authority if they are consistent. CCP Art. 725 enables the prosecutor to authorise the representatives of the requesting judicial authorities to attend the execution of acts. Similarly, CCP Arts. 727, 729, and 729bis allow evidence to be received from foreign judicial authorities where it does not strictly conform to Italian rules of criminal procedure or admissibility.

204. The amendments also expedite the procedure for extradition. The Minister must forward the request to the Prosecutor General within 30 days, who in turn has 30 days to submit their closing speech to the Court of Appeal. The Court of Appeal must render judgement within six months. The Supreme Court and the MOJ also have time limits to complete their appellate (six months) and executive (45 days) functions (CCP Arts. 703-708). The amendments uphold the separation between the judicial and administrative phases of extradition. A distinction exists between the role of the MOJ, responsible for assessing whether to refuse extradition only in cases where it may jeopardise the sovereignty, security or other essential interests of the State, and the role of the judicial authority, responsible for assessing whether the conditions for extradition are met under the relevant applicable treaty or law (CCP Art. 697, 701). The MOJ can grant extradition where a person consents; or deny extradition on limited grounds where the international agreement does not require judicial oversight (CPP Art. 697, 701; Third Additional Protocol to the European Convention on Extradition). Italy states that the MOJ denies extradition only in exceptional cases. The grounds for denying extradition are discussed in more detail in Section B.4.e at p. 59.

B.4.d. European Investigation Orders and European Arrest Warrants

205. Another significant change to the MLA framework since Phase 3 is the introduction of the EIO. LD 108/2017, which implements Directive 2014/41/EU, governs MLA requests from EU Member States. The EIO procedure enables direct transmission of MLA requests between competent judicial authorities without the involvement of the MOJ. Extradition requests from the EU Member States are governed exclusively by Law 69/2005, which implements European Council Framework Decision 2002/584/JHA on the EAW. In 2019 and 2021, Italy introduced amendments to bring its law further into line with the EAW Framework Decision, limiting the grounds for non-execution (Law 117/2019; LD 10/2021).

B.4.e. Grounds for denying extradition

B.4.e.i. Concussione

206. In Phase 2, the lead examiners were concerned that the requirement of dual criminality, coupled with the defence of *concussione*, may be an obstacle to extradition for foreign bribery. This was designated a follow-up issue in Phase 3 (Follow-up Issue 13(i)(i)). As discussed in para. 142, the 2012 amendments narrowed but did not eliminate the *concussione* defence for foreign bribery. Accordingly, this issue is not resolved.

207. Italy states that *concussione* is not grounds to contest extradition, and it has never been raised in a domestic or foreign bribery extradition case. In addition, as *concussione* is a defence, the requesting State would be the only competent authority to decide the merits. However, this argument overlooks the requirement of dual criminality. Before granting extradition, Italian judicial authorities must consider the alleged conduct of the person sought for extradition in order to be satisfied that the pre-condition of dual criminality is met. By raising *concussione* a person sought for extradition could advance an argument that their conduct does not constitute a criminal offence in Italy because they are a victim of concussione, not a perpetrator of bribery. Consequently, the dual criminality requirement may not be satisfied and extradition could be denied.

Commentary

The lead examiners reiterate Phase 3 Follow-up Issue 13(i)(i) and recommend that the Working Group follow up whether concussione is a defence to extradition for foreign bribery.

B.4.e.ii. Expiry of the statute of limitations

208. In Phase 3, the statute of limitations for the foreign bribery offence was a serious concern for the Working Group, leading to a recommendation that Italy urgently take steps to extend it. Prosecutors were uncertain if extradition would be possible if the statute of limitations for an offence had expired in Italy. This

caused doubt that Italy could adhere to the requirements of Art. 10(3) of the Convention, which requires a Party to either extradite its nationals for foreign bribery or, if it declines to extradite on the grounds of nationality, to prosecute the case itself (Follow-up Issue 13(i)(ii)).

209. Italy has since taken steps to address the deficiencies surrounding the statute of limitations for natural persons (see Section B.3.d at p. 55). Moreover, the expiry of the statute of limitations in the requested state is not grounds for refusing extradition under the CCP (Art. 705) or the optional grounds for refusal of an EAW. For offences committed before the operation of the EAW (7 August 2002), the Extradition Convention between Member States of the European Union (1996) stipulates that a Party may not deny extradition because prosecution or punishment has become statute-barred in the requested state. Since Phase 3, Italy has ratified the Fourth Additional Protocol to the European Convention on Extradition (1957). Art. 1 of the Additional Protocol replaces Art. 10 of the Convention. It provides that extradition will not be refused where the offence is statute-barred in the requested state, as was previously the case under Art. 10. The Supreme Court recently granted extradition to Poland and Switzerland. The court held that the expiry of the statute of limitations in Italy is not grounds for refusal of extradition under the Extradition Convention between Member States of the European Union (1996) and the Fourth Additional Protocol to the European Convention on Extradition (1957), respectively. The latter case involved an Italian national.

B.4.e.iii. Extradition of nationals

210. Under Convention Art. 10(3), if a party declines to extradite its national solely on the grounds of nationality, then it must submit the case to its competent authorities for prosecution. Italy extradites its nationals only where expressly provided for by a treaty (Constitution Art. 26). At least some of its bilateral and multilateral extradition treaties stipulate that, where extradition is denied because of nationality, Italy would prosecute the person sought upon the demand of the requesting state. If such cases involve foreign bribery, then Italy states that it is bound by Convention Art. 10(3) to submit the case to Italian judicial authorities for prosecution. A demand from the requesting state is not required.

211. In 2018, Italy denied the extradition of an Italian national sought by India in the Helicopters (India) Case. Italy does not have a bilateral extradition treaty with India. The person sought was charged in Italy for his role in the foreign bribery scheme. However, the charges against him were dismissed in 2019. Italy is currently in negotiations with India to adopt an extradition treaty.

B.4.e.iv. Requests that undermine the sovereignty, security or essential interests of Italy

212. As previously discussed, the CCP distinguishes between the administrative and judicial phases of extradition. Under CCP Art. 705, the Court of Appeal will deliver a favourable judgement on extradition where there are serious indications of guilt, or a final judgement of conviction has been passed, and there are no ongoing proceedings or final judgment for the same offences against the person sought in Italy. The CCP enumerates limited grounds on which the Court of Appeal may deny extradition that essentially relate to protecting the fundamental rights of the person sought (CCP Art. 705(2)).

213. The MOJ has the discretion to not give effect to an extradition request that undermines the sovereignty, security or essential interests of Italy or where there are reasonable grounds to believe an extradited person may be subjected to persecution or discrimination, receive inhumane treatment or the death penalty (CCP Arts. 697(1bis) and 698). Similarly, the MOJ has the discretion not to execute an incoming MLA request from a non-EU Member State where there is a danger to Italy's national sovereignty, security, or essential interests (CCP Art. 723(3)). There is no guidance on how this discretion should be exercised. CCP Art. 723(5) specifies additional grounds upon which the Minister may deny a request for MLA, namely where the requested measures are forbidden or contrary to Italian law or there are reasonable grounds for believing that considerations of race, religion, sex, nationality, language, political opinions or personal or social conditions may affect the trial or its outcome.

214. Provisions that permit the denial of assistance in the essential interests of the state may conflict with Art. 5 of the Convention. Extradition or MLA in cases of foreign bribery should not be influenced by considerations of national economic interest under the guise of protecting the essential interests of the state. Italian authorities state that the MOJ does not refuse to execute requests for MLA despite the power to do so. The MOJ receives between 2 000-2 500 MLA requests per year. CCP Art. 723(3) has never been used in practice. On the other hand, the Minister has refused extradition but only in exceptional cases and never on the grounds of economic interest. The Minister can refuse extradition granted by the courts but will only do so to safeguard a person's fundamental rights, such as the right to a fair trial or to prevent discrimination.

Commentary

The lead examiners acknowledge that provisions such as those contained in the Italian CCP that grant a discretion to the Minister of Justice to deny assistance where it may undermine Italy's sovereignty, security, or essential interests are not unique to Italy, and many international agreements include similar provisions. There is no guidance on how the discretion should be exercised. The Working Group has noted in evaluations of other countries that similar provisions could impede international co-operation in foreign bribery cases.[74] The lead examiners therefore recommend that the Working Group follow up the application of CCP Arts. 697(1bis), 698 and 723(3) in practice.

B.4.f. Mutual legal assistance in practice

B.4.f.i. Incoming MLA requests in foreign bribery cases

215. As observed in Phase 3 (para. 141), Italian law places few restrictions on granting MLA. The sole precondition is whether the activity under investigation is criminal. Italy provides MLA in matters concerning legal persons, regardless of whether the requesting country would impose criminal or administrative liability. Italy states that there are no evidentiary thresholds for providing assistance. It is sufficient that the requesting authority indicates the relevance of the evidence sought to an ongoing investigation. Italy does not decline MLA requests on the grounds of banking secrecy. They report that obtaining banking records and corporate documents is quick and straightforward. Since 2015, there were 5 instances of Italy providing banking documents in foreign bribery cases; they did so within 4 to 11 months.

216. At the time of the Phase 3 evaluation, there was insufficient information to assess Italy's practice of providing MLA in foreign bribery cases. Since June 2015, when the MOJ commenced using an electronic case management system, Italy received 13 incoming MLA requests concerning legal and natural persons in foreign bribery cases. Response times ranged from 2 days to 2 years and 8 months, with an average response time of approximately 7½ months. Notably, the response time for the 3 EIOs received was 2 days to 4 months. Italy responded to the majority of requests by non-EU countries in less than 6 months. However, significant delays arose in 2016 regarding one incoming MLA request from Argentina for telecommunication data. Initially, Italy stated the delay was attributable to the "concurrent competence of different Italian prosecution offices". Subsequently, Italy said the delay was attributable to the requirement of oversight by the Court of Appeal, a procedure abolished by the 2017 amendments to the CCP.

217. The 2021 survey of Working Group members on international co-operation with Italy (2021 survey) also raises concerns about Italy's processing time. Whilst most countries report good co-operation with Italy and fluid exchange on their MLA requests, one country that frequently requests assistance from Italy notes delays in providing bank documents. One request took 22 months, and another issued over 11

[74] For instance, see France Phase 4, paras. 292-295 and Recommendation 12(b); Belgium Phase 3, paras. 130-139 and Follow-up Issue 14(e); Estonia Phase 3, para. 110 and Recommendation 4; Argentina Phase 3bis, paras. 191-195 and Follow-up Issue 14(j).

months ago is still unanswered. Countries also say that whilst Italy did not refuse their requests, 30% of requests for service of a summons/subpoena were not fulfilled. Another country reports that the processing time of requests by Italian authorities varies. In some cases, according to this country, Italian judicial authorities seem to be overloaded and hence will not respond to requests they consider not urgent. This country reports practical and technical difficulties causing delays for some Regional PPOs (e.g. slow or ineffective postal service, difficulty in contacting the relevant authority by phone). It reports delays in confiscation matters due to the length of Italian court proceedings. However, on a positive note, it reports swift and effective co-operation in a recent money laundering and foreign bribery case.

B.4.f.ii. Outgoing MLA requests in foreign bribery cases

218. The MOJ transmits outgoing MLA requests to the foreign competent authority within 30 days of receipt from Italian judicial authorities (CCP Art. 727). In urgent cases or where permitted under an international agreement, the judicial authority may proceed directly. In cases of considerable delays or lack of response without justification by the requested country, the MOJ enters into consultations with the foreign authorities through diplomatic channels.

219. Italy has been proactive in seeking MLA in foreign bribery investigations since Phase 3, sending at least 59 outgoing MLA requests in 19 cases. In addition, Italy and Working Group members that responded to the 2021 Survey note the successful use of informal co-operation networks. However, Italy did not request MLA in 6 cases where it had jurisdiction, and criminal proceedings were ongoing abroad. Regarding the quality of requests, the 2021 Survey responses indicate that Italian EIOs sometimes lack detail. One country states that it had to request additional information regarding one out of two requests from Italy and another says that the description of facts could be clearer.

220. In several cases, responses to outgoing MLA requests were provided with considerable delay, and 10 requests were not responded to. Response time varied from 5 days to 2 years and 7 months. Italy followed up on requests in 6 cases and reported intervention by the Minister in one recent case. In another case, the Milan PPO wrote a complaint letter to Argentinian authorities. Despite these actions to follow up, several investigations were discontinued when Italy received no or inadequate responses.

B.4.f.iii. Joint investigative teams

221. Anti-Bribery Recommendation XIX.C encourages Parties to the Convention to take proactive steps to co-operate in foreign bribery investigations and prosecutions, including through direct co-ordination, using relevant international and regional organisations and setting up joint or parallel investigative teams. A recent foreign bribery case involved a joint investigation by German, Italian and Finnish authorities co-ordinated by Eurojust.

Commentary

The lead examiners commend Italy for the concerted efforts to strengthen its legal and policy framework in international co-operation and thereby enhance its ability to provide prompt and effective MLA and extradition in foreign bribery cases. They also commend Italy's established practice of seeking and providing MLA in foreign bribery cases and, in particular, their recent efforts to co-ordinate with other Parties to the Convention on multijurisdictional cases. Prompt responses to outgoing MLA requests are especially crucial for Italian law enforcement authorities, given problems arising from the statute of limitations for legal persons. The lead examiners note with concern the instances in which the lack of or inadequate responses to Italy's outgoing MLA requests have resulted in the discontinuance of foreign bribery cases. They recommend that Italy take measures to ensure that requests are followed up systematically and that the Ministry of Justice continues to intervene in cases of delay or inaction.

B.4.g. Extradition in practice

222. Italy has not sought or granted extradition in a foreign bribery case. Two Working Group members expressed concerns in the 2021 Survey about the refusal of extradition by Italy in non-foreign bribery cases. One disagrees with a decision by Italy to deny extradition, stating that the grounds for refusal were not in accordance with the European Convention on Extradition (1957). Another reports that Italy refused extradition for reasons that were not included in the grounds for refusal in the bilateral treaty between the two countries.

B.5. Offences related to foreign bribery

B.5.a. Money laundering offence

223. Money laundering is criminalised in CC Art. 648bis and is complemented by two other offences that deal with the illicit origin of the proceeds of crime: CC Arts. 648 (receiving) and 648ter (use of money, goods, or assets of illicit origin). CC Art. 648ter.1, which criminalises self-laundering in circumstances where the principle of *ne bis in idem* does not apply, came into force on 1 January 2015 (Phase 3 Follow-up Issue 13(e)). Foreign bribery is an eligible predicate offence for all money laundering offences. The conduct underlying a predicate offence committed abroad must also constitute an offence under Italian law (dual criminality).[75] A conviction is possible even if the perpetrator of the predicate offence is not charged or punished.[76] The penalty for natural persons is 4-12 years' imprisonment and a EUR 5 000-25 000 fine except for self-laundering which is 2 to 8 years and the same fine. Committing an offence in the exercise of a professional activity is an aggravating circumstance. The sanctions are reduced where the predicate offence is punishable by a maximum term of imprisonment of less than five years. Confiscation of the product or profit of the offence, or its equivalent value, is mandatory upon conviction unless the property belongs to a person unrelated to the crime (CC Art. 648quater). Since 2021, the permission of the Minister of Justice is not needed to prosecute self-laundering committed by an Italian national abroad.

224. Actual enforcement of money laundering predicated on foreign bribery may not be sufficient. Italy has just one such conviction. In May 2021, an individual received a suspended 23-month jail sentence and EUR 6 000 fine for laundering EUR 475 219 of proceeds of foreign bribery. A legal person is contesting the same charge. Many of the other 50 foreign bribery enforcement actions in the questionnaire responses contain allegations of conduct that could amount to money laundering under Italian law, e.g. a briber laundering the proceeds of bribery-tainted contracts, or hiding bribes as consultant fees. None resulted in charges of money laundering predicated on foreign bribery. Statistics provided by Italy indicate that in 2016-2019 an average of 2 561 and 27 natural and legal persons were prosecuted annually for money laundering (not predicated on foreign bribery, presumably). The conviction rate was extremely low, at 27% and 5% for natural and legal persons respectively.

Commentary

The lead examiners commend Italy for criminalising self-laundering. They recommend that Italy take appropriate measures to effectively enforce its money laundering offence in connection with foreign bribery cases.

[75] Cass. Penale 42120/2012; FATF (2016), Italy: Mutual Evaluation Report, p. 131.

[76] FATF (2016), Italy: Mutual Evaluation Report, p. 131.

B.5.b. False accounting offence

B.5.b.i. Elements of the false accounting offence

225. Italy has improved its false accounting offence since Phase 3. Civil Code Arts. 2621 and 2622 set out the false accounting offences for non-listed and listed companies respectively. The current offences are felonies (*delitti*) instead of misdemeanours (*contravvenzioni*). Monetary thresholds for liability have been eliminated, in response to Phase 3 Recommendation 9(a)(i). Corporate liability is no longer limited to offences committed "in the interest of the company, by directors, general managers or liquidators, or by individuals under their supervision, if the fact would have not occurred if they had exercised their supervision in compliance with the obligations inherent to their office." Instead, the general standard of corporate liability in LD 231/2001 applies.

226. Nevertheless, the false accounting offences remain more restrictive than Convention Art. 8(1):

(a) Limited individuals: The offence can only be committed by "directors, general managers, managers responsible for preparing the company's accounting documents, statutory auditors and liquidators". Civil Code Art. 2639(1) extends liability to those who perform *de facto* the same functions. But other individuals in a company (e.g. lower-level managers) are omitted. Italy states that CC Art. 110 imposes liability on others. But this provision only states that when several people participate in an offence, each is liable. The provision would not result in liability when a lower-level manager commits false accounting without the participation of senior managers. Italy also refers to the offences in LD 39/2010 Art. 29 and Civil Code Art. 2625, but these offences also only apply to company directors.

(b) Profit motive: The offence only prohibits false accounting committed "to obtain an undue profit". It would not cover false accounting to conceal bribery for winning an unprofitable contract that facilitates market entry, for example. Requiring the profit to be "undue" could exclude a briber who is the best-qualified bidder or who would have otherwise obtained the business. Italy argues that this situation would be covered because the provision would be broadly interpreted. It did not provide supporting case law or jurisprudence, however.

(c) Limited external disclosures only: The falsehood must be "in the financial statements, reports, or other corporate communications addressed to the shareholders or the public". Such communications must also be "required by law on the economic, balance sheet or financial situation of the company or of the group". The offence would not cover falsity in internal accounting books and records (e.g. ledgers) or external documents not falling within the listed categories.

(d) Materiality and likelihood to mislead: The offence only covers "relevant material" falsehoods (*fatti materiali rilevanti*)[77] that are "concretely likely to mislead others". "Particularly less serious" offences may also be exempted from prosecution (Civil Code Art. 2621ter and CC Art. 131bis). The Working Group stated in Phase 2 (para. 184) that such requirements "may leave many instances of the activities described in Convention Art. 8(1) unpunished".

(e) "Small" non-listed companies can be prosecuted only upon a complaint by the company, shareholders, creditors, or other addressees of the corporate communication. Requiring a shareholder of a private, family-run business to file a complaint is tantamount to denouncing itself, which is unlikely (Phase 3 Report para. 116 and Recommendation 9(a)(ii)). Italy argues that the Civil Code defines a "small" company in this context as a non-listed company with gross revenues of EUR 200 00 or less in the past three years.[78] As such, "it is highly unlikely, if not impossible" that such "micro-companies" would engage in international economic transactions. But economic data indicate that many micro, small and medium-sized enterprises in Italy are internationally active and thus at risk of committing foreign bribery (see para. 9). Some of these companies could

[77] For a definition of "relevance" in this context, see Cass. Penale 22474/2016, para. 10.1.

[78] Civil Code Art. 2621bis(2) and RD 267/1942, Art. 1(2).

fall within the definition of "small" under the Civil Code. Italy does not provide data to contradict this observation.

227. Tax fraud offences cannot be used to address these shortcomings, contrary to the claims of Italian authorities. These offences in LD 74/2000 only cover false accounting with tax consequences. As the Supreme Court held in the Helicopters (India) foreign bribery case, these offences require proof of a "specific *mens rea* of tax evasion, which corresponds to the deliberate and exclusive intention to avoid paying taxes in full awareness of the illegality of the end and the means." As Italy admits, the offence applies "where the taxpayer has used, in his/her tax return, invoices which do not reflect a real economic transaction". Italy also refers to DL 201/2011 Art. 11, but this provision only covers false information that is provided to the *Guardia di Finanza*. All of these offences are hence narrower than Convention Art. 8.

Commentary

The lead examiners commend Italy for improving its false accounting offences. Nevertheless, these offences continue to differ significantly from Convention Art. 8(1). Tax offences also only cover false accounting that has tax consequences. The lead examiners therefore recommend that Italy amend its legislation to prohibit the full range of conduct described in Convention Art. 8(1).

B.5.b.ii. Sanctions for false accounting

228. Table 4 below summarises the sanctions for false accounting. The penalties for legal persons increase by one-third if the entity gains considerable profits. Some ancillary penalties (e.g. disqualification from corporate directing and managerial functions) are available for natural persons. Confiscation is available against both natural and legal persons.[79]

Table 4. Sanctions for false accounting offences

	Natural Persons	Legal Persons
Listed and assimilated companies	Imprisonment: 3 to 8 years	EUR 206 400 – EUR 1 858 800
Non-listed companies	Imprisonment: 1 to 5 years	EUR 103 200 – EUR 1 239 200
Non-listed companies that are "small" or which commit an offence of "minor importance"	Imprisonment: 6 months to 3 years	EUR 51 600 – EUR 619 600

229. The maximum fines against legal persons are not effective, proportionate and dissuasive. Consider as an example one of Italy's largest companies that was recently convicted of foreign bribery (but not false accounting). The maximum fine for false accounting would only amount to 0.003% of the company's average turnover in 2017-2021. In evaluations of other countries, the Working Group found that maximum fines of EUR 705 000 or 780 000 were too low. One country was encouraged to enact fines of up to 10% of a company's turnover.[80]

Commentary

The lead examiners recommend that Italy significantly increase the sanctions against legal persons for false accounting related to foreign bribery.

B.5.b.iii. Enforcement of the false accounting offence

230. Actual enforcement of foreign bribery-related false accounting is inadequate. Many of the 51 foreign bribery cases in the questionnaire responses involved fictitious activities and false invoices. None resulted in charges or investigations of the Civil Code false accounting offences. Five cases saw charges of tax

[79] Civil Code Art. 2621, 2621-bis, 2622, and 2641; LD 231/2001 Arts. 10, 19 and 25ter(2); CC Arts. 19(4) and 32bis; Law 262/2005 Art. 39(5).

[80] Netherlands Phase 3, para. 108 and Recommendation 6(b); Australia Phase 4 (2017), paras. 85 and 95.

offences, presumably because there was evidence of tax evasion and not false accounting *per se*. Italy also provided statistics indicating an annual average of 1 550 convictions of natural persons for false accounting in 2014-2019. But these likely do not involve foreign bribery, given the complete absence of false accounting cases in the questionnaire responses.

Commentary

The lead examiners recommend that Italy ensure that competent authorities also give due consideration to proceedings against the involved natural or legal persons for accounting offences committed for the purpose of bribing foreign public officials or hiding such bribery, as defined under Art. 8 of the Convention.

B.6. Concluding and sanctioning foreign bribery cases

B.6.a. Non-trial resolutions (patteggiamento)

231. Non-trial resolutions of foreign bribery enforcement actions are available under a procedure known as *patteggiamento*. The procedure is available to a natural person who is sentenced to not more than five years' imprisonment (CCP Art. 444(1)) or a legal person that receives only a financial penalty (LD 231/2001 Art. 63(1)). Upon the joint application of the prosecutor and the accused, the sentence of imprisonment or financial penalty is reduced by up to one-third. If a judge approves the settlement, then a judgement is entered. If the sentence imposed does not exceed two years, then the offence is extinguished if the offender does not commit a similar crime within five years (CCP Art. 445(2)).

232. Confiscation likely is a precondition for *patteggiamento*. CCP Art. 444(1ter) requires "a full refund of the price or profit" of certain listed offences, including CC Art. 322bis. CC Art. 322ter(2) explicitly states that, for natural persons, confiscation is mandatory for *patteggiamento* for a foreign bribery offence under CC Arts. 321 and 322bis. The same applies to legal persons by reason of LD 231/2001 Art. 63, says Italy. Confiscation is also mandatory regardless of whether *patteggiamento* is used (LD 231/2001 Art. 19). The Supreme Court has held that *patteggiamento* is not eligible for "pecuniary reparation" under Art 322quater, however.[81]

233. *Patteggiamento* is the source of most of Italy's successful foreign bribery enforcement actions. It accounted for all of the sanctions for foreign bribery at the time of Phase 3 (para. 98). Since then, of the 14 and 8 natural and legal persons that have been sanctioned for foreign bribery, *patteggiamento* were used for all but 3 natural and 2 legal persons.[82]

234. *Patteggiamento* raises two issues: accountability and transparency; and its application to co-operating offenders. The sufficiency of sanctions resulting from *patteggiamento* for natural and legal persons is considered in Sections B.6.b at p. 68 and C.3 at p. 74.

B.6.a.i. Accountability and transparency of patteggiamento

235. *Patteggiamento* is subject to judicial review.[83] If the prerequisites are met (see paras. 231-232), then the prosecutor must consent to the *patteggiamento* procedure. Refusals are judicially reviewable. The *patteggiamento* is then submitted to a judge who considers the legal classification of the facts; the circumstances of the case; and the appropriateness of the sentence (CCP Art. 444(2)). This includes a consideration of the aggravating and mitigating sentencing factors, according to Italian authorities.[84] The

[81] Cass. Penale 12541/2019, Section 2.

[82] Gas Facilities (Nigeria) and Logistics (DRC & Niger) Cases.

[83] Anti-Bribery Recommendation XVIII.vii.

[84] Citing Cass. Penale 3779/2020 and CC Art. 133.

judge then approves or rejects the *patteggiamento* as proposed; he/she cannot change the sentence that has been agreed between the prosecution and the accused (except the amount of confiscation).[85] In the Consultancy (North Macedonia) foreign bribery case, a judge rejected a *patteggiamento* because the proposed sentence was not appropriate for the gravity of the offence.

236. *Patteggiamento* decisions could be more transparent, however. Phase 3 Recommendation 4(e) asked Italy to "make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through *patteggiamento*, such as the reasons why *patteggiamento* was deemed appropriate in a specific case and the terms of the arrangement, in particular, the amount agreed to be paid". Italy has not implemented this recommendation. Most of the *patteggiamento* decisions in foreign bribery cases are not available on the internet and had to be requested from the Italian authorities.

237. Making *patteggiamento* decisions available on demand is not an adequate substitute for publication. Italy states that "*patteggiamento* judgments, especially those rendered in sensitive cases, are always made public. […] [J]ournalists and as all other persons who have a legitimate interest are entitled to request the Court that has issued a judgment to provide them with a copy of it". But access should be given to the entire public, not only those who have a "legitimate interest", whatever this term means. More importantly, only individuals who already know of a resolution would request it. Instead, Italian authorities should actively inform the public of foreign bribery resolutions.

Commentary

The lead examiners reiterate Phase 3 Recommendation 4(e) and recommend that Italy, where appropriate, and consistent with data protection rules and privacy rights, as applicable, make public elements of non-trial resolutions, including: (a) the main facts and the natural and/or legal persons concerned; (b) the relevant considerations for resolving the case with a non-trial resolution; (c) the nature of sanctions imposed and the rationale for applying such sanctions; and (d) remediation measures, including the adoption or improvement of internal controls and anti-corruption compliance programmes or measures and monitorship.

B.6.a.ii. Patteggiamento and co-operating offenders

238. Three of the foreign bribery cases that resulted in acquittals relied on co-operating offenders with less than positive results. These witnesses' testimonies were not the sole evidence of foreign bribery. Some of the testimonies also related to matters unrelated to bribery, e.g. alleged kickbacks received by other defendants. Nevertheless, the rejection of these witnesses' evidence negatively impacted the prosecution's cases to some degree:

- In the Helicopters (India) Case, one of the intermediaries agreed to co-operate with the prosecution and was sentenced via *patteggiamento* in 2014. The sentence became final later that year. He then testified during the retrial in 2017. In acquitting the accused, the Court of Appeal rejected some of the intermediary's testimony.
- Similarly, an executive of a defendant company in the Oil and Gas (Algeria) was sentenced via *patteggiamento* that became final in June 2017. He then testified against other defendants. In January 2020, the Court of Appeal entered acquittals of the other defendants, holding that bribery was not proven. The Court found the executive's evidence "fragmented, confused, and also unreliable".
- In the Oil Prospecting (Nigeria) Case, an executive of the defendant company also co-operated with the authorities and testified at trial. The court accordingly found "an intrinsic unreliability" in

[85] Cass. Penale 54977/2016.

his testimony. Italy points out that *patteggiamento* was not used. Nevertheless, the case is another example of unreliable co-operating offenders in foreign bribery cases.

239. The prosecution does not appear to have any recourse when such co-operating defendants turn out to be less than reliable. In two of the three cases above, the *patteggiamento* sentence against the co-operating offender had become final before the conclusion of the proceedings against the other defendants. If a co-operating defendant recants or later proves to be untruthful, the sentence discount that he/she has received under the *patteggiamento* cannot be annulled. Italy states that a recanting co-operating offender could be guilty of perjury (CC Art. 372). But this requires subjective intent to deceive which is difficult to prove. Many instances of insufficient co-operation will fall short of this threshold.

B.6.b. Sanctions against natural persons

B.6.b.i. Sanctions generally

240. Since Phase 3, the imprisonment terms for foreign bribery have been increased (see Table 5):[86]

Table 5. Sanctions against natural persons for foreign bribery

Offence	Phase 3	Phase 4
Principal foreign bribery offence: Bribery for the performance of functions or powers	6 months to 3 years	3 to 8 years
Principal foreign bribery offence: Bribery for an act in breach of duties	2 to 5 years	6 to 10 years
Incitement to bribery for the performance of functions or powers	4 months to 2 years	2 to 5 years and 4 months
Incitement to bribery for an act in breach of duties	1 year and 4 months to 3 years and 4 months	4 to 6 years and 8 months
Undue inducement	Enacted after Phase 3	up to 3 years[87]
Corruption in judicial proceedings	3 to 8 years	6 to 12 years

241. The sentence in an actual case is determined by setting a "base" penalty within the range set out in the statute and then applying aggravating and mitigating factors (in some cases cumulatively). This can result in a sentence outside of the statutory range. CC Arts. 61, 62 and 62bis specify general aggravating and mitigating sentencing factors, including the payment of reparation or compensation before the judgment. The sentence is reduced by up to one-third for *patteggiamento* and a fast-track trial (*giudizio abbreviato*) (CCP Arts. 444(1) and 442(2)). Reduction is by one to two-thirds when the offender takes steps to avoid further consequences of the offence, secures the evidence and identification of other perpetrators, or ensures the seizure of the sums or other benefits transferred (CC Art. 323bis(2)). Additional factors apply to specific bribery offences and to organised crime (CC Arts. 61bis, 319bis, 320 and 323bis(1)).

242. Ancillary disqualification sanctions were also increased in 2019. Individuals convicted of bribery (except for undue inducement) are subject to a lifetime ban on holding public office and contracting with the public administration. A ban is reduced to 5-7 years if the sentence imposed does not exceed two years or the mitigating factor in CC Art. 323bis(1) applies, and to 1-5 years for co-operating offenders under Art. 323bis(2) (CC Art. 317bis). Individuals sentenced to imprisonment of six months or more can also be temporarily disqualified from corporate directing and managerial functions (CC Art. 32bis).

243. A prison sentence for foreign bribery of two years or less can be suspended (CC Arts. 163-168). The offender must not have received an earlier prison sentence, and the court must be satisfied that the

[86] Laws 190/2012, 69/2015, 3/2019 and LD 75/2020.

[87] The prison term for undue inducement is up to 4 years if the offence causes a prejudice to the financial interests of the EU, and if the damage or the profits are over EUR 100 000.

offender will not re-offend (CC Art. 164). Sentences for bribery are suspended only if the offender pays "pecuniary reparation" under CC Art. 322quater (CC Art. 165(4)). The judge may impose conditions such as eliminating the consequences of a crime or performing community work (CC Art. 165). The sentence is suspended for five years (CC Art. 163). If the offender does not commit another crime during this period, then the offence is extinguished (CC Arts. 167-168). A suspension may be imposed under *patteggiamento* (CCP Art. 444(3)). Disqualification sanctions can also be suspended (CC Art. 166(1)).

244. In practice, foreign bribery cases have produced relatively light sanctions, although these cases were subject to the provisions before the recent legislative amendments. Italy provides statistics on sanctions in foreign bribery cases (Phase 3 Recommendation 3(c)). Since Phase 3, 10 of the 14 individuals who have been sanctioned since Phase 3 received suspended prison sentences.[88] The offences underlying the suspended sentences were not trivial. In one case, the vice-president of a company who allegedly paid USD 25 million in bribes to win USD 873 million contracts received a 16-month suspended sentence. The main reason for the low sanctions is that base penalties were successively reduced by multiple mitigating factors. Three custodial sentences since Phase 3 ranged from 11 to 34 months. A fourth case resulted in a six-year sentence but the court's reasons for sentence are not available at the time of this report. Lower courts also did impose heavier sentences against 10 accused who were later acquitted on appeal for reasons unrelated to the sentences. All received jail terms ranging from 4 years to 5 years and 5 months. These sentences were generally longer because all of the accused went to trial (except for two fast-track trials): reductions for co-operation and *patteggiamento* therefore did not apply.

Commentary

The lead examiners note that sanctions in practice against natural persons for foreign bribery have been relatively light because of sentence suspensions and statutory mitigating factors. They therefore welcome the recent increase of the available imprisonment terms and disqualification sanctions. They recommend that the Working Group follow up the sanctions imposed in future cases.

B.6.b.ii. Unavailability of fines

245. Fines are not available against natural persons for foreign (or domestic) bribery. Confiscation is not a sufficiently dissuasive alternative as it disgorges the gains of a crime and therefore merely returns the offender to the position before the offence was committed.[89] Phase 3 Recommendation 3(a) therefore requested that Italy "consider making available to judges both the imposition of imprisonment and fines in cases of offences of foreign bribery perpetrated by natural persons as a useful additional deterrent". But Italy decided against introducing fines for foreign bribery because of "reasons of coherence and rationality of the sanctioning system of the Criminal Code". This is because fines are not available for other crimes against the public administration.[90] The Criminal Code, however, does provide for fines for approximately 200 offences, including property crimes such as money laundering, theft, extortion, and a wide variety of fraud.

246. Italy has instead enacted "pecuniary reparation" in CC Art. 322quater, but this measure is essentially not a fine but a replacement for confiscation. Both reparation and confiscation require the payment of an amount equivalent to "the price or profit of the crime". Indeed, courts have held that reparation and confiscation cannot be imposed simultaneously.[91] Courts may decline to order confiscation when the profit cannot be quantified, and will likely take the same approach for pecuniary reparation. That a fine does not

[88] These include two convictions which are not final at the time of this report.

[89] Germany Phase 3, Commentary after para. 112.

[90] The government's position as reproduced in Cass. Penale 16872/2019.

[91] Cass. Penale 16872/2019, Section 2, p. 4.

require quantifying the profit is one reason why it is an important tool in addition to confiscation. In any event, as stated at the outset, reparation (or confiscation) alone is not a sufficiently dissuasive remedy. Italy characterises pecuniary reparation as "a form of compensation for the administration affected by the crime". This is because the reparation is paid to the administration. But from the offender's perspective, the pecuniary reparation replaces and is thus tantamount to confiscation.

247. Additional requirements for pecuniary reparation make it an unsuitable substitute for fines. Unlike a fine, reparation must be equal to the price or profit of the crime, even when a higher or lower amount would be a more appropriate punishment. The provision requires proof of "damage" to the foreign government, and thus may exclude cases where bribes are offered but not accepted, or where the briber is the best-qualified bidder. The reparations may have to be transmitted to the foreign government, since the provision requires payment "in favour of the damaged administration". If a foreign regime is corrupt, such a payment could fuel further corruption. Finally, reparation is unavailable as part of *patteggiamento*.[92] This is a severe limitation, since practically all successful foreign bribery enforcement actions are resolved via *patteggiamento* (see para. 12). Reparations are also unavailable for the offence of incitement to bribery.

Commentary

Fines continue to be unavailable as a sanction against natural persons for foreign bribery, even though fines are available in Italy for numerous offences including many property crimes. Italy states that fines are not available for crimes against the public administration, but there is no reason in principle why this must be the case. Italy is an outlier: fines are available for foreign bribery in 41 of the other 43 Working Group members.[93] The recently introduced "pecuniary reparations" are not a fine but rather a replacement for confiscation. The lead examiners therefore recommend that Italy make effective, proportionate, and dissuasive fines available against natural persons for foreign bribery.

B.6.c. Confiscation

248. The Phase 3 Report (paras. 72-76) noted that only a few concluded foreign bribery cases had resulted in confiscation. The Working Group decided to follow up the issue (Follow-up Issue 13(d)).

249. Confiscation against natural persons is mandatory in most foreign bribery cases. Confiscation of the "price" of the offence (i.e. the bribe) is compulsory upon conviction for all foreign bribery offences (CC Art. 240(2)(1)). Confiscation of the "profit" (i.e. proceeds) is mandatory upon a conviction (including *patteggiamento*) for the principal active foreign bribery offences (CC Art. 322ter(2)). It is optional for the offences of undue inducement and incitement to corruption (CC Art. 240(1)). Value confiscation is only available for the profit of the principal foreign bribery offences (Art. 322ter(2)). Since 2019, confiscation imposed by a trial court is maintained even if the conviction is overturned on appeal because of a time-bar (CCP Art. 578bis). Unexplained wealth from an individual convicted of foreign bribery is subject to "extended confiscation" (CC Art. 240bis). "Preventive confiscation" can be imposed on a member of a criminal group aiming to commit foreign bribery (LD 159/2011 Arts. 4(1)i-bis, 16, 20, 24).

250. As for legal persons, the "price or the profit" of bribery is confiscated upon conviction (LD 231/2001 Art. 19). Italy states that confiscation is mandatory for a conviction via *patteggiamento*, despite the absence of an express provision to this effect. If a legal person is not responsible because of the "organisational models defence", the "profit" may still be confiscated (Art. 6(5)). Value confiscation is available in both cases. An entity can avoid "interdictive" sanctions by, among other things, making the proceeds of bribery available for confiscation before trial (Art. 17; see Section C.3.b at p. 76).

[92] Cass. Penale 12541/2019, Section 3, p. 5.

[93] The other two Working Group members in which fines are unavailable are Portugal (Phase 3 Report, para. 55 and Recommendation 4(a)) and Türkiye (Phase 3 Report, para. 64 and Recommendation 2(a)).

251. Regarding the quantum of confiscation, if the profit cannot be determined, then Italian courts should confiscate at least an amount equal to the bribe in foreign bribery cases. The Supreme Court stated in 2008 that the profit to be confiscated for a corruption crime equals the contract value minus the (i) costs and (ii) "effective utility" that the "damaged party" (i.e. the public administration) obtains from the contract. Prosecutors in Phase 3 (para. 75) stated that such a calculation is complex and requires forensic analysis. This difficulty persists in Phase 4, says one prosecutor at the on-site visit. Instead, it is assumed that the profit amounts to at least the value of the bribe and is then confiscated. CC Art. 322ter(2) now codifies this rule. In addition, the quantum of confiscation agreed between the accused and the prosecutor under *patteggiamento* does not bind a sentencing judge.[94] A mere opportunity to bid for contracts is also not a "profit" of the crime capable of confiscation.[95]

252. This rule has been applied in most – but not all – foreign bribery cases. Of the 12 post-Phase 3 foreign bribery cases that resulted in sanctions, two cases did not have a benefit capable of confiscation. Seven cases saw confiscation of an amount equal to at least the bribe, though the judgments often do not explain how the amount was calculated. In two cases, confiscation was for less than the value of the bribe. In the Oil Licences (Congo-Brazzaville) Case, the court confiscated EUR 11 million as the "profit" of the bribery but valued the bribes at USD 77 million. The benefit was even higher, according to information provided by Italy in this evaluation: the value of the briber company's licences increased due to the bribery by USD 968 million. In the Construction Equipment (Algeria) case, confiscation was not ordered against two company representatives because "the advantage obtained […] is difficult to quantify" and was in any event "obtained by the company". But when the company was sentenced, the court also did not order confiscation and merely wrote that the benefit to the company was "limited". Confiscation was also ordered against one individual in the Gold Extraction Licenses (Ivory Coast) Case but the reasons for sentence are not available at the time of this report. The sentence is also not yet final.

253. Finally, Italian courts have not systematically ordered confiscation against intermediaries who facilitate foreign bribery. These intermediaries often charge a "fee" for their services that should be confiscated. This was done in the Oil Prospecting (Nigeria) Case in which the court confiscated CHF 21.2 million and USD 94.8 from two intermediaries (who were later acquitted on appeal for unrelated reasons). The same was not done in three other cases. In the Construction (Panama) Case, the court sentenced the intermediary to prison, found that he acted "for his personal profit", but did not order confiscation. In the Helicopters (India) Case**,** the court did not order confiscation because "it is not possible to quantify the profit of the crime". In the Oil and Gas (Algeria) Case, the trial court did not explain the lack of confiscation. An appeal court later acquitted the intermediary for unrelated reasons.

Commentary

The lead examiners are encouraged that the proceeds of foreign bribery are confiscated in most concluded foreign bribery enforcement actions. They recommend that Italy take steps to ensure that it systematically seeks confiscation (a) of an amount equal to at least the value of the bribe, in cases where the actual "profit" of foreign bribery cannot be determined, and (b) against intermediaries who facilitate foreign bribery.

[94] Cass. Penale 54977/2016, p. 2.

[95] Cass. Penale 1754/2018, Section 6.

C. Responsibility of legal persons

254. Legislative Decree (LD) 231/2001 provides for the administrative liability of legal persons for criminal offences including foreign bribery, false accounting and money laundering. Since Phase 3, eligible predicate offences have been expanded to include undue inducement, trading in illegal influence, and self-laundering.[96] Jurisprudence has raised a new issue of liability for crime committed by low level employees. Crucial Working Group recommendations on fines and statute of limitations remain unimplemented.

C.1. Scope of corporate liability

C.1.a. Foreign bribery committed by "lower level persons" in a company

255. Corporate liability arises for crimes committed by two categories of individuals (LD 231/2001 Art. 5):

(a) senior corporate officers, namely "representatives, directors, or managers of the entity or of one of its organisational units that enjoy financial and functional independence, as well as individuals who are responsible, including *de facto*, for the management or control of the entity"; and

(b) those "subject to the management or supervision" of a senior corporate officer in (a).

256. This provision does not permit corporate liability for crimes committed by low-level employees, according to post-Phase 3 jurisprudence. In a 2016 case,[97] a railway maintenance technician was convicted of manslaughter after violating safety legislation and causing a deadly accident. The trial court acquitted the employer company partly because the technician was under the supervision of "simple middle managers" in a part of the company that "does not have autonomous functional, management and spending powers". The upshot of the decision is that the acts of employees below middle management can never trigger corporate liability. (The court also acquitted the company because of the organisational model defence (see para. 265)).

257. This renders LD 231/2001 inconsistent with the Convention. Art. 2 of the Convention requires corporate liability when a senior corporate officer directs or authorises "a lower level person" to commit the crime, or fails to prevent "a lower level person" from doing so (Anti-Bribery Recommendation Annex I.B.3). The Convention does not limit liability to the acts of employees above a particular level. Nor does the provision require the culpable employee to be under the direct or immediate supervision and management of a senior corporate officer. Otherwise, liability would only result from the acts of individuals one tier below senior management, thus excluding the vast majority of most companies' employees. Unlike LD 231/2001, the Convention also does not limit corporate liability to foreign bribery committed by employees in a corporate unit with "autonomous functional, management and spending powers".

258. Italy's response does not alleviate these concerns. It states that "the unanimous interpretation of Italian commentators and legal experts" indicates that Art. 5(b) covers crimes committed by lower-level employees. But the fact remains that the court did not apply this commentary in the 2016 case. Italy also states that the case is not "an authoritative precedent". But the case has not been overturned. Italy does not point to other case law on the application of Art. 5(b) to lower-level employees. It also argues that the persons under Art. 5(b) are entitled to whistleblower protection which must therefore include all lower-level employees (see Section A.6.b at p. 17). But one could equally argue the opposite based on the 2016 case. Finally, Italy contends that LD 231/2001 Art. 5 on its face complies with the Convention and Anti-Bribery Recommendation Annex I.B. But for the Working Group's Phase 4 evaluations, a law's judicial application takes precedence over its facial compliance with the Convention.

[96] LD 231/2001, Arts. 25, 25-ter, 25-quinquiesdecies, and 25-octies.

[97] Trib. Di Catania 2133/2016.

Commentary

The lead examiners recommend that the Working Group follow up whether corporate liability can result from foreign bribery committed by lower level persons of a company, and regardless of whether the person is in a corporate unit with autonomous functional, management and spending powers.

C.1.b. Liability of parent companies and subsidiaries

259. A further requirement for liability is that the offence must be committed in a legal person's interest or to its advantage (LD 231/2001 Art. 5(1)). The entity is also not liable if an offender acts in the "exclusive interest" of him/herself or a third party (Art. 5(2)). "Interest" and "advantage" are disjunctive conditions, i.e. only one has to be met to result in liability. "Interest" is a subjective criterion concerning the natural person perpetrator and the purpose of the offence. "Advantage" is objective and focuses on the actual benefit deriving from the offence.[98]

260. The Phase 3 Report (para. 45) considered whether these criteria would render a parent company liable when the principal offender bribes to the advantage of a subsidiary (or vice versa). Italian prosecutors were confident of liability in such cases. Nevertheless, the Working Group decided to follow up the issue (Follow-up Issue 13(c)).

261. Post-Phase 3 jurisprudence indicates that a parent can be liable for a subsidiary's offence (and vice versa) if the requirements of liability in LD 231/2001 are met. The act of a company is not automatically attributed to all other affiliated companies in the same corporate group.[99] This is consistent with the Convention, which only requires the liability of a parent company for "using intermediaries, including related legal persons" such as a subsidiary, to commit foreign bribery (Anti-Bribery Recommendation Annex I.C.1). Nevertheless, courts in Italy have held a parent or another company of the group liable when "the individual who acts on behalf of these participates with the individual who commits the offence".[100] Similarly, a parent is liable for an offence by a subsidiary if a natural person who acts on behalf of the parent, "also pursuing the interest of the [parent]", participated in the commission of the offence.[101] A subsidiary has also been convicted because the natural person perpetrator acted in the subsidiary's interest, even if the main advantage of the crime accrued to the parent.[102]

262. Italian authorities add that the natural person perpetrator who is the director of the parent company can be a *de facto* director of a subsidiary, or vice versa (Civil Code Art. 2639). However, the *de facto* director must "exercise the typical powers inherent to the qualification or function in a continuous and significant manner." The management activity must therefore be "carried out in a non-episodic or occasional way".[103]

263. The Working Group also decided to follow up whether a company is liable for an offence that is to its indirect advantage, such as an improved competitive situation (Phase 3 Report para. 45 and Follow-up Issue 13(c)). As mentioned above, Italian courts have held a subsidiary liable because the natural person perpetrator acted in the subsidiary's interest, even though another legal person was the main benefactor of the crime.[104] Italy adds that case law provides a very broad definition of "advantage". It is sufficient that

[98] Cass. 38343/2014, section 63. See also Cass. 54640/2018.

[99] Cass. 24583/2011, pp. 61-62; Cass. 52316/2017, section 13.3.

[100] Cass. 24583/2011, pp. 61-62.

[101] Cass. 52316/2017, section 13.3.

[102] Cass. 4324/2013, section 5.

[103] Cass. 35346/2013.

[104] Cass. 4324/2013, section 5.

the offence committed by the principal offender resulted in an advantage for the entity, even if not a direct financial advantage, but also an advantage of reputational nature or an opportunity to improve its competitiveness. Supporting case law is not provided.

C.2. Defence of "organisational models"

264. LD 231/2001 Arts. 6-7 provide an "organisational model" defence to corporate liability. An organisational model is essentially a corporate compliance programme. A company escapes liability if, prior to the offence, it adopts and effectively implements an organisational model suitable for preventing the type of crime in question. For offences committed by a senior corporate officer listed in Art. 5(1)(a), the company must further prove that an independent body supervises the model which has been "fraudulently circumvented" by the natural person perpetrator. The essential elements of a model are listed in the provisions and supplemented by the courts. A model adopted after the offence mitigates sentence but does not exclude liability (see Section C.3.a at p. 74). In Phase 3 (paras. 39-42), the defence had been successful in only one case. The Working Group decided to follow up the matter (Follow-up Issue 13(b)).

265. Practice since Phase 3 has been limited. Italian authorities referred to only one case in which the defence succeeded. A company was acquitted of manslaughter in 2016 because it had a suitable organisational model for preventing such workplace accidents.[105] The defence failed in three foreign bribery cases. In the Gas Facilities (Nigeria) Case, the courts found the model was merely "on paper" and inadequate "to impede or at least make more difficult" the commission of the crime.[106] In the Oil and Gas (Algeria) Case, the trial court found the compliance measures inadequate, particularly regarding the due diligence on the intermediation contracts. (An appeal court acquitted the company on other grounds.) The company in the Logistics (DRC & Niger) Case adopted a model only after the offence. Most of the other foreign bribery cases were resolved under *patteggiamento* without an analysis of the defence.

266. Prosecutors mention some difficulties with the defence. They state that it is often complex to determine whether a compliance model is adequate. Medium to large businesses frequently have good compliance programmes on paper. Examining the model's implementation in practice is time-consuming. Expert opinions of consultants are sometimes needed. Prosecutors do not have guidelines for assessing models, though one prosecutor states that training and exchange of practices have covered this issue.

C.3. Sanctions against legal persons

267. LD 231/2001 provides for fines and "interdictive" sanctions against legal persons for foreign bribery. Both types of sanctions are available under *patteggiamento* (Art. 63).

C.3.a. Fines

268. Italy has not implemented Phase 3 Recommendation 3(b) to "increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through *patteggiamento* procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies".

269. When imposing a sentence, a judge follows a three-step procedure. First, LD 231/2001 Art. 25 sets out a range of "quotas" (i.e. units) for each bribery offence. The judge chooses a quota within the applicable range, having regard to the gravity of the case, the extent of the entity's responsibility, and efforts to eliminate or mitigate the consequences of the offence and to prevent similar offences in the future (Art. 11(1)). Second, the judge decides a monetary value of each quota between EUR 258 and 1 549 (Art. 10(3)). The decision is based on the legal person's economic and financial situation (Art. 11(2)). The

[105] Trib. Di Catania 2133/2016.

[106] Cass. 11442/2016, p. 28.

chosen value of the quota multiplied by the number of quotas equals the "base fine". The range of available base fines for foreign bribery is in Table 6 below.

Table 6. Sanctions against legal persons for foreign bribery

	Quotas	Base Fine
Principal foreign bribery offence: Bribery for the performance of functions or powers	100-200	EUR 25 800 – 309 800
Principal foreign bribery offence: Bribery for an act in breach of duties	200-600	EUR 51 600 – 929 400
Incitement to bribery for the performance of functions or powers	100-200	EUR 25 800 – 309 800
Incitement to bribery for an act in breach of duties	200-600	EUR 51 600 – 929 400
Undue inducement	300-800	EUR 77 400 – 1 239 200
Bribery for an act in breach of duties in cases where the legal person has gained a significant profit	300-800	EUR 77 400 – 1 239 200
Corruption in judicial proceedings	200-600	EUR 51 600 – 929 400

270. Third, the base fine may then be reduced due to mitigating factors. *Patteggiamento* reduces the fine by up to one-third, and a fast-track trial (*giudizio abbreviato*) by one-third. The reduction is one-third to one-half (to a floor of EUR 10 329) for implementing an organisational model, surrendering the profit for confiscation, compensating the damage, or eliminating the offence's consequences before trial. The monetary value of the quota is fixed below the minimum (at EUR 103) for a crime that resulted in particularly minor financial damage, or was committed mainly in the interest of the natural person perpetrator or a third party and the entity obtained no or minor advantage.[107]

271. Three features combine to render fines inadequate. First, unlike for natural persons, there are only mitigating and no aggravating sentencing factors. The base fines are therefore the maximum. The highest is EUR 1.24 million (for two of the seven applicable offences). It is even lower at EUR 929 400 for the principal foreign bribery offence, which likely applies to most cases. The Working Group has long held that comparable maximum fines in other countries of EUR 780 000 to 1.1 million are insufficient.[108] The Working Group has also encouraged countries to set maximum fines that refer to a company's turnover.[109] Second, many mitigating factors apply cumulatively to radically reduce the base fine. For example, successive factors reduced the fine in the Construction Equipment (Algeria) Case by 80%. Third, all but one mitigating factor derive from the legal person's post-offence conduct. A company thus has ample opportunity to seek leniency after getting caught, which dulls any incentive to prevent the crime beforehand. Moreover, two of these factors (eliminating the offence's consequences and preventing future offences) are already considered under the first step, when determining the quota. They therefore count double and have disproportionate influence.

272. The eight legal persons that have been sanctioned for foreign bribery since Phase 3 starkly illustrate the inadequacy of this regime. The fines were EUR 80 000 or less in five of the eight cases. In the remaining three, the fines were higher but still a fraction of the bribes paid and contracts won. In the Oil Licences (Congo-Brazzaville) Case, the fine was EUR 826 000 for a USD 77 million bribe. The benefit of the bribery was USD 968 million, according to prosecutors. The Gas Facilities (Nigeria) Case involved USD 180 million in bribes for USD 6 billion in contracts but yielded only a EUR 600 000 fine. The

[107] LD 231/2001 Arts. 11, 12, 63(2)-(3); CCP Arts. 444(1) and 442(2).

[108] Netherlands Phase 3, para. 46 and Commentary after para. 55; Germany Phase 3, para. 101 and Commentary after para. 112; Sweden Phase 3, para. 56 and Commentary after para. 59.

[109] Germany Phase 4, para. 243 and Commentary after para. 244. Germany had increased fines to EUR 10 million, but was also encouraged to proceed with a plan to introduce administrative fines up to 10% of a company's turnover.

Helicopters (India) Case produced a fine of EUR 300 000 after bribes of EUR 7.5 million and a contract of EUR 556 million. In these last three cases, the fines were 0.0018-0.0052% of the companies' groupwide revenues for the year before the fines were imposed.

273. Prosecutors agree that the maximum fines available for companies are too low. A judge notes that confiscation eliminates the gains of bribery. However, confiscation only removes ill-gotten profits and puts the offender in the same position as before the crime. It is therefore not a sufficient deterrent. Italian authorities also mention that an "interdictive" sanction can be converted into a fine. Such a fine, however, merely replaces an interdictive sanction; it is not an additional sanction and deterrent, which was the point of the Working Group's Phase 3 recommendation. Furthermore, this provision has been in force since 2001, well before the Working Group's recommendation. In any event, interdictive sanctions – and hence such fines – are rare in foreign bribery cases, as explained in the next section.

Commentary

The lead examiners deeply regret that Italy has not increased the maximum fines available against legal persons. The current regime is unfit for purpose since it produces fines which are so low that they do not provide general or specific deterrence. The lead examiners therefore reiterate Phase 3 Recommendation 3(b) and strongly recommend that Italy urgently amend its legislation to ensure that the sanctions imposed against legal persons in practice for foreign bribery are effective, proportionate and dissuasive.

C.3.b. Interdictive sanctions

274. Though not expressly stated in LD 231/2001, "interdictive" sanctions are nevertheless available for foreign bribery.[110] These sanctions, which can be imposed cumulatively, are: (a) suspension or revocation of authorisations, licenses, or concessions instrumental to the commission of the offence; (b) prohibition from contracting with the public administration, except to obtain a public service; (c) denial of facilitations, funding, contributions and subsidies (including those already granted); (d) prohibition on advertising; and (e) a general ban on the activity, which is applied when the other sanctions would be inadequate (LD 221/2001 Arts. 9 and 14). LD 50/2016 additionally provides for debarment from public procurement (see Section C.3.c at p. 77).

275. In 2019, the length of the interdictive sanctions for bribery offences was increased considerably. These sanctions last 4-7 years for offences committed by senior corporate officers, and 2-4 years for offences committed by persons under their management or supervision (Art. 25(5)). However, the duration is reduced to between 3 months and 2 years if, before the first instance decision, the entity takes steps to avoid further consequences of the offence, co-operates with prosecutors, and adopts an adequate organisational model (Art. 25(5bis)).

276. Several factors limit the application of interdictive sanctions. First, for these sanctions to apply, the entity must have obtained a "considerable profit" or committed repeated violations (Art. 13(1)). Second, the sanctions do not apply if, before trial begins, the entity (a) compensates the damage and takes steps to eliminate the offence's consequences; (b) implements an organisational model to prevent offences; and (c) gives up the profit from the offence for confiscation (Art. 17). Italy points out that these conditions are conjunctive, i.e. all have to be met. But they were applied disjunctively in at least one foreign bribery case.[111] These same factors already reduce the fine against the legal person (see para. 270). If the entity adopts these measures after the trial begins, then the interdictive sanctions can be substituted with a fine in an amount between the main fine and double this amount (Art. 78). Finally, the sanctions are not available for bribery and incitement to bribery to perform functions (Art. 25(5)).

[110] Cass. 42701/2010, p. 13.

[111] For example, see the Electrical Systems (Kazakhstan) Case, Trib. di Monza 119/2017.

277. In practice, interdictive sanctions have not been imposed in foreign bribery cases and have thus had no impact. It takes little to not impose interdictive sanctions on a company. In the Oil Licences (Congo-Brazzaville) Case, the judge found that the conditions in Art. 17 were met and that the company had, among other things, rectified shortcomings in its compliance programme. But all the company did was to dismiss the natural person perpetrator. There is no indication that the programme was improved. The company avoided interdictive sanctions by making the profit of the crime available for confiscation in the Electrical Systems (Kazakhstan) Case. Though not stated in the judgment, interdictive sanctions were apparently avoided for the same reason in the Gas Facilities (Nigeria) Case, according to Italian authorities. Such a mitigating factor is highly dubious, since the profit in all of these cases should have been confiscated anyways. In the Construction Equipment (Algeria) Case, the court merely said that "the conditions for the application of disqualification sanctions do not exist" without elaboration. Italian authorities say the company implemented a compliance model and did not significantly profit from the crime. The court in the Helicopters (India) Case did not even address interdictive sanctions.

Commentary

The lead examiners recognise that fines should be the principal sanction against a legal person for foreign bribery. Additional "interdictive" sanctions are only supplementary in nature. Anti-Bribery Recommendation XXIV.i accordingly asks countries to impose such sanctions "to an appropriate degree". Nevertheless, the threshold for excusing companies from interdictive sanctions is too low in Italy. As a result, such sanctions have never been imposed. The lead examiners therefore recommend that Italy take steps to ensure that interdictive sanctions are imposed in practice to an appropriate degree.

C.3.c. Debarment from public procurement

278. Anti-Bribery Recommendation XXIV.i requires member countries' laws and regulations to permit authorities to suspend or debar from competition for public advantages, including public procurement contracts and contracts funded by official development assistance, companies determined to have bribed foreign public officials. Recommendation XXIV.iii provides that, where appropriate and to the extent possible, in making such decisions on suspension and debarment, member countries take into account, as mitigating factors, remedial measures developed by companies to address specific foreign bribery risks, as well as any gaps in their existing internal controls, ethics, and compliance programmes or measures.

C.3.c.i. Institutional set-up

279. Procurement in Italy is carried out at all levels of government by a pool of over 30 000 contracting authorities, including national ministries, agencies, and publicly owned companies. At the national level, centralisation of procurement occurs through the main purchasing body, *Concessionaria Servizi Informativi Pubblici S.p.A*. (CONSIP).[112] CONSIP is a public stock company owned by the Italian Ministry of Economy and Finance (MEF). Since 2000, on behalf of the MEF, it manages the Program for the Rationalisation of Public Spending for Goods and Services and the national e-procurement platform. Italy states that the latter is a digital platform that strives to increase transparency and efficiency in public procurement and to track public expenditure. In 2019, more than 98 000 public purchasers used CONSIP's e-procurement platform to award approximately 680 000 contracts with a combined value of EUR 13.5 billion. When ANAC, Italy's independent authority for the prevention of corruption in the public sector, was created in 2014, it took over the responsibility of supervising public contracts. ANAC has regulatory, monitoring and sanctioning powers in public procurement, transparency, integrity of public employees and whistleblowing. ANAC is also responsible for drafting and implementing a three-year national anti-corruption plan and supervising the implementation of the anti-corruption plans of public administration and State-controlled

[112] European Commission, Public procurement – Study on administrative capacity in the EU, Italy Country Profile, p. 115.

entities. ANAC is the authority responsible for receiving public sector whistleblower complaints and reporting suspected crimes to judicial authorities.

C.3.c.ii. Overview of the legal framework for debarment from public procurement

280. Three separate regimes provide for debarment from public procurement as a sanction for foreign bribery. First, a court may debar a legal person through an interdictive sanction under the corporate liability law LD 231/2001 (see para. 274). Second, a natural person convicted of foreign bribery, or sentenced via *patteggiamento,* may be prohibited from contracting with the public administration pursuant to CC Art. 32quater and 317bis. Third, public procurement law also provides for debarment. In Phase 3, the Working Group recommended that Italy extend the grounds for debarment from public tenders in its debarment law to cover all offences in Art. 1 of the Convention, not just those involving EU officials (Recommendation 11(b)). In 2016, Italy repealed LD 163/2006 Art. 38, which defined corruption according to EU instruments, thus limiting its application to foreign bribery involving EU officials and replaced it with new public procurement laws, thus rectifying the deficiency.

281. LD 50/2016 Art. 80(1) stipulates the grounds upon which contracting authorities must exclude economic operators from participating in public tenders. The grounds include where an "economic operator" has been convicted or sentenced via *patteggiamento* for specific crimes, including foreign bribery. Consequently, a company convicted of foreign bribery will automatically be debarred from public tenders and cannot be awarded government-funded contracts under the new laws. This is the case, whether or not the court imposed an interdictive sanction under LD 231/2001, according to Italian authorities. Automatic debarment is for five years, except where the penalty for the offence is less, in which case it shall be equal to the duration of the sentence imposed (Art. 80(10)). Such debarment shall apply if the judgment has been pronounced against a broad range of natural persons, including inter alia an owner, partner, director, member of the board, agent, or senior official (Art. 80(3)). This also applies to individuals who have left office in the year before the publication of the notice of the public contract if the company does not demonstrate that there has been a complete and effective dissociation from the criminally sanctioned conduct.

282. Contracting authorities also have the discretion to debar economic operators suspected of illegal conduct. They may do so by demonstrating that the conduct amounts to serious professional misconduct that casts doubt on the integrity or reliability of the economic operator under Art. 80(5)(c). ANAC issued Guidelines 6/2016 to contracting authorities, providing examples of what might constitute serious professional misconduct. The contracting authorities are responsible for assessing the seriousness of the alleged conduct and determining whether or not it satisfies the grounds for exclusion. ANAC are in the process of adopting new guidelines. The draft guidelines advise authorities to consider that committal for trial, precautionary measures and conviction, even if not final, for any of the offences in Art. 80(1) may be relevant to assessing serious professional misconduct because final convictions for those offences would constitute grounds for automatic exclusion. The duration of exclusion for serious professional misconduct is 3 years (Art. 80(10bis)).

C.3.c.iii. Due diligence in public procurement

283. In Phase 3, the Working Group urged Italy to establish mechanisms for verifying information submitted by prospective public contractors, including declarations on previous convictions for foreign bribery and checking whether they are listed on an international financial institution (i.e. multilateral development bank, MDB) debarment list (Recommendation 11(a)).

284. Under the current procedure, companies that wish to tender for public contracts must submit a declaration under oath to the contracting authority, attesting to the absence of impediments, including criminal convictions for the offences listed in Art. 80 of the public procurement law to participate in the tender. Before awarding the tender, Italian contracting authorities verify the accuracy of the declaration

through the AVCPASS system managed by ANAC. The AVCPASS system integrates information from various government departments, including the MOJ, on criminal convictions and administrative sanctions. Neither the declaration nor the AVCPASS system contains information on whether or not a company is on a debarment list of an MDB. Contracting authorities are also not required to consult these lists before awarding a tender. For foreign companies, the declaration is verified through the Irregularities Management System (IMS) or from information requested from authorities abroad. MDB debarment lists are not consulted.

285. ANAC also maintains the Digital Records of Economic Operator (DREO, *Casellario Informatico delle Imprese*). The DREO contains information relevant to assessing the grounds for exclusion in Art. 80. The DREO stores information on anti-mafia decisions, violations of workplace safety regulations, criminal proceedings and disqualifications (of up to one year) issued by ANAC for false statements made by economic operators in procurement proceedings. Italy does not keep statistics on the number of economic operators that have been suspended from competition for public contacts due to a conviction for foreign bribery, or any of the other grounds in Art. 80, only those excluded for false declarations.

Commentary

The lead examiners commend Italy for introducing new public procurement laws and repealing the previous law that limited the grounds of exclusion from public advantages to foreign bribery involving EU officials. The lead examiners acknowledge Italy's efforts to establish mechanisms for verifying the accuracy of information submitted by prospective public contractors in their declarations, including information on previous convictions for foreign bribery. However, contracting authorities still do not check MDB debarment lists before awarding public contracts. The AVCPASS system does not contain information from these lists or convictions imposed outside Italy. The lead examiners reiterate Phase 3 Recommendation 11(a) and recommend that Italy enhance its due diligence in public procurement by including in the AVCPASS system information obtained through verifying foreign or Italian companies operating abroad and integrated data from MDB debarments lists.

C.3.c.iv. Measures to manage and monitor public contracts where corruption is identified

286. ANAC has the authority to manage and monitor public contracts where corruption is identified. LD 90/2014 Art. 32, provides for extraordinary measures where corruption, including a foreign bribery offence, is being investigated by a judicial authority. ANAC can inform the prosecutor that an individual or company has a public contract and take measures to replace individuals or engage in extraordinary and temporary management of the company for the execution of the contract.

C.3.c.v. Debarment in practice

287. In practice, as discussed in Section C.3.b at p. 76, interdictive sanctions are rarely imposed against legal persons convicted of foreign bribery. Debarment has been imposed against natural persons in only two foreign bribery cases. In the Oil Prospecting (Nigeria) Case, both natural persons convicted at first instance were disqualified from holding public office for five years and prohibited from contracting with the public administration for one year. The convictions were overturned on appeal. In the Logistics (DRC & Niger) Case, both natural persons convicted in July 2020 were prohibited from contracting with the public administration for one year. No interdictive sanction was imposed on the company because it had introduced an organisational model post-offending.

288. The fact that courts are not routinely ordering debarment as a sanction places more responsibility on contracting authorities to conduct due diligence and ensure that debarment is adequately enforced in the public procurement process. Art. 80 of the public procurement law applies to natural and legal persons convicted or sentenced under *patteggiamento* for foreign bribery, regardless of whether a court imposed debarment as an interdictive sanction. However, there is no evidence that Art. 80 is being applied in

practice. Italy cannot confirm that any of the 14 natural persons and 8 legal persons that have been convicted of foreign bribery since Phase 3 are debarred under Art. 80. Italy also does not keep records of debarment under Art. 80, except for economic operators ANAC excludes for false declarations.

Commentary

The lead examiners recommend that Italy take steps to ensure that debarment, when ordered by a court as an interdictive sanction or required under LD 50/2016 Art. 80, CC Arts. 32quater or 317bis, is applied to foreign bribery cases in practice.

C.4. Statute of limitations for legal persons

289. The longstanding issue of statute of limitations for legal persons resulted in two Phase 3 recommendations. First, Italy was asked to "re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals" (Recommendation 4(f)(ii)). Second, Italy was recommended to "take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among the prosecuting authorities throughout the country, to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently and diligently, with a view to avoiding the dismissal of these cases based on statute of limitations grounds" (Recommendation 2).

290. Regrettably, Italy has prolonged the limitation period only for natural persons and not legal persons. The period remains at 5 years from the commission of the offence to when the legal person is charged (LD 231/2001 Art. 22). The period is not suspended while an MLA request to a foreign country is outstanding. Data provided by Italy show that a large number of cases continue to be time-barred. In 2015-2019, the limitation period for 71 legal persons in 37 foreign and domestic bribery cases expired. The longer limitation period for natural persons leads to unjust situations like in one ongoing foreign bribery case, where individuals face prosecution but the company's charges are time-barred.

Commentary

The lead examiners deeply regret Italy's failure to lengthen the limitation period for legal persons in foreign bribery cases. The period for natural persons has been substantially lengthened, in some cases to 15 years (see para. 192). This reflects an acknowledgement by Italy of the time needed to properly investigate and prosecute foreign bribery matters. The lead examiners believe that Italy should also lengthen the current 5-year limitation period for legal persons.

The lead examiners also observe that Italy has taken a similar stance on the issue of sanctions. Sanctions for natural persons have increased substantially (para. 240). But fines against legal persons remain so low as to be unfit for purpose (para. 272).

For these reasons, the lead examiners reiterate Phase 3 Recommendation 4(f)(ii) and strongly recommend that Italy increase the limitation period for legal persons for foreign bribery, and align it with the period for natural persons.

C.5. Engaging the private sector

C.5.a. Awareness-raising efforts

291. Since 2017, the Ministry of Foreign Affairs and International Co-operation (MAECI) has organised the Italian Business Integrity Day (IBID) in co-operation with Transparency International Italy. During this event, companies present their business integrity practices to foreign audiences in workshops hosted by Italian foreign missions. This initiative commendably raises awareness of the fight against foreign bribery. However, the event has predominantly been held in developed countries where foreign bribery risks are

relatively low.[113] Italy states "the project can highlight the efforts and achievements of Italian companies operating abroad whose activity is inspired by compliance and integrity and […] address the need of a reciprocity to check lawfulness and fairness of economic activity to guarantee a fair competitive environment (level playing field) in light of global anticorruption requirements." In other words, the purpose is to prompt other countries to fight foreign bribery and promote good integrity practices among Italian companies.

292. Italy makes additional efforts to engage the private sector. Through its work in G20, G7 and the OECD, it promotes a holistic view of corruption. It conducts constant dialogue with the private sector and major Italian companies on the implementation of Italy's international anti-corruption obligations and commitments. To this end, it also participates in Transparency International's Business Integrity Forum.

293. Italy does not have a specific policy or procedure for assisting Italian companies solicited to pay bribes by foreign public officials. When asked about such policies, Italy refers only to the internal reporting directive previously mentioned (Section A.5 at p. 14). It reiterates that its personnel are obliged to report allegations of foreign bribery to Italian judicial authorities under the directive. There are currently no guidelines for Italian officials on how to support Italian companies that may experience bribe solicitation in the course of international business. Moreover, Italian authorities do not offer any formal guidance to Italian companies operating abroad on adopting compliance programmes or other foreign bribery preventative measures.

C.5.b. Other awareness-raising efforts in the private sector

294. Apart from initiatives linked to Anti-Corruption Day, Italy does not describe any other awareness-raising activities in the private sector that specifically mention foreign bribery. The Ministry of Economic Development is the National Contact Point under the OECD Guidelines on Multinational Enterprises (MNEs). The Guidelines contain a chapter on corruption, including foreign bribery. Italy states that the Ministry "is actively engaged in promoting the OECD guidelines" but does not detail any specific measures or explain how this relates to foreign bribery.

Commentary

The lead examiners praise Italy's efforts to raise awareness of foreign bribery in the private sector through their Italian Business Integrity Day initiatives. However, Italy could do more to extend these initiatives in countries with higher risks of corruption. Italy could take more concrete measures to provide support and guidance to companies operating in sectors or in countries with a high risk of bribery. Specifically, the lead examiners are concerned that Italy does not have a policy or procedure for assisting Italian companies solicited to pay bribes by foreign public officials.

The lead examiners therefore recommend that Italy implement targeted measures to (a) further raise awareness of the risk of foreign bribery in Italian companies, including SMEs, that operate in higher risk countries and sectors, and provide guidance on how to mitigate the risk, and (b) develop guidelines for MAECI officials on how to support Italian companies operating abroad that may experience bribe solicitation in the course of international business.

C.5.c. Promoting corporate anti-corruption compliance

295. Italy has made limited efforts to promote corporate compliance programmes. Under the corporate liability legislation (LD 231/2001), there is no legal obligation for companies to adopt an organisational model. A Bill that would change this has been dormant in the Senate since September 2018.[114] However,

[113] Oslo in 2017, Washington in 2017 and 2018, Sao Paulo in 2018, Vienna in 2018, London in 2019, Abu Dhabi in 2020 and Berlin in 2020. An event was also organised at the OECD in December 2017.

[114] Atto Senato n. 726, XVIII Legislatura.

a company escapes liability if it has implemented an effective organisational model to prevent the offence, among other requirements (see Section C.2 at p. 74). Some regional governments require certain types of companies (e.g. those offering social and health services) to adopt a model and a code of conduct. The same applies to non-profit institutions seeking social services from the public administration. A company that wishes to qualify for the STAR Segment of the Italian Stock Exchange must adopt a model. If a company is found liable for an offence under LD 231/2001, courts have ordered corporate managers to pay damages to the company where they failed to implement or propose adopting a model.[115] CONSIP, the body managing centralised public procurement, also requires companies that tender for government contracts to have a model and "high corporate ethics". Concerning SOEs, certain unlisted publicly-controlled companies are strongly recommended to adopt an organisational model and must also adopt additional corruption-prevention measures according to ANAC Resolution 1134/2019.

296. CONSOB, the securities market regulator, enforces an obligation on large public-interest entities to publish an annual statement on non-financial topics such as corporate social responsibility. This may include reporting corporate anti-bribery policies. CONSOB is also responsible for the Corporate Governance Code of Borsa Italia. The Code contains some relevant provisions, such as internal controls and whistleblowing, but is otherwise not directly relevant to corporate anti-corruption compliance.

297. Guidance to companies on anti-corruption compliance programmes are issued by business associations and can be submitted to the Ministry of Justice (MOJ) for approval (LD 231/2001 Art. 6(3); Ministerial Decree 201/2003 Arts. 5-7). The MOJ consults with other government departments and evaluates the suitability of the compliance model to prevent crime and provides its observations. MOJ approval does not bind judicial authorities in criminal proceedings. Confindustria, a business association, has issued some MOJ approved guidance.[116] In 2021, 13 business associations submitted guidelines to the MOJ.

298. Nevertheless, company representatives state that there are no government-issued guidelines to assess whether or not a compliance programme would be sufficient to avoid liability, and non-governmental guidelines are inadequate. Multinational and medium-sized companies say they look to other jurisdictions or used best practices identified in international standards as reference for their compliance programmes. However, they note the limitations of this approach as those standards are not tailored to the specificities of the Italian legal system. Companies and business associations agree that compliance programmes are best practice but opine that Italy does little to promote them or assist companies to implement them. Moreover, as discussed in Phase 3 (para. 127), the cost of implementing and maintaining effective models puts them beyond reach for many small- and medium-sized enterprises.

C.5.d. Engaging small- and medium-sized enterprises (SMEs)

299. Small- and medium-sized enterprises (SMEs) merit particular attention in foreign bribery awareness-raising and training. Many Parties to the Convention find SMEs numerous, dispersed and hence the most difficult to reach. SMEs also have fewer resources and expertise than large companies to set up anti-foreign bribery measures. As mentioned at para. 9, many Italian SMEs are internationally active.

300. Italian authorities do not appear to have made efforts to engage SMEs in fighting foreign bribery. Italy highlighted two initiatives, both of which are non-governmental. The Business Integrity Forum created the PMI (i.e. SME) Business Integrity Kit. Transparency International, a civil society group, organises the Forum. Italy states that the Kit helps SMEs "counter bribery at the domestic level" and likely does not explicitly address foreign bribery. Unioncamere the Italian Confederation of Chambers of Commerce, has raised awareness of anti-corruption legislation and bribery risk factors. In co-ordination with other European chambers of commerce, it created the C-Detector (also known as the Anti-Corruption Toolkit for

[115] Trib. di Milano Penale 1774/2018.

[116] Confindustria (June 2021), Guidelines on Organisational Models.

SMEs (ACTs)). Companies take an online questionnaire of approximately 30 questions. The tool then identifies the company's corruption risks and offers suggestions for addressing the risks. Companies operating abroad can use the toolkit. However, it does not assess the risk of foreign bribery.

301. Confindustria, Italy's main business association, with members from over 150 000 small, medium and large enterprises, has created a working group to evaluate and collect information on corporate social responsibility procedures in SMEs and disseminate good practices. In 2019, the working group produced guidelines for "Sustainability Reporting for SMEs."

Commentary

The lead examiners observe that the Anti-Bribery Recommendation XXIII.C asks countries to encourage companies to develop and adopt adequate anti-corruption compliance programmes. Countries should also encourage business organisations to assist in these efforts. Italy has taken a reactive approach, leaving business associations to develop guidance on such programmes and submitting them to the MOJ for approval. Companies have found this approach wanting, and have had to rely on guidance from other jurisdictions. Guidance to SMEs specific to anti-corruption compliance programmes is notably absent.

For these reasons, the lead examiners recommend that Italy take a more proactive approach and encourage (a) companies, including state-owned enterprises, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, and (b) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small- and medium-size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery.

D. Other issues

D.1. Non-tax deductibility of bribes and sanctions

302. Anti-Bribery Recommendation XX.i requires "Member countries [to] explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner." As in Phase 3 (para. 128), Italian legislation disallows the tax deductibility of bribes. Law 537/1993 Art. 14(4bis) provides for the non-deductibility of costs and expenses directly used for the performance of acts or activities qualified as an intentional offence where the prosecution has brought criminal proceedings, a judge has ordered a trial, or ruled there are no grounds to proceed where the statute of limitations has expired. The *Agenzia delle Entrate* issued Circular 32/E of 3 August 2012, advising that costs and expenses are non-deductible when there is a direct relationship between the goods or services purchased and a criminal offence. This is the case when such a relationship exists *ab origine* (from the time the goods or services were purchased) and when it occurs subsequently, i.e. when the goods or services are initially purchased for a lawful purpose are then used to commit an offence or are used for the offence and for lawful purposes. The circular also stated that non-deductibility extends to costs and expenses, which were only partly instrumental in the commission of the offence e.g. depreciation charges, interest costs, provisions, contingent liabilities, capital losses.

303. In practice, Italian taxation authorities can review the tax returns of taxpayers accused of a crime upon the prosecuting authorities initiating proceedings. Under Italian taxation law, the Revenue Agency must issue a notice of assessment and impose penalties by 31 December of the fifth year from the filing of a tax return. Authorities state that the tax audit and criminal investigation run in parallel. When charged with a criminal offence, a taxpayer can submit a subsequent revised declaration provided they have not already been notified of tax penalties. If acquitted, they are entitled to reimbursement of the higher taxes, interest and penalties incurred.

304. Italian tax authorities have not developed a practice of re-examining the tax returns of those sanctioned in foreign bribery cases. 14 natural and 8 legal persons have been sanctioned for foreign bribery since Phase 3. Italian authorities can only confirm they conducted tax audits in 4 cases and state that "unjustified costs were classified as non-deductible because they related to invoices for fictitious transactions". Italy states that it is "not in the position to acquire certain and detailed information on tax audits" in other cases. Italy therefore has not demonstrated they are proactively reviewing tax returns and ensuring that individuals and companies that have bribed foreign public officials have not claimed those bribes as tax deductions.

305. The tax treatment of sanctions and confiscation is a horizontal issue in Phase 4 evaluations. Criminal sanctions are not eligible tax deductions in Italy. The *Agenzia delle Entrate*, in Circular 42/E of 26 September 2005, clarified that sanctions arising from the commission of unlawful activities shall not be considered costs inherent in revenue earned and cannot be claimed as deductions. In judgment 7317/2003, the Italian Supreme Court also held that financial penalties for crimes do not constitute expenses and are therefore not deductible.

Commentary

The lead examiners recommend that Italian tax authorities adopt a practice of proactively reviewing tax returns when foreign bribery proceedings are initiated to ensure that individuals and companies who have bribed foreign public officials have not claimed those bribes as tax deductions.

D.2. Tax amnesty programmes

306. The impact of tax amnesty programmes on tax officials' ability to detect suspicions of foreign bribery was designated a follow up issue in Phase 3 (Follow-up Issue 13(g)). After stating that tax amnesty programmes would be discontinued following the Phase 2 evaluation, Italy introduced a new programme in 2009. Another similar programme was introduced in 2014. Foreign bribery cases were not detected through the 2014 amnesty.

307. The 2014 law introduced a procedure of voluntary disclosure whereby a person who had violated tax declaration obligations might use the voluntary disclosure procedure to regularise their position for violations that occurred before September 2014. Voluntary disclosure included details of all financial assets established or held abroad, directly or indirectly via third parties, accompanied by documents and supporting information. Under the procedure, administrative penalties are reduced and criminal liability is excluded for tax crimes and related offences of money laundering. However, outstanding taxes must be paid. Italy states that the procedure was compliant with Financial Action Task Force (FATF) regulations and did not alter the application of anti-money laundering obligations for customer due diligence, data recording and suspicious transaction reporting. Tax authorities add that the voluntary disclosure procedure did not affect tax officials' ability to detect suspicions of foreign bribery or remove criminal liability for foreign bribery. On the contrary, they consider it could lead to increased detection of corruption, because auditors share the information on beneficial ownership of foreign assets with prosecuting authorities.

Conclusions: Positive achievements, recommendations and follow-up issues

308. The Working Group welcomes Italy's efforts since Phase 3 to implement the Convention and related instruments. Based on the findings in this report, the Working Group concludes by commending Italy on good practices and positive achievements, makes recommendations to Italy for further improvement, and identifies issues for follow-up. Italy will report to the Working Group in writing in October 2024 on its implementation of all recommendations, on its foreign bribery enforcement actions, and on developments related to the follow-up issues.

Good practices and positive achievements

309. This report has identified several good practices and positive achievements by Italy for combating foreign bribery.

310. The specialised unit responsible for foreign bribery and other crimes in the Milan PPO signifies Italy's commitment to implement the Convention. Initially created as an informal group in 2014, the Milan PPO's 3rd Department on International Affairs – Transnational Economic Crimes was formally established in 2018. The Department is responsible for all transnational economic crimes including foreign bribery, money laundering and tax havens. It also handles incoming MLA requests involving these offences. As experience from other countries amply demonstrates, such a specialised unit for the criminal enforcement of foreign bribery concentrates expertise and maximises efficiency in fighting this complex crime.

311. This specialisation has contributed to sustained efforts to investigate and prosecute actual foreign bribery cases. The pace of enforcement increased since Phase 3 in 2011, with 90 investigations and 72 proceedings, yielding 14 and 8 natural and legal person convictions. Prosecutors face a daunting set of challenges ranging from an exceedingly onerous standard of proof and wholly inadequate corporate fines to an unduly short limitation period for legal persons. Yet they continue to bring investigations and prosecutions of foreign bribery, often in cases with complex facts and against defendants that are major, well-resourced companies. The commitment and professionalism that they demonstrate is highly commendable.

312. This enforcement has been supported by Italy's concerted efforts to strengthen its legal and policy framework in international co-operation and thereby enhance its ability to provide prompt and effective

MLA and extradition in foreign bribery cases. Equally notable is Italy's established practice of seeking and providing MLA in foreign bribery cases and, in particular, their recent efforts to co-ordinate with other Parties to the Convention on multijurisdictional cases. Prompt responses to outgoing MLA requests are especially crucial for Italian law enforcement authorities, given problems arising from the statute of limitations for legal persons.

313. Foreign bribery enforcement may soon be further strengthened by Italy's plans to significantly increase human resources and to invest in the digitisation of the judiciary. Both initiatives can substantially reduce delays in proceedings in corruption and other cases that have long plagued the Italian judicial system.

314. In terms of detection, Italy has increased tax audits and co-operation between tax and law enforcement authorities, resulting in the detection of three foreign bribery cases. The introduction of rules to protect whistleblowers in the public and private sector was a significant step forward. These protections should be expanded and strengthened, however, possibly during the hopefully imminent transposition of the EU Whistleblowing Directive.

315. Finally, the Italian Business Integrity Day (IBID) held annually on International Anti-Corruption Day (9 December) is an innovative awareness-raising effort. Organised in part by the Ministry of Foreign Affairs and International Co-operation (MAECI), the event showcases Italian companies' integrity practices to foreign audiences in workshops hosted by Italian diplomatic missions. Extending the event to corruption-prone countries and sectors will enhance its impact in fighting foreign bribery.

Recommendations of the Working Group

Recommendations for preventing and detecting foreign bribery

1. Regarding prevention and awareness-raising, the Working Group recommends that Italy:
   (a) develop a national strategy to fight foreign bribery that encompasses prevention, detection, awareness-raising and enforcement (Anti-Bribery Recommendation III and IV.i);
   (b) take additional measures to raise awareness of foreign bribery among public officials including those working abroad, and of their duty to report this crime to law enforcement (Anti-Bribery Recommendations IV.i and XXI.vi);
   (c) implement targeted measures to further raise awareness of the risk of foreign bribery in Italian companies, including SMEs, that operate in higher risk countries and sectors, and provide guidance on how to mitigate the risk (Anti-Bribery Recommendations IV.ii, XXI.vi and Annex I.A.2);
   (d) take a more proactive approach and encourage (i) companies, including state-owned enterprises, to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, and (ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small- and medium-size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. (Anti-Bribery Recommendation XXIII.C.i-ii and Annex II.B); and
   (e) develop guidelines for MAECI officials on how to support Italian companies operating abroad that may experience bribe solicitation in the course of international business (Anti-Bribery Recommendation XII.ii and Annex I.A.3).
2. Regarding the detection of foreign bribery allegations in the media, the Working Group recommends that Italy ensure that the Italian and foreign media is regularly monitored for foreign bribery allegations

and that all relevant media reports, including those provided by the Working Group, are forwarded immediately to law enforcement (Anti-Bribery Recommendation VIII and XXI.iv).

3. Regarding self-reporting of foreign bribery, the Working Group recommends that Italy consider measures to encourage persons who participated in, or have been associated with, the commission of foreign bribery, to supply information useful to competent authorities for investigating and prosecuting foreign bribery, and ensure that appropriate mechanisms are in place for the application of such measures in foreign bribery investigations and prosecutions (Anti-Bribery Recommendation X.iii and XV.ii).

4. Regarding whistleblowing, the Working Group recommends that Italy:

   (a) enhance its framework to protect and/or provide remedy against any retaliatory action to whistleblowers in the public sector (Anti-Bribery Recommendation XXII);

   (b) urgently adopt an enhanced, strong and effective framework to protect and/or provide remedy against any retaliatory action to all private sector whistleblowers (Anti-Bribery Recommendation XXII); and

   (c) further raise awareness and provide training on (i) the implementation of adequate measures for protecting reporting persons in the private sector, and (ii) the protection and remedies available for private sector whistleblowers (Anti-Bribery Recommendation XXII.xii).

5. Regarding money laundering, the Working Group recommends that Italy:

   (a) properly consider money laundering predicated on foreign bribery in its future national money laundering risk assessments (Convention Art. 7 and Anti-Bribery Recommendation VIII);

   (b) provide guidance and typologies to obliged entities that explicitly address foreign bribery (Anti-Bribery Recommendation IV.ii and Anti-Bribery Recommendation VIII);

   (c) train UIF staff specifically on foreign bribery (Anti-Bribery Recommendation IV.i); and

   (d) maintain comprehensive statistics on STRs that result in or support bribery investigations, prosecutions and convictions (Anti-Bribery Recommendation VIII).

6. With respect to accounting requirements, external audit and internal company controls, the Working Group recommends that Italy:

   (a) train external auditors on the detection of foreign bribery (Anti-Bribery Recommendation IV.ii and XXIII);

   (b) raise awareness among accountants and auditors of their duty to report foreign bribery and the protection for those who report (Anti-Bribery Recommendation IV.ii and XXIII.B); and

   (c) ensure that all auditors – not only those who audit a “public interest” or “intermediate regime” entity – who report foreign bribery on reasonable grounds to competent authorities are expressly protected from legal action (Anti-Bribery Recommendation XXIII.B.v).

7. Regarding tax, the Working Group recommends that Italy:

   (a) raise awareness of the foreign bribery offence amongst tax authorities and further train tax auditors on the detection of foreign bribery (Anti-Bribery Recommendation IV.i and XX.i); and

   (b) adopt a practice of proactively reviewing tax returns when foreign bribery proceedings are initiated to ensure that individuals and companies who have bribed foreign public officials have not claimed those bribes as tax deductions (Anti-Bribery Recommendation XX.i).

8. Regarding export credits, the Working Group recommends that:

   (a) SACE and SIMEST (i) further raise awareness of foreign bribery among their staff and clients, and (ii) provide adequate training to staff on how to detect potential foreign bribery by conducting appropriate due diligence (Anti-Bribery Recommendation IV.i, and XXI.vi; Export Credits Recommendation IV.1 and IV.5);

   (b) SACE and SIMEST ensure that their policies and procedures expressly establish the obligation to promptly report all credible allegations or evidence of foreign bribery to law enforcement authorities, and develop guidelines for staff on this issue (Anti-Bribery Recommendation IV.i, XXI.v and XXI.vi; Export Credits Recommendation IV.6, VII.1, and VIII.1); and

   (c) SACE take steps to explore further enhanced due diligence measures that could be applied in practice when suspicions of foreign bribery arise in connection with a supported transaction (Anti-Bribery Recommendation XXIII.D; Export Credits Recommendation V, VI, and VIII).

9. Regarding official development assistance, the Working Group recommends that Italy review its development co-operation contracts and provisions to ensure that where allegations of foreign bribery are identified in the performance of an ODA contract, the contract may be suspended or terminated and public funds reimbursed (Anti-Bribery Recommendation XXIV.i and v).

Recommendations for investigating, prosecuting, and sanctioning foreign bribery and related offences

10. Regarding the offence of foreign bribery, the Working Group recommends that Italy:

    (a) provide training and awareness-raising to judicial authorities on the treatment of circumstantial evidence in foreign bribery cases (Convention Art. 1);

    (b) take steps to align the level of details about the corrupt agreement that must be proven for its foreign bribery offence with that seen in practice, by taking appropriate measures including training judicial authorities, and if necessary amending its legislation (Convention Art. 1);

    (c) take steps to ensure that its foreign bribery offence is satisfied when funds are provided for the benefit of a corrupt official regardless of whether the foreign official actually receives the same funds provided by the briber, or whether the official has title and not mere access to the bribe, by taking appropriate measures including training judicial authorities, and if necessary amending its legislation (Convention Art. 1);

    (d) take steps to ensure that liability for foreign bribery arises whenever a person offers, promises or gives a bribe to a foreign public official directly or through an intermediary, including where the person joins and becomes a party to a corrupt transaction after the official has entered into a prior "corrupt agreement" with the intermediary or another third party, by taking appropriate measures including training judicial authorities, and if necessary amending its legislation (Convention Art. 1); and

    (e) urgently amend its law to make its foreign bribery offence autonomous, i.e. by not requiring proof of foreign law (Convention Art. 1 and Commentary 3).

11. Regarding defences to foreign bribery, the Working Group recommends that Italytake steps to ensure that under CC Art. 323ter (i) a person cannot be immune from liability by denouncing a bribed foreign public official or a less culpable individual in the criminal enterprise, (ii) the defence applies only when a person provides compelling evidence essential to proving a crime that is otherwise unavailable to

the authorities, and (iii) the crime that is reported is otherwise unknown to the authorities (Convention Art. 1).

12. Regarding sanctions and confiscation for foreign bribery, the Working Group recommends that Italy:

    (a) take steps to ensure that the sanctions imposed in practice for undue inducement in foreign bribery cases are effective, proportionate and dissuasive, including by increasing if necessary the maximum sanctions available (Convention Art. 3(1));

    (b) make effective, proportionate and dissuasive fines available against natural persons for foreign bribery (Convention Art. 3(1));

    (c) take steps to ensure that it systematically seeks confiscation (i) of an amount equal to at least the value of the bribe, in cases where the actual "profit" of foreign bribery cannot be determined, and (ii) against intermediaries who facilitate foreign bribery (Convention Art. 3(3); Anti-Bribery Recommendation XVI);

    (d) urgently amend its legislation to ensure that the sanctions imposed against legal persons in practice for foreign bribery are effective, proportionate and dissuasive (Convention Art. 3(1)); and

    (e) take steps to ensure that interdictive sanctions are imposed in practice to an appropriate degree (Anti-Bribery Recommendation XXIV.i).

13. Regarding debarment from public procurement, the Working Group recommends that Italy:

    (a) enhance its due diligence in public procurement by including in the AVCPASS system information obtained through verifying foreign or Italian companies operating abroad and integrated data from MDB debarments lists (Anti-Bribery Recommendation XXIV.ii); and

    (b) take steps to ensure that debarment, when ordered by a court as an interdictive sanction or required under LD 50/2016 Art. 80, CC Arts. 32quater or 317bis, is applied to foreign bribery cases in practice (Anti-Bribery Recommendation XXIV.iv).

14. Regarding the statute of limitations for foreign bribery, the Working Group recommends that Italy:

    (a) amend the CCP to provide for an adequate period for preliminary investigations (Convention Art. 6; Anti-Bribery Recommendation IX.ii); and

    (b) increase the limitation period for legal persons for foreign bribery, and align it with the period for natural persons (Convention Art. 6; Anti-Bribery Recommendation IX.ii).

15. Regarding the enforcement of foreign bribery, the Working Group recommends that Italy:

    (a) create a national database of cases of foreign bribery and related offences that is accessible to all prosecutors (Convention Art. 5; Anti-Bribery Recommendation XI);

    (b) maintain the assignment of cases of foreign bribery and other international economic crimes within the jurisdiction of the Milan PPO to its 3rd Department, and continue to ensure that resources provided to the 3rd Department for foreign bribery cases are commensurate with the Department's workload (Convention Art. 5 and Commentary 27; Anti-Bribery Recommendation VII);

    (c) raise awareness of Art. 5 among relevant officials, in order to prevent communications that could potentially influence foreign bribery prosecutions and investigations based on Art. 5 factors from being forwarded to judicial authorities (Convention Art. 5 and Commentary 27); and

    (d) conclude the planned reforms to significantly increase human resources and to introduce digitisation into the judiciary (Convention Art. 5 and Commentary 27; Anti-Bribery Recommendation VII).

16. Regarding the money laundering offence, the Working Group recommends that Italy take appropriate measures to effectively enforce the offence in connection with foreign bribery cases (Convention Art. 7).

17. Regarding the false accounting offence, the Working Group recommends that Italy:

    (a) amend its legislation to prohibit the full range of conduct described in Convention Art. 8(1) (Convention Art. 8);

    (b) significantly increase the sanctions against legal persons for false accounting related to foreign bribery (Convention Art. 8); and

    (c) ensure that competent authorities also give due consideration to proceeding against the involved natural or legal persons for accounting offences committed for the purpose of bribing foreign public officials or hiding such bribery (Convention Art. 8; Anti-Bribery Recommendation XXIII.A.iv).

18. Regarding MLA, the Working Group recommends that Italy take measures to ensure that outgoing MLA requests are followed up systematically and that the Ministry of Justice continues to intervene in cases of delay or inaction (Convention Arts. 5 and 9; Anti-Bribery Recommendation XIX.A.vi and x).

19. Regarding non-trial resolutions, the Working Group recommends that Italy where appropriate, and consistent with data protection rules and privacy rights, as applicable, make public elements of non-trial resolutions, including: (i) the main facts and the natural and/or legal persons concerned; ii) the relevant considerations for resolving the case with a non-trial resolution; (iii) the nature of sanctions imposed and the rationale for applying such sanctions; and (iv) remediation measures, including the adoption or improvement of internal controls and anti-corruption compliance programmes or measures and monitorship (Anti-Bribery Recommendation XVIII.iv).

Follow-up by the Working Group

20. The Working Group will follow up the issues below as case law, practice and legislation develops:

    (a) application of recklessness, wilful blindness and dolus eventualis to the foreign bribery offence (Convention Art. 1);

    (b) “active” vs. “passive” side intermediaries in foreign bribery cases (Convention Art. 1; Anti-Bribery Recommendation Annex I.C.1);

    (c) *concussione* as a defence to foreign bribery (Convention Art. 1 and Anti-Bribery Recommendation Annex I.A.1);

    (d) the standard of proof for undue inducement (Convention Arts. 1 and 3(1));

    (e) post-Phase 3 jurisprudence on Italy’s jurisdiction to prosecute foreign bribery (Convention Art. 4);

    (f) implementation of the corporate beneficial ownership registry, including law enforcement’s access to the registry (Anti-Bribery Recommendation X.i);

    (g) whether *concussione* is a defence to extradition for foreign bribery (Convention Art. 10);

    (h) application of CCP Arts. 697(1bis), 698 and 723(3) in extradition and MLA (Convention Arts.5, 9 and 10, and Commentary 27);

    (i) sanctions imposed against natural persons for foreign bribery (Convention Art. 3(1)); and

    (j) whether corporate liability can result from foreign bribery committed by lower level persons of a company, and regardless of whether the person is in a corporate unit with autonomous functional,

management and spending powers (Convention Art. 2; Anti-Bribery Recommendation Annex I.B.3).

Annex 1. Summaries of foreign bribery cases concluded since Phase 3

Construction (Algeria)

Between 2007 and 2011, the director of an Italian construction company bribed Algeria's Minister of Energy to obtain construction contracts. In 2017, he accepted a non-trial resolution (*patteggiamento*) and was sentenced to 18 months' imprisonment and confiscation of EUR 2.1 million representing the value of the potential contracts to be won. The Supreme Court quashed the confiscation order because a mere "chance" of winning a contract cannot be the subject of confiscation. The company was not prosecuted because the statute of limitations was about to expire, and the company was on the verge of bankruptcy.

Construction (Panama)

In 2011, an Italian company paid USD 50 000 in bribes and promised another USD 20 million to representatives of the government of Panama in return for a EUR 1.5 billion construction contract. In January 2015, a natural person, who acted as an intermediary, entered into *patteggiamento* approved by the Court of Naples. He was sentenced to 11 months' imprisonment for the offence of foreign bribery. Confiscation was not ordered. The company was not charged.

Construction Equipment (Algeria)

In 2014, an Italian construction equipment company paid a EUR 45 000 bribe to an Algerian public official through an intermediary, and spent approximately EUR 6 300 on a holiday for the official and his family in Tuscany in return for the award of two contracts valued at EUR 4.23 million.

The company entered into *patteggiamento* for foreign bribery in April 2019 and was fined EUR 20 000. Despite the company obtaining contracts valued at EUR 4.23 million the court found there was a "limited amount of benefit". Interdictive sanctions were not imposed and confiscation was not ordered. The company CEO and an intermediary also entered into *patteggiamento* for foreign bribery in October 2019. The CEO received a sentence of imprisonment of 13 months' 10 days and the intermediary 16 months' 20 days, both sentences were suspended.

Consultancy (North Macedonia)

Between 2013 and 2016, an Italian consultancy company paid a EUR 40 000 bribe and gave or promised other benefits of approximately EUR 23 600 through a British consultant intermediary to two North Macedonian public officials to obtain two EU funded contracts valued at EUR 2.2 million for projects related to North Macedonia's accession to the EU.

The company, and three natural persons who were partners in either the parent company or its subsidiary, entered into *patteggiamento* for foreign bribery in 2021. The company was fined EUR 80 000, the three natural persons received suspended sentences of imprisonment for two years. The first *patteggiamento* submitted by the prosecutor was rejected by the court at first instance as the proposed sanctions did not reflect the seriousness of the offending. Two of the partners each paid compensation of EUR 10 000 to the EU, EUR 10 000 to North Macedonia and EUR 15 000 to Italy. The partner in the parent company paid EUR 10 000 compensation to Italy. The company paid compensation of EUR 40 000 to both the EU and North Macedonia and EUR 180 000 to Italy.

Electrical Equipment (Libya)

An Italian electrical equipment company signed a consultancy contract with an intermediary to obtain business from Libya's state-owned oil company. In 2010-2011, the company's general partner authorised payments of consulting fees totalling EUR 572 988 to the intermediary, of which EUR 420 000 was allegedly in turn paid to the son of the then Libyan leader. The intermediary admitted to paying at least EUR 297 000. Some payments were channelled through an executive of the Libyan SOE. The intermediary then procured a EUR 38.8 billion contract from the SOE for the Italian company. The contract was eventually not executed because the regime was toppled.

In 2017, both the general partner and the intermediary were acquitted at trial after the prosecution conceded the case. The intermediary was acquitted because, at the time, a broader *concussione* defence applied, which covered not only coercion but also "inducement" by a public official. The court found that the intermediary was induced to pay the two Libyan officials. The court also found that the general partner's awareness of the illicit destination of part of the sums was not proven.

Electrical Systems (Kazakhstan)

Between 2007 and 2011, an Italian company paid USD 25 million in bribes through intermediaries to the son-in-law of the President of Kazakhstan to secure contracts valued at USD 873 million for the supply of electrical systems at the Kashagan oil field.

In February 2017, the company and one natural person, a company executive, entered into *patteggiamento* for foreign bribery. The company was fined EUR 25.8 million and the court confiscated EUR 6.58 million, which represented the estimated profit. The natural person received a suspended sentence of 16 months' imprisonment. Charges of foreign bribery against two alleged intermediaries were discontinued in 2019 due to the expiration of the statute of limitations.

Gold Extraction Licenses (Ivory Coast)

Between 2019 and 2020, three Italian nationals allegedly bribed Ivorian public officials to obtain authorisation for the research and extraction of gold in a protected nature reserve. XOF 7 million (EUR 10 600) were reportedly paid to a regional director of the Ministry of Mines and Geology, and XOF 1 million (EUR 1 500) to a director of the Office of Parks and Reserves. The bribers acted through companies incorporated under Ivorian law and with the help of Ivorian individuals. In 2021, the Italian nationals were charged with two counts of foreign bribery and two counts of "fraudulent transfer of valuables". One of the defendants was convicted of foreign bribery on 21 September 2022 after a fast-track trial. He was sentenced to 6 years' imprisonment, permanent exclusion from holding public office, and debarment from contracting with the public administration for at least 3 years. The conviction is not final and the judgment's reasons are not available at the time of this report. The trial against the other two defendants is pending.

Helicopters (India)

A helicopter-manufacturing company and subsidiary of one of the world's largest defence companies allegedly paid approximately EUR 10.5 million in bribes through intermediaries to the former Chief of the

Indian Air Force and his close relatives from 2005 to 2010 to obtain a EUR 556 million contract for the supply of twelve helicopters to the Indian Ministry of Defence.

In April and August 2014 respectively, the Busto Arsizio Court approved two *patteggiamento*, one with a natural person who intermediated the bribery and another with two companies. The natural person was imprisoned for 1 year and 10 months, which he had already served. One company was fined EUR 80 000 and the other was ordered to pay a EUR 300 000 fine and EUR 7.5 million in confiscation. Following the offending both companies implemented compliance programmes, a factor that was taken into account in mitigation and was relevant to the non-imposition of interdictive sanctions including debarment.

Two former company executives went to trial and were acquitted after lengthy judicial proceedings. A trial court in Busto Arsizio exonerated both of foreign bribery, but convicted them of related-tax fraud in 2014. The Milan Court of Appeal overturned the decision and entered convictions for foreign bribery and tax fraud in 2016. The following year, the Supreme Court quashed the convictions on procedural grounds and ordered a retrial. In 2018, the Milan Court of Appeal retried and acquitted both defendants, concluding that corruption was not proven. The Supreme Court rejected appeals of this decision in 2019.

Gas Facilities (Nigeria)

In 1995-2004, an Italian engineering and construction company had a natural gas project in Nigeria as part of a joint venture that comprised the company's wholly-owned Dutch subsidiary and companies from France, Japan, and the United States. The joint venture paid over USD 180 million in bribes to Nigerian public officials to obtain contracts to build liquefied natural gas facilities valued at more than USD 6 billion. The payments were channelled through a shell company controlled by an individual from the United Kingdom and a Japanese trading company that acted as intermediaries. In 2006, an Italian oil and gas multinational acquired the Italian company involved in the scheme.

By 2011, all the joint venture companies had resolved foreign bribery charges with the US authorities, paying well over USD 1 billion in financial penalties. In 2013, an Italian court convicted the successor Italian company of foreign bribery and imposed a EUR 600 000 fine and EUR 24.5 million in confiscation. The Supreme Court upheld the conviction in 2016. The prosecutors had also charged five individuals (executives and top managers) with foreign bribery, but their case became time-barred.

Land Development (Tanzania)

In 2007, an Italian oil and gas company paid a EUR 150 000 bribe to the son of the Tanzanian President to obtain permission for a commercial land development. In January 2016, a company executive entered into *patteggiamento* and was sentenced to 16 months' imprisonment and ordered to pay confiscation equivalent to the amount of the bribe. The company was not charged.

Logistics (DRC & Niger)

Two executives of an Italian company that collects commissions on freight charges to various African countries promised or paid bribes to public officials in the Democratic Republic of Congo (DRC) and Niger. In 2008-2015, the executives allegedly bribed or attempted to bribe public officials of DRC's Office of Maritime Freight Management (OGEFREM), in order to win a contract and seek protection of the company's economic interests in the country. In 2015, they promised to pay bribes to the Niger Ministers of Finance and Transport, as well as the Director General of the Shippers Council, to obtain a contract for issuing e-certificates for goods bound for Niger-Benin. The promised bribes were 4% of the commissions collected by the company. In 2015, one of the executives promised a EUR 50 000 bribe to a Senator in DRC to obtain the position of Honorary Consul.

Italian prosecutors charged the two executives with various counts of foreign bribery, tax fraud, and self-laundering. The company was also prosecuted under the rules on administrative liability of legal persons. In 2020, a first instance court entered convictions for two of the foreign bribery counts involving the public

officials in Niger and Senator in DRC. The defendants received suspended jail sentences of 1 year and 8 months (for two counts) and 1 year and 6 months (for one count) respectively, and were prohibited from contracting with the public administration for 1 year. The company received a EUR 25 800 fine. The court entered acquittals for the other foreign bribery counts as it found that the allegedly bribed OGEFREM officials were not public officials, and because there was insufficient evidence of bribery. Also not proven were tax fraud and self-laundering predicated on tax fraud. Appeals are pending at the time of this report.

Oil Licences (Congo-Brazzaville)

In 2013 and 2014, a Congolese public official renewed three oilfield exploration permits of an Italian oil company in the Republic of the Congo without going through a public tender process and under favourable terms. A former senior executive of the Italian oil company negotiated the deal. The executive agreed to take a Congolese company, beneficially owned by the public official, as their local partner in exchange for the renewed oilfield permits. The Congolese company was allocated a 7-10% interest in each of the permits. In return, the Congolese public official awarded a 23% share of another oilfield exploration permit to a company that was beneficially owned (through a series of shell companies) by the Italian executive. The court estimated the value of the bribes was USD 77 million. The benefit obtained by the Italian company was USD 968 million.

In 2021, the Italian company entered into *patteggiamento* for foreign bribery (undue inducement). The company was fined EUR 826 134 and ordered to pay confiscation of EUR 11 million. The court did not impose interdictive sanctions, finding that the company had rectified shortcomings of its compliance programmes. The court accepted that the company was unduly induced, even though the senior executive, who authorised the bribe, received USD 23 million in kickbacks. The senior executive and other natural persons alleged to have taken part in the bribery scheme were not sanctioned.

Oil Prospecting (Nigeria)

This case concerned a protracted sale of an oil prospecting licence for an offshore oilfield in Nigeria. An Italian and an Anglo-Dutch oil and gas multinational companies allegedly engaged in foreign bribery to obtain the licence. In the late 1990s, the licence was awarded to a company controlled by the then Oil Minister. Between 2001 and 2006, the licence was at some point revoked an awarded in a public tender to a consortium between the Anglo-Dutch company and a state company. The government later reassigned the licence to the former Oil Minister's company. A new government reaffirmed the decision in 2010. Meanwhile, the former Oil Minister began negotiations to sell the licence through two intermediaries. The Italian and Anglo-Dutch companies carried out negotiations for the purchase, in which they also met and/or had exchanges with the Nigerian President, Attorney General, and Oil Minister. The sale was finally concluded in April 2011, with three resolution agreements signed by the government, the two companies and the former Oil Minister's company. The two companies paid approximately USD 1.3 billion in exchange for the licence free of all legal claims. The government would then transfer approximately USD 1 billion to the former Oil Minister's company.

Italian prosecutors filed foreign bribery charges against the Italian and Anglo-Dutch companies, and 13 individuals including the companies' executives, several intermediaries, and the former Oil Minister. The prosecution alleged that the two companies had a corruption agreement with the Nigerian President, Attorney General, and Oil Minister. Other officials who were involved in the negotiations were considered intermediaries. According to the prosecutors' theory, part of the sum paid to the former Oil Minister's company was destined to these public officials as remuneration for the agreement.

In March 2021, a first instance court acquitted all accused of foreign bribery. The court found no direct evidence that the companies negotiated a corrupt agreement with the Nigerian public officials. In July 2022, the prosecution conceded the appeal and the acquittals became final. In related proceedings, two alleged

intermediaries were convicted in the first instance after opting for a “fast-track trial”. They were also acquitted after the prosecution conceded the appeal in 2021.

Oil and Gas (Algeria)

A major Italian company in oilfield services, and subsidiary of an oil and gas Italian multinational, allegedly bribed Algerian public officials to win contracts from the state-owned oil company Sonatrach. Between 2007 and 2010, the company allegedly paid over EUR 197 million in bribes to win seven contracts worth over EUR 8 billion from Sonatrach. The bribes were allegedly also paid to obtain the authorisation for the acquisition of a Canadian company and the extension of concessions. The alleged bribes were mainly destined to the Minister of Energy, as well as his family and members of his entourage, and to Sonatrach’s CEO. Most of the payments were disguised as fees paid under contracts with companies controlled by an intermediary and close associate of the Energy Minister.

In 2015, the former president of the company’s Algerian subsidiary co-operated with the authorities and entered into *patteggiamento*, under which he was sentenced to 2 years and 10 months imprisonment and was imposed confiscation. In 2018, a first instance court convicted the Italian company as well as several of its executives and intermediaries of foreign bribery. The court entered acquittals for the separate transaction related to the acquisition of a Canadian company. The company’s parent and its executives were acquitted also in relation to the Sonatrach transactions. In January 2020, the Court of Appeal quashed the convictions and acquitted all defendants, holding that bribery was not proven. The Supreme Court upheld the acquittals in December 2020.

Other jurisdictions have imposed sanctions in the same case, however. In April 2020, the parent company settled charges over the same allegations with the US Securities and Exchange Commission that it violated the books and records and internal controls provisions of the FCPA. The company agreed to pay USD 24.5 million in disgorgement and prejudgment interest. In February 2022, an Algerian court found that the company “obtained a contract, with a price higher than the expected value, concluded with a state-owned commercial and industrial company, benefitting of the influence of representatives of that company”; and made “false custom declarations”. The company was sentenced to pay EUR 192 million, and two former employees received imprisonment sentences. The former Energy Minister and Sonatrach CEO were also convicted. This judgment is not final and the company intends to appeal.

Steel Pipes Supply (Brazil)

Three executives of an Argentine-Italian corporate group allegedly paid EUR 6.6 million in bribes in 2009-2014 to a director of Petrobras, a Brazilian state-owned oil company. Petrobras then awarded 22 contracts worth EUR 1.4 billion for steel pipes to the corporate group’s Brazilian subsidiary. In 2019, Milan prosecutors charged the three executives and the corporate group’s holding company with foreign bribery. In delivering its oral verdict in May 2022, the trial court dismissed the case because “the criminal prosecution should not have been initiated for lack of Italian jurisdiction”. The decision is not final. This report does not consider the court’s reasons for judgment as they were provided only shortly before the report’s adoption.

Another jurisdiction has imposed sanctions, however. In June 2022, an Italian company of the group settled charges over the same allegations with the US Securities and Exchange Commission that it violated the FCPA’s anti-bribery, books and records and internal controls provisions. The company agreed to pay a USD 25 million civil penalty and USD 53 million in disgorgement and prejudgment interest.

Annex 2. Phase 3 Recommendations to Italy

Phase 3 Recommendation	*Status at 2014 Written Follow-up*
Recommendations Concerning Investigation, Prosecution and Sanctioning of Foreign Bribery	
1. Regarding the foreign bribery offence, the Working Group recommends that Italy:	
(a) Amend its legislation without delay to exclude the application of *concussione* as a possible defence to foreign bribery; and	Fully Implemented
(b) Assess any amendment changing the application of *concussione* as a possible defence to foreign bribery independently of similar amendments dealing with the offence in relation to domestic bribery [Convention, Article 1; 2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 7(a)].	Partially Implemented
2. Regarding the responsibility of legal persons, the Working Group recommends that Italy take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among the prosecuting authorities throughout the country, to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently and diligently, with a view to avoiding the dismissal of these cases based on statute of limitations grounds [Convention, Article 2, Phase 2 Evaluation, recommendation 7(b)].	Not Implemented
3. Regarding sanctions, the Working Group recommends that Italy:	
(a) Consider making available to judges both the imposition of imprisonment and fines in cases of offences of foreign bribery perpetrated by natural persons as a useful additional deterrent [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];	Partially Implemented
(b) Increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through *patteggiamento* procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];	Not Implemented
(c) Strengthen its efforts to compile at the national level, for future assessment, information and statistics on cases concluded and sanctions imposed for the foreign bribery offence in a manner that differentiates between (i) sanctions imposed on natural and legal persons for the offence of foreign bribery and (ii) the procedures applied (court decision with a full hearing, *patteggiamento* or other procedural step), in order to allow Italy to effectively review its laws implementing the Convention and its approach to enforcement [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V, Phase 2 evaluation, follow-up issue 8(e)];	Partially Implemented

Phase 3 Recommendation	*Status at 2014 Written Follow-up*
4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Italy:	
(a) Further develop and deliver a consistent foreign bribery training module to police services that may become involved in investigating foreign bribery cases, in particular to the Guardia di Finanza, and continue to deliver a foreign bribery training module to all prosecutors and judges likely to be involved in foreign bribery cases throughout the country [2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 1(a)];	Fully Implemented
(b) Use proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations, in addition to having Italian embassies and consular offices report suspicions of crime and acquire information about related legal proceedings in the foreign jurisdictions;	Fully Implemented
(c) Considering taking the following steps to ensure effective investigations and prosecution: (i) establishing specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; (ii) establishing working groups specialised in the foreign bribery offence within the Public Prosecutor's Offices that are the most likely to be involved in foreign bribery; (iii) raising awareness at national level about the need to prioritise the investigation of foreign bribery offence; and (iv) reinforcing the resources available in PPOs and tribunals to deal with foreign bribery; and [2009 Recommendation III(ii) and V];	Partially Implemented
(d) Consider the establishment of a national database for all on-going cases, in line with private data protection legislation, with a view to ensure coordination of foreign bribery investigations nationally and to avoid intelligence gaps [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V];	Not Implemented
(e) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through *patteggiamento*, such as the reasons why *patteggiamento* was deemed appropriate in a specific case and the terms of the arrangement, in particular, the amount agreed to be paid [Convention, Article 3, Phase 2 evaluation, follow-up issue 8(e)]; and	Not Implemented
(f) Urgently (i) take the necessary steps to significantly extend, including for "first time offenders," the length of the "ultimate" limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means; and (ii) re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals (as extended according to (i) above) [Convention, Article 6, Phase 2 recommendation 7(b)].	Partially Implemented
Recommendations Concerning Prevention, Detection, and Reporting of Foreign Bribery	
5. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Italy (a) in relation to the public sector, further improve training programmes that address foreign bribery, including among foreign embassies abroad, with a view to assist public officials to be alert to instances of foreign bribery; and (b) in relation to the private sector, continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence [2009 Recommendation III(i), IX and X.C.].	Fully Implemented
6. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Italy (a) continue to remind public officials of their obligation under article 331 CCP to report suspicions of foreign bribery detected in the course of performing their duties to law enforcement; and (b) create and publicize a clear means by which private individuals can report suspicions of foreign bribery [2009 Recommendation IX(ii); Phase 2 evaluation, recommendation 1(b)].	Partially Implemented
7. Regarding whistleblower protection, the Working Group recommends that Italy (a) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and (b) take steps to raise awareness of these mechanisms [2009 Recommendation IX(iii), Phase 2 evaluation, recommendation 2].	Partially Implemented

Phase 3 Recommendation	*Status at 2014 Written Follow-up*
8. Regarding money laundering, the Working Group recommends that Italy maintain statistics on (a) sanctions in money laundering cases; (b) the predicate offence for money laundering, with a view to identifying cases where foreign bribery is a predicate offence; and (c) STRs that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].	Partially Implemented
9. Regarding accounting and auditing requirements, the Working Group recommends that Italy:	
(a) Ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (i) monetary thresholds, (ii) whether the offence is committed in relation to listed or non-listed companies, and (iii) whether the offence causes damage to shareholders or creditors [2009 Recommendation X.A(iii); Phase 2 recommendation 3]; and	Not Implemented
(b) Engage in awareness-raising activities with auditors, including through providing training regarding (i) the detection of indications of suspected acts of foreign bribery; (ii) the obligation under LD 58/1998 to report such acts to company management and criminal law enforcement authorities; and (iii) the legal protections that may be available to auditors who report suspicions of wrongful conduct [2009 Recommendation X.B];	Not Implemented
10. Regarding corporate compliance, internal controls and ethics programs, the Working Group recommends that Italy encourage companies, particularly SMEs, (a) to adopt or further develop adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery; and (b) to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures for preventing and detecting bribery [2009 Recommendation X.C, Annex II].	Fully Implemented
11. Regarding public procurement, the Working Group recommends that Italy (a) establish mechanisms for verifying, when necessary, information submitted by prospective public contractors, including declarations regarding whether they have been previously convicted for foreign bribery and whether they are listed on IFI debarment lists; and (b) extend the grounds for debarment from public tenders administered by AVCP and other agencies to cover all offences falling within the scope of Article 1 of the Convention, not just those involving EU officials [2009 Recommendation XI(ii)].	Partially Implemented
12. Regarding export credit, the Working Group recommends that Italy require SACE and CONSIP to formalise procedures to be followed by employees for reporting credible evidence of the bribery of a foreign official to law enforcement [2009 Recommendation IX].	Partially Implemented
Phase 3 Follow-up by Working Group	*Status at Written Follow-up*
13. The Working Group will follow up on the issues below as case law and practice develop:	
(a) The interpretation by the Italian Supreme Court of Cassation with regard to the definition of foreign public official and the implementation of the principle of "ex officio" ascertainment by the judge of the law of the foreign public official's country to ensure that is compatible with the requirement of an autonomous definition [Convention, Article1];	Continue to follow up
(b) The application of the defence of organisational model available to legal persons under CLL, articles 6(1) and 7 [Convention, Article 2, 2009 Recommendation IV, Annex I, B];	Continue to follow up
(c) Whether CLL imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery [Convention, Article 2, 2009 Recommendation IV, Annex I, B];	Continue to follow up
(d) Whether both the bribe and the proceeds of the bribery of a foreign public official are subject to seizure and confiscation in Italy [Convention, Article 3.3];	Continue to follow up
(e) The status of bills A.S. 733-bis, A.C. 3986 and A.S. 1454, which would criminalise self-laundering [Convention, Article 7];	Continue to follow up

Phase 3 Recommendation	*Status at 2014 Written Follow-up*
(f) Whether the methodology for conducting tax audits is adequate in terms of (i) the basis of risks considered when deciding which companies to audit and (ii) the time-lag between audits [2009 Recommendation I(ii)];	Continue to follow up
(g) The impact of special tax programs, such as tax amnesty programmes, on tax officials' ability to detect suspicions of foreign bribery [2009 Recommendation III(iii); 2009 Tax Recommendation II; Phase 2 evaluation, recommendation 6];	Continue to follow up
(h) Implementation of the extension of Italy's external audit requirements to cover certain non-listed companies [2009 Recommendation X.B];	Continue to follow up
(i) Italy's ability to extradite an individual (i) where that person raises the *concussione* as a defence to prevent extradition and (ii) where the statute of limitations for the foreign bribery offence has expired in Italy [Convention, Article 10].	Continue to follow up

Annex 3. On-site visit participants

Public Sector

- Ministry of Justice
- Ministry of Foreign Affairs and International Co-operation (MAECI)
- Revenue Agency (*Agenzia delle Entrate*)
- National Anti-Corruption Authority (ANAC)
- Inter-Institutional Board of Experts against Corruption (*Tavolo Inter-istituzionale anti-corruzione*)
- Italian National School of Public Administration (*Scuola Nazionale dell'Amministrazione*)
- Ministry of the Interior
- Bank of Italy
- Financial Intelligence Unit (*Unità d'Informazione Finanziaria*)
- *Commissione Nazionale per le Società e la Borsa* (CONSOB)
- *Servizi Assicurativi del Commercio Estero S.p.A.* (SACE)
- *Società Italiana per le Imprese all'Estero* (SIMEST)
- *Concessionaria Servizi Informativi Pubblici S.p.A.* (CONSIP)
- *Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili* (CNDCEC)

Police

- Guardia di Finanza
- State Police (*Polizia di Stato*), Anti-corruption Division

Judiciary

Courts

- Supreme Court of Cassation
- Court of Appeal of Milan
- Court of Appeal of Turin
- Court of Appeal of Naples
- Court of 1st Instance of Milan

Public Prosecutor's Office

- Supreme Court of Cassation
- Court of Appeal of Milan
- Court of 1st Instance of Genoa
- Court of 1st Instance of Locri
- Court of 1st Instance of Milan
- Court of 1st Instance of Naples
- Court of 1st Instance of Rome
- Court of 1st Instance of Siena
- Court of 1st Instance of Udine
- National Anti-Mafia Prosecutor's Office

Parliament

- Anna Rossomando

Private Sector

Private Enterprises

- Eni S.p.A.
- Ferrovie dello Stato Italiane S.p.A.
- Intesa San Paolo
- Leonardo S.p.A.
- Pietro Fiorentini S.p.A.
- Unicredit

Business Associations

- CONFINDUSTRIA (*Confederazione generale dell'industria italiana*)
- Association of Italian Joint Stock Companies (*Associazione fra le società italiane per azioni*, Assonime)
- Italian Banking Association
- Confederation of Chambers of Commerce (*Unione Italiana delle Camere di Commercio Industria e Artigianato*, Unioncamere)
- National Council of Notaries (*Consiglio Nazionale del Notariato*)

Lawyers and Legal Academics

- Maurizio Bellacosa
- Francesco Centonze
- Gian Luigi Gatta
- Antonio Gullo
- Stefano Manacorda
- Carla Manduchi
- Vincenzo Mongillo

Accounting and auditing profession

- Deloitte Financial Advisory S.r.l.

Civil Society and media

- Global Witness
- ReCommon
- Transparency International Italia
- Corriere della Sera
- La Repubblica
- Il Fatto Quotidiano
- Reuters Italy

Annex 4. List of abbreviations and acronyms

AML	anti-money laundering
Art.	Article
AICS	Italian Agency for Development Co-operation
ANAC	*Autorità Nazionale Anticorruzione* (National Anti-Corruption Authority)
AVCP	*Autorità per la vigilanza sui contratti pubblici di lavori, servizi e furniture* (Authority for the Supervision of Public Contracts for Works, Services and Supplies)
BoI	Bank of Italy
CC	Criminal Code
CCP	Code of Criminal Procedure
CDP	*Cassa Depositi e Prestiti*
CHF	Swiss franc
CONSIP	Concessionaria Servizi Informativi Pubblici S.p.A.
CONSOB	*Commissione Nazionale per le Società e la Borsa* (securities market regulator)
CSM	*Consiglio Superiore della Magistratura* (Superior Council of the Judiciary)
DGCS	Directorate-General for Development Co-operation, MAECI
EAW	European Arrest Warrant
EIO	European Investigation Order
EUR	euro
FATF	Financial Action Task Force
IFRS	International Financial Reporting Standards
ISA	International Standards on Auditing
LD	legislative decree
MAECI	Ministry of Foreign Affairs and International Co-operation (*Ministero degli affari esteri e della cooperazione internazionale*)
MDB	multilateral development bank
MEF	Ministry of Economy and Finance (*Ministero dell'Economia e delle Finanze*)
MLA	mutual legal assistance
MOJ	Ministry of Justice
ODA	official development assistance
PEP	politically exposed person
PIE	public interest entity
PPO	Public Prosecutor's Office
SACE	*Servizi Assicurativi del Commercio Estero S.p.A.* (export credit agency)
SAET	*Servizio Anticorruzione e Trasparenza* (Anti-corruption and Transparency Service)
SIMEST	*Società Italiana per le Imprese all'Estero* (trade promotion agency)
SME	micro, small or medium-sized enterprise
SNA	National School of Public Administration (*Scuola Nazionale dell'Amministrazione*)
SOE	state-owned or controlled enterprise
STR	suspicious transaction report (money laundering)
UIF	*Unità d'Informazione Finanziaria* (financial intelligence unit)
UNCAC	United Nations Convention against Corruption
USD	United States dollar

Annex 5. Excerpts of relevant legislation

Criminal Code

Article 317 - *Concussione*

A public official or a person in charge of a public service who, by abusing his quality or powers, coerces someone to give or unduly promise, to himself or a third party, money or other advantages shall be sentenced to imprisonment from six to twelve years.

Article 317bis - Ancillary penalties

The conviction for the offences referred to in Articles 314, 317, 318, 319, 319-bis, 319-ter, 319-quarter, first paragraph, 320, 321, 322, 322-bis and 346-bis shall entail a perpetual ban from public office and an inability in perpetuity to contract with the public administration, except to obtain the services of a public service. However, if imprisonment is imposed for a period not exceeding two years or if the mitigating circumstance provided for in the first paragraph of Article 323-bis occurs, the sentence shall entail temporary disqualification and prohibition, for a period of not less than five years or more than seven years.

Where the mitigating circumstance provided for in the second paragraph of Article 323a occurs, the conviction for the offences provided for therein shall include the ancillary penalties referred to in the first paragraph of this Article for a period of not less than one year or more than five years.

Article 318 - Bribery for the performance of one's functions

A public official who, in order to perform his functions or powers, unduly receives for himself or others, money or other advantages, or accepts the promise thereof, shall be sentenced to imprisonment from three to eight years.

Article 319 - Bribery for the performance of an act contrary to official duties

A public official who, in order to omit or delay or having omitted or delayed an act related to his office, or in order to perform or having performed an act contrary to the duties of his office, receives for himself or others money or other advantages, or accepts the promise thereof, shall be sentenced to imprisonment from six to ten years.

Article 319bis - Aggravating circumstances

The penalty is increased if the fact referred to in Article 319 has as its object the conferral of public employment or salaries or pensions, or the conclusion of contracts in which the administration to which the public official belongs is concerned as well as the payment or reimbursement of taxes.

Article 319ter - Corruption in judicial proceedings

If the facts specified in Articles 318 and 319 are committed with a view to favouring or damaging a party to a civil, criminal or administrative proceeding, the punishment shall be a term of imprisonment from six to twelve years.

If the fact gives rise to an unfair conviction to imprisonment for no longer than five years, the punishment shall be imprisonment from six to fourteen years; if it gives rise to an unfair conviction to imprisonment for longer than five years or to life imprisonment, the punishment shall be a term of imprisonment from eight to twenty years.

Article 319quater - Undue inducement to give or promise advantages

Unless the act constitutes a more serious offence, a public official or a person in charge of a public service who, by abusing his/her capacity or powers, induces someone to unduly give or promise, to himself/herself or others, money or other advantages, shall be punished by a term of imprisonment of six years to ten years and six months.

In the cases provided for under paragraph 1, the person who gives or promises money or other advantages shall be punished by a term of imprisonment of up to three years and, when the offence causes harm to the financial interests of the European Union and the damage or profit amounts to more than 100,000 Euros, the sentence shall be a term of imprisonment of up to four years»

Article 320 - Bribery of persons charged with a public service

The provisions of Articles 318 and 319 shall also apply to persons charged with a public service. In any case, the punishment shall be reduced by no more than one third.

Article 321 - Sanctions for the briber

The sanctions laid down in Article 318, Article 319, Article 319-bis, Article 319-ter and in Article 320 in relation to the aforementioned hypotheses of Articles 318 and 319, also apply to those who give or promise to the public official or to the person in charge of a public service the money or other advantages.

Article 322 - Incitement to bribery

Any person who offers or promises money or other undue advantages to a public official or a person in charge of a public service, for the exercise of his duties or powers, shall be subject, where the offer or promise is not accepted, to the penalty laid down in the first paragraph of Article 318, reduced by one third.

If the offer or promise is made to induce a public official or a person in charge of a public service to omit or delay an act of his office, or to perform an act contrary to his duties, the offender shall be subject, if the offer or promise is not accepted, to the penalty laid down in Article 319, reduced by one third.

The sanction referred to in the first paragraph shall apply to a public official or a person in charge of a public service who seeks a promise or bestowal of money or other benefits for the exercise of his duties or powers.

The sanction referred to in the second paragraph shall apply to a public official or a person in charge of a public service who requests a promise or bestowal of money or other benefits from a private individual for the purposes set out in Article 319.

Article 322bis - Embezzlement, *concussione*, undue inducement to give or promise an advantage, bribery and incitement to bribery of the members of international Courts, members of bodies of the European Communities or members of international parliamentary assemblies or international organizations and officials of the European Communities and foreign States.

The provisions set forth in articles 314, 316, from 317 to 320 and 322, third and fourth paragraphs, shall also apply:

1) to the members of the Commission of the European Communities, of the European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;

2) to contracted officials and agents in accordance to either Staff Regulations applying to officials of the European Communities or to the provisions applying to agents of the European Communities;

3) to any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions corresponding to those performed by the officials or agents of the European Communities;

4) to members and servants of bodies created on the basis of the Treaties establishing European Communities;

5) to those who, within other Member States of the European Union, carry out functions or activities corresponding to those performed by public officials or persons in charge of a public service;

5bis) to judges, prosecutors, deputy prosecutors, officials and agents of the International Criminal Court, to any person seconded by the States party to the Treaty establishing the International Criminal Court who carries out functions corresponding to those performed by the officials or agents of the International Criminal Court, to members and servants of bodies created on the Treaty establishing the International Criminal Court;

5ter) to any person who, within international public organizations, carries out functions or activities corresponding to those performed by public officials or persons in charge of a public service;

5quater) to members of international parliamentary assemblies or of international or supranational organizations and judges and officials of international courts;

5quinquies) to any person who, within States other than Member States of the European Union, carries out functions corresponding to those performed by public officials or persons in charge of a public service, if the fact harms financial interests of the European Union.

The provisions set forth in Articles 319-quater, second paragraph, 321 and 322, first and second paragraphs, shall also apply whereas the money or other benefits are given, offered or promised:

1) to persons who are referred to in the first paragraph of this article;

2) to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or within public international organisations.

Persons indicated in the first paragraph are assimilated to public officials, whereas they carry out equivalent functions, and to persons in charge of a public service in all the other cases.

Article 322ter - Confiscation

In the event of conviction, or application of the penalty at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure, for one of the offences referred to in Articles 314 to 320, even if committed by the persons referred to in the first paragraph of Article 322-bis, the confiscation of the property constituting its profit or price shall always be ordered, unless they belong to a person unrelated to the offence, or, where that is not possible, the confiscation of property, of which the offender has the availability, for a value corresponding to that price or profit.

In the event of a conviction, or of the application of the penalty pursuant to Article 444 of the Code of Criminal Procedure, for the offence provided for in Article 321, even if committed pursuant to the second paragraph of Article 322-bis, the confiscation of the property constituting the profit is always ordered unless it belongs to a person unrelated to the crime, or, where it is not possible, the confiscation of property, of which the offender has the availability, for a value corresponding to that of that profit and, in any case, not less than that of money or other advantages given or promised to the public official or to the person in charge of a public service, or to the other subjects indicated in article 322-bis, second paragraph.

In the cases referred to in the first and second paragraphs, the judge, with the sentence of conviction, determines the sums of money or identifies the assets subject to confiscation as constituting the profit or the price of the crime or as having a value corresponding to the profit or price of the crime.

Art. 322ter.1 - Judicial custody of seized assets

Assets seized in the context of criminal proceedings relating to the crimes referred to in Article 322-ter, other than money and financial resources, may be entrusted by the judicial authority in judicial custody to the bodies of the judicial police that request it for their operational needs.

Art. 322quater - Pecuniary reparation

With a judgment of conviction for the offences provided for in Articles 314, 317, 318, 319, 319ter, 319quater, 320, 321 and 322bis, a sum of money of equivalent value to the price or profit of the crime shall always be ordered as pecuniary reparation in favour of the public administration that has been damaged by the conduct of a public official or a person in charge of a public service, without prejudice to compensation for damages.

[…]

Article 648 - Receiving

Apart from cases of participation in the offence, whoever, in order to procure a profit for himself or others, buys, receives or conceals money or things deriving from any crime, or in any case interferes in making them buy, receive or conceal them, is punished to imprisonment from two to eight years and to a fine of EUR 516 to EUR 10 329.

The punishment is increased when the fact concerns money or things deriving from crimes of aggravated robbery pursuant to article 628(3), of aggravated extortion pursuant to article 629(2) or aggravated theft pursuant to article 625(1)(7-bis).

The penalty is imprisonment for up to six years and a fine of up to € 516 if the offence is particularly minor.

The provisions of this article also apply when the perpetrator of the offence from which the money or things comes is not attributable or not punishable or when there is no condition of admissibility related to such offence.

Article 648bis - Money laundering

Apart from the cases of participation in the offence, whoever replaces or transfers money, goods or other benefits deriving from an intentional offence, or performs other transactions in connection with them, in such a way as to prevent the identification of their unlawful origin, shall be liable to imprisonment for from four to twelve years and to a fine of from € 5,000 up to € 25,000.

The punishment shall be increased if the offence is committed in the exercise of a professional activity.

The punishment shall be reduced if the money, goods or other benefits derived from an offence punished by a maximum term of imprisonment of less than five years.

The last paragraph of Article 648 shall apply.

Article 648ter - Use of money, good or benefits of unlawful origin

Apart from the cases of participation in the offence, and the cases provided for by Articles 648 and 648-bis, whoever uses for economic or financial activities money, goods or other benefits of unlawful origin, shall be liable to imprisonment for from four to twelve years and by a fine of € 5,000 up to € 25,000).

The punishment shall be increased if the offence is committed in the exercise of a professional activity.

The punishment shall be reduced in the case set out in Article 648, paragraph 2.

The last paragraph of Article 648 shall apply.

Article 648ter.1 - Self-laundering

Whoever, having committed or participated in the commission of an intentional offence, uses, replaces, transfers in economic, financial, business and speculative activities, money, goods or other benefits derived from the commission of such offence, in such a way as to actively prevent the identification of their unlawful origin, shall be liable to imprisonment for from two to eight years and to a fine of from € 5,000 up to € 25,000.

The punishment shall be imprisonment for from one to four years and a fine of from € 2,500 to € 12,500 if the money, goods or other benefits derived from an intentional offence punished by a maximum term of imprisonment of less than five years.

The punishments set out in the first paragraph shall apply in any case if the money, goods or other benefits derived from an offence committed under the conditions and for the purposes as per Article 7 of Decree Law No. 152 of 13 May 1991, converted, after amendment, into Law No. 203 of 12 July 1991, and subsequent amendments.

Apart from the cases referred to in the previous paragraphs, any conduct in relation to which the money, goods or other benefits are intended merely for personal use or personal enjoyment, shall not be punishable.

The punishment shall be increased if the illicit actions are committed in the exercise of banking or financial activities or other professional activity.

The punishment shall be reduced by up to a half for those who have acted effectively in order to prevent the criminal conduct from having further consequences, or to ensure evidence of the offence and to identify the goods, money and other benefits derived from the offence.

The last paragraph of Article 648 shall apply

Corporate liability (Legislative Decree 231/2001)

Chapter I Corporate Administrative Liability

Section I General Principles and Criteria for Attributing Administrative Liability

[…]

Article 5 - Liability of The Entity

1. The entity is liable for the crimes committed in its interest or to its advantage:

> a) by individuals who hold the position of representatives, directors or managers of the entity or of one of its organizational units that enjoys financial and functional independence, as well as individuals who are responsible, including *de facto*, for the management or control of the entity;
>
> b) by individuals subject to the management or supervision of one of the persons/entities referred to in letter a).

2. The entity is not responsible if the individuals referred to in paragraph 1 have acted exclusively in their own interest or in the interest of a third party.

Article 6 - Senior managers and the entity's organisational models

1. If the crime has been committed by an individual indicated in Article 5, paragraph 1, letter a), the entity is not liable if it can prove that:

> a) before the act was committed, the management body adopted and effectively implemented organisational models designed to prevent the type of crimes committed;

b) the task of ensuring that the organisational models function and are observed, and that they are kept up to date, has been allocated to a unit of the entity with autonomous powers of initiative and control;

c) the persons committed the crime by fraudulently circumventing the organisational models;

d) there was neither insufficient supervision nor a lack of supervision by the unit referred to in letter b).

2. In relation to the extension of delegated powers and the risk of committing crimes, the organisational models referred to in letter a) of paragraph 1 must:

a) identify the activities where crimes may be committed;

b) set out specific protocols designed to assist management in formulating and implementing the entity's decisions in relation to the crimes to be prevented;

c) identify methods for managing the financial resources necessary for preventing the crimes;

d) set out obligations for sending information to the unit responsible for supervising the functioning and observance of the organisational models;

e) introduce a disciplinary system that penalises failure to comply with the measures set out in the organisational model.

2-bis. The organisational models referred to in letter a) of paragraph 1 establish:

a) one or more channels that allow the persons indicated in Article 5, paragraph 1, letters a) and b), to submit - in protection of the integrity of the entity - detailed reports of unlawful conduct under this decree that are based on clear and coherent facts, or violations of the entity's organisational model which they became aware of due to the functions they perform; these channels must guarantee the confidentiality of the identity of the whistleblower in the management of the report;

b) at least one alternative whistleblowing channel capable of guaranteeing the confidentiality of the identity of the whistleblower using computerized methods;

c) a ban on acts of retaliation or discrimination - direct or indirect - against the whistleblower for reasons connected directly or indirectly to the report;

d) in the disciplinary system adopted pursuant to paragraph 2 letter e), sanctions against those who violate the measures to protect the whistleblower, as well as those who carry out, with malice or gross negligence, reports that prove to be unfounded.

2-ter. The adoption of discriminatory measures against the whistleblowers referred to in paragraph 2-bis may be reported to the National Labor Inspectorate, for the measures under its jurisdiction, not only by the whistleblower but also by their chosen trade union organization.

2-quater. The retaliatory or discriminatory dismissal of the whistleblower is invalid. A change of responsibilities as defined in Article 2103 Civil Code, as well as any other retaliatory or discriminatory measure adopted against the reporting party are also invalid. It is the employer's responsibility, in case of disputes related to the imposition of disciplinary sanctions or demotions, dismissals, transfers or subjection of the whistleblower to another organizational measure having direct or indirect negative effects on their working conditions after the submission of the report, to demonstrate that these measures are based on reasons not related to the report.

3. Organisational models can be adopted, meeting the requirements of paragraph 2, on the basis of codes of conduct drawn up by industry associations, submitted to the Ministry of Justice which, in collaboration with other relevant ministries, will issue an opinion within 30 days on the adequacy of the organisational models for the prevention of the crimes.

4. In small entities, the duties referred to in paragraph 1, letter b), can be carried out directly by the management body.

4-bis. In corporations, the board of statutory auditors, the supervisory board and the management control committee may perform the functions of the supervisory body indicated in paragraph 1, letter b, above.

5. Any profit made by an entity as a result of a crime may be confiscated, including in the form of equivalent assets.

Article 7 - Individuals subject to management by others and organisational models for entities

1. In the case envisaged in Article 5, paragraph 1, letter b), the entity is liable if the commission of the crime was possible due to failure to comply with management and supervision obligations.

2. In any case, failure to comply with management and supervision obligations is excluded if the entity, before the commission of the crime, adopted and effectively implemented a organisational model suitable for preventing crimes of the type carried out.

3. In view of the nature and size of the organization, as well as the type of activity it performs, the organisational model contains suitable measures to ensure the activity is performed in accordance with the law and to detect and promptly eliminate risks.

4. Effective implementation of the organisational model requires:

a) periodic verification and possible modification of the organisational model when significant violations of the regulations are discovered or when the organization or its activities undergo changes;

b) a disciplinary system penalizing failure to comply with the measures set out in the organisational model.

Article 8 - Autonomy of the liability of the entity

1. An entity is also liable when:

a) the perpetrator of the crime has not been identified or cannot be charged;

b) the crime is no longer punishable for a reason other than an amnesty.

2. Unless the law states differently, an entity is not prosecuted if an amnesty has been granted for a crime for which it is held liable and the offender has declined the application of the amnesty.

3. An entity can decline an amnesty.

SECTION II General penalties

Article 9 - Administrative penalties

1. The penalties for administrative offences arising from crimes are:

a) financial penalties;

b) interdictive penalties;

c) confiscation;

d) publication of judgment.

2. The interdictive penalties are:

a) a ban on performing the activity;

b) the suspension or withdrawal of authorizations, licenses or permits enabling the commission of the offence;

c) a ban on contracting with the public administration, other than to obtain a public service;

d) the exclusion from concessions, loans, grants and subsidies and possible revocation of those already granted;

e) ban on advertising goods or services.

Article 10 - Administrative fine

1. For administrative offences arising from a crime, financial penalties are always applied.

2. Financial penalties are applied of not less than a hundred units and not more than a thousand units.

3. The amount of a unit is not less than €258.23 (five hundred thousand lire) and not more than €1,549.37 (three million lire).

4. Reduced payment is not allowed.

Article 11 - Rules for the proportioning of financial penalties

1. In proportioning monetary sanctions the judge determines the number of units by taking into account the gravity of the case, the extent of the entity's responsibility and what has been done to eliminate or mitigate the consequences of the offence and prevent the commission of similar offences.

2. The amount of each unit is based on the economic and financial situation of the entity in order to ensure the effectiveness of the penalties.

3. In the cases envisaged in Article 12, paragraph 1, the amount of the unit is always €103.29 (two hundred thousand lire).

Article 12 - Reductions of financial penalties

1. Financial penalties are reduced by half and in any case cannot be more than €103,291.38 (two hundred million lire) if:

a) the perpetrator of the crime committed the act mainly in their own interests or in the interests of third parties and the entity did not receive any advantage or received a minimal advantage;

b) the financial damage caused is particularly minor;

2. The penalties are reduced by between a third to a half if, before the first-instance court hearing begins:

a) the entity has completely refunded the damage and has either eliminated the damaging or dangerous consequences of the crime or taken effective steps in this direction;

b) the entity has adopted and put into practice a organisational model to prevent crimes of the type in question.

3. In cases where both the conditions referred to in the letters of the previous paragraph apply, the sanctions are reduced by between a half and two-thirds.

4. In any case, the financial penalties cannot be less than €10,329.14 (twenty million lire).

Article 13 - Interdictive penalties

1. Interdictive penalties apply to crimes for which they are expressly envisaged, when at least one of the following conditions exists:

a) the entity has gained a substantial profit and the crime was committed by senior managers, or by persons subject to the management of another individual, if the crime resulted from or was facilitated by serious organisational shortcomings;

b) in the event of repeated offending.

2. Without prejudice to article 25, paragraph 5, interdictive penalties last for not less than three months and not more than two years.

3. Interdictive penalties are not applied for those cases referred to in Article 12, paragraph 1.

Article 14 - Criteria for selecting interdictive penalties

1. Interdictive penalties apply to the specific activity to which the entity's offence relates. The judge determines the type and duration of the penalties on the basis of the criteria indicated in Article 11, taking into consideration the ability of each individual penalty to prevent the type of offence committed.

2. The ban on contracting with the public administration can also be limited to specific types of contract or to specific administrations. The ban on performing an activity implies the suspension or withdrawal of authorizations, licenses or permits necessary to perform the activity.

3. If necessary, interdictive penalties can be applied jointly.

4. The ban on performing the activity only applies when other interdictive penalties are inadequate.

Article 15 - Court-appointed administrator

1. If the conditions exist for applying a interdictive penalty that results in the interruption of an entity's activities, the judge, when applying the penalty, will arrange for the entity's activities to continue under a court-appointed administrator for a period equal to the duration of the interdictive penalty applied, provided at least one of the following conditions applies:

a) the entity provides a public service or a service of public necessity, which if interrupted could cause serious harm to the general public;

b) interruption to the entity's activity could have significant repercussions on employment, given its scale and the economic conditions in the area where it is located.

2. In the judgment allowing the activity to continue, the judge indicates the responsibilities and powers of the court-appointed administrator, taking into account the specific activity in which the entity committed the offence.

3. In accordance with the responsibilities and powers indicated by the judge, the court-appointed administrator is entrusted with implementing organisational models suitable for preventing crimes of the type committed. The court-appointed administrator cannot carry out acts of extraordinary administration without the authorization of the judge.

4. Any profit deriving from the continuation of the activity is confiscated.

5. Continuation of the activity by a court-appointed administrator cannot be ordered if the interdictive penalty is definitive.

Article 16 - Permanent interdictive penalties

1. An entity can be permanently disqualified from carrying out an activity if the entity has obtained a significant profit from the crime and has been sentenced, at least three times in the last seven years, to temporary disqualification from carrying out the activity.

2. The judge may permanently ban the entity from contracting with the public administration or advertising goods or services if the entity has already been sentenced to the same penalty at least three times in the last seven years.

3. If an entity or one of its organizational units is permanently used for the sole or prevalent purpose of enabling or facilitating the commission of crimes for which it can be held liable, then disqualification from carrying out the activity is always permanent and the provisions contained in Article 17 do not apply.

Article 17 - Repairing the consequences of a crime

1. Without prejudice to the application of financial penalties, interdictive penalties are not applied if the following conditions exist before the first-instance court hearing begins:

a) the entity has completely refunded the damage and has either eliminated the damaging or dangerous consequences of the crime or taken effective steps in this direction;

b) the entity has eliminated the organizational deficiencies that allowed the crime to be committed by adopting and implementing organisational models suitable for preventing crimes of the type in question;

c) the entity has made available for confiscation the profit made from the offence.

Article 18 - Publication of the conviction

1.Publication of the conviction can be ordered when interdictive penalties are applied to the entity.

2. The judgment is published pursuant to Article 36 Criminal Code and by public notice in the municipality where the entity has its head office.

3. The publication of the judgment is arranged by the clerk of the court and paid for by the entity.

Article 19 - Confiscation

1. If convicted, the entity will always be subject to confiscation of the price or profit from the crime, excluding the part that could be returned to injured parties. This is without prejudice to any rights acquired by third parties in good faith.

2. If it is not possible to enforce confiscation pursuant to paragraph 1, then sums of money, goods or other assets of value equivalent to the price or of profit of the crime may be confiscated.

Article 20 - Repeated offending

1. Repeated offending occurs when an entity, having already been definitively found guilty for an offence arising from a crime, commits another within five years of the definitive judgment.

Article 21 - Multiple offences

1. If the entity is liable for multiple crimes committed through one action or omission, or as part of the same activity, and no definitive or non-definitive judgement has yet been passed for any of these crimes, then the financial penalty envisaged for the most serious offence, increased by up to three times, is applied. As a result of this increase, the quantum of the financial penalty cannot in any case be more than the sum of the penalties applicable for each offence.

2. In the cases referred to in paragraph 1, if the conditions exist for the application of interdictive penalties for one or more of the offences, then the sanction for the most serious offence is applied.

Article 22 - Prescription (statute of limitation)

1. There is a time bar for administrative penalties of five years from the date of the crime being committed.

2. A request to apply precautionary measures and charging an administrative offence in accordance with Article 59 interrupts the time bar.

3. The time-bar period is reset as a result of the interruption.

4. If the interruption was due to charging the administrative offence arising from the crime, the time- bar period does not start until the judgment becomes final.

Article 23 - Non-compliance with interdictive penalties

1. Anyone who, when carrying out an activity for an entity for which penalties or precautionary measures have been applied, transgresses the obligations or prohibitions inherent in the penalties or measures, is liable to imprisonment for a term of between six months and three years.

2. In the case referred to in paragraph 1, the entity in whose interest or advantage the crime was committed is liable to an administrative fine of between two hundred and six hundred units and the confiscation of the profit in accordance with Article 19.

3. If the entity has made a significant profit from the crime referred to in paragraph 1, interdictive penalties are applied.

[…]

Article 25 - Embezzlement, extortion, illegal inducement to give or promise benefits, corruption and abuse of office

1. In relation to the commission of the crimes referred to in Articles 318, 321 and 322, paragraphs 1 and 3 and 346-bis of the Criminal Code, a financial penalty of up to two-hundred units shall be applied. The same penalty applies when the crime is committed against the financial interests of the European Union, in relation to the commission of the other offences referred to in Articles 314, paragraph 1, 316 and 323 of the Criminal Code.

2. In relation to the crimes referred to in Articles 319, 319-ter, paragraph 1, 321, 322, paragraphs 2 and 4 Criminal Code, the entity shall be punished by a financial penalty of two hundred to six hundred units.

3. In relation to the commission of the crimes referred to in Articles 317, 319, aggravated as per Article 319-bis when the entity has obtained a significant amount of profit, 319-ter, paragraph 2, 319-quater and 321 of the Criminal Code, the entity shall be imposed a financial penalty of three hundred to eight hundred units.

4. The financial penalties for crimes envisaged in paragraphs 1 to 3 shall also be applied to the entity when offences are committed by the individuals indicated in Articles 320 and 322-bis.

5. In cases of conviction for one of the crimes indicated in paragraphs 2 and 3, the interdictive penalties envisaged in Article 9, paragraph 2 shall be applied for a period of not less than 4 years and not more than 7 years, if the offence was committed by one of the persons referred to in Article 5, paragraph 1, letter a), and for no less than two years and no more than four years, if the offence was committed by one of the persons referred to in article 5, paragraph 1, letter b).

5-*bis*. If before a first-instance judgment an entity has effectively endeavoured to avoid any further consequences of the criminal activity, to secure evidence of the crimes and identify perpetrators or for the purposes of seizing money or other benefits transferred, and it has eliminated the organisational deficiencies that gave rise to the crime by adopting and implementing organisational models suitable to prevent crimes of the type that occurred, interdictive penalties shall have the duration established by Article 13, paragraph 2.

[…]

Article 25ter - Corporate crimes

1. In relation to the corporate crimes envisaged by the Civil Code, the entity is subject to the following financial penalties:

a) for the crime of false corporate reporting envisaged by Article 2621 Civil Code, the financial penalty of two hundred to four hundred units;

a-*bis*) for the crime of false corporate reporting envisaged by Article 2621-bis Civil Code, the financial penalty of one hundred to two hundred units;

b) for the crime of false corporate reporting envisaged by Article 2622 Civil Code, the financial penalty of four hundred to six hundred units; […]

[…]

Article 25octies - Receiving, laundering and using money, goods or assets of unlawful origin, as well as self-laundering

1. In relation to the crimes referred to in Articles 648, 648-bis, 648-ter, 648-ter.1 of the Criminal Code, the entity is subject to a financial penalty of four hundred to eight hundred units. In cases where the money, goods or other profits come from an offence where the maximum prison term is set at five years or more, monetary sanctions of between four hundred and one thousand units are applied.

2. In the case of a conviction for one of the crimes indicated in paragraph 1, the interdictive penalties contained in Article 9, paragraph 2 are applied for a period of not more than two years.

3. In relation to the offences referred to in paragraphs 1 and 2, the Ministry of Justice, after hearing the opinion of the Financial Information Unit (UIF), issues an opinion in accordance with Article 6 Legislative Decree 231 of 8 June 2001.

False accounting (Civil Code)

Article 2621 (False corporate reporting)

Outside the cases covered by art. 2622, directors, general managers, managers responsible for preparing the company's accounting documents, statutory auditors and liquidators, who, in order to obtain an undue profit for themselves or others, in the financial statements, reports or other corporate communications addressed to the shareholders or the public provided for by law, knowingly state relevant material facts that do not correspond to the truth or omit relevant material facts the communication of which is required by law concerning the economic, balance sheet, or financial situation of the company or the group to which it belongs, in a way that is concretely likely to mislead others, are punished with imprisonment from one to five years.

The same punishment also applies if the falsehoods or omissions concern assets owned or managed by the company on behalf of third parties.

Article 2622 (False corporate reporting of listed companies)

Directors, general managers, managers responsible for preparing the company's accounting documents, statutory auditors and liquidators of companies issuing financial instruments admitted to trading on an Italian or any other European Union country regulated market, who, in order to obtain an undue profit for themselves or others, in the financial statements, reports or other corporate communications addressed to the shareholders or the public, knowingly state material facts that do not correspond to the truth or omit relevant material facts the communication of which is required by law concerning the economic, balance sheet, or financial situation of the company or the group to which it belongs, in a way that is concretely likely to mislead others, are punished with imprisonment from three to eight years.

The following companies are assimilated to the companies indicated in the previous paragraph:

1) companies issuing financial instruments for which an application for admission to trading on a regulated market in Italy or another European Union country has been submitted;

2) companies issuing financial instruments admitted to trading on an Italian multilateral trading facility;

3) companies controlling companies issuing financial instruments admitted to trading on a regulated market in Italy or in another country of the European Union;

4) companies which raise capital among the public or otherwise manage such investments.

The provisions in the preceding paragraphs also apply if the falsehoods or omissions concern assets owned or managed by the company on behalf of third parties.

www.oecd.org/corruption/anti-bribery