

## ITALY

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Italy signed the Convention on December 17, 1997. It adopted the implementing law on September 29 2000 (Act N° 300), which was published in the Ordinary Supplement 176- L to the Official Journal of 25 October 2000 n° 250. The law entered into force on 26 October 2000. Italy deposited its instrument of ratification of the Convention on December 15, 2000 with a “Note Verbale” regarding the delegation of responsibility to the Government to introduce non penal sanctions against legal persons for the bribery of public officials (see below).

The implementing law provides an amendment to the Italian Criminal Code by establishing the offence of bribing a foreign public official as well as a passive bribery offence in relation to officials of the European Union. It also contains a Criminal Code amendment providing for the confiscation of the proceeds of certain offences, including the offence of bribing a foreign public official. Moreover, in accordance with Article 11 of the law the Government is due to issue, within eight months from the entry into force of the law (i.e., 26 June 2001), a legislative decree to regulate the administrative responsibility of legal persons and of bodies without legal personality for the commission of the foreign bribery offence, in accordance with the principles and guidelines therein. The legislative decree will be limited in application to bribery offences committed by bodies after the entry into force of the legislative decree.<sup>1</sup>

A legislative decree such as the one provided for under the implementing law has the same force as law (article 77, paragraph 1, of the Italian Constitution). The draft legislative decree, drawn up by the Ministry of Justice was approved on 11 April 2001 by the Council of Ministers and transmitted to the Parliamentary Commissions (the two Justice Commissions of the Chamber of Deputies and Senate of the Republic) for a non-binding opinion. This opinion is mainly given to assess whether the government complied with the content of the enabling act, that is Article 11 of the above mentioned Law no 300 of 29 September 2000. The President of the Republic must then issue the decree within the period provided under the enabling statute. On 3 May 2001, the Italian authorities informed the Working Group that a parliamentary opinion was issued at the end of April and that the Council of Ministers approved the final legislative decree on 2 May 2001. According to the Italian authorities, the legislative decree should enter into force after its publication in the Official Journal, which should be within one month of its approval by the Council of Ministers.

##### Convention as a Whole

The implementing law authorises the President of the Republic to ratify several international instruments, including the Convention on Combating Bribery of Foreign Public Officials. In addition to the provisions mentioned above, it makes some amendments to the current provisions on jurisdiction in the Criminal Code, and amends a section in the Criminal Code that provides for additional sanctions in certain circumstances for a person convicted of an offence, including the foreign bribery offence. It also contains a provision on the responsible authorities for the making and receiving of requests, etc. pursuant to Article 11 of the Convention.

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1 See: paragraph (m), section 1 of article 11 of the implementing legislation.

The Criminal Code contains existing provisions relevant to the other obligations under the Convention, including the statute of limitations, jurisdiction and money laundering. The Italian Code of Criminal Procedure contains provisions on mutual legal assistance and extradition, and other statutes, including the Italian Civil Code, contain further relevant provisions.

Domestic law provisions enacted in order to implement international obligations such as the OECD Convention must be interpreted in Italy, according to the Italian Supreme Court, in conformity with the relevant international provisions in order that Italy fully complies with international obligations undertaken.

### 1.1 General Description of the Offence

The implementing legislation amends the Criminal Code by adding article 322-bis, which establishes two basic offences—the passive bribery offence of officials of the European Communities and the active bribery of foreign public officials. Since the Convention is directed at the active bribery of foreign public officials, this review will only assess the provisions in the implementing law related thereto. In this respect, article 322-bis (paragraph 2)<sup>2</sup> provides as follows:

*The provisions of articles 321 and 322, first and second paragraphs, shall also apply if the money or other advantages are given, offered or promised:*

- 1. to persons which are referred to in the first paragraph of this article;*
- 2. to persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations, when the offence was committed in order to procure an undue benefit for himself or others in international business transactions.*

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

Paragraph 1 of article 322-bis refers to the following persons:

- 1. the members of the Commission of the European Communities, of European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;*
- 2. to officials and contracted agents within the meaning of the Staff Regulations of officials of the European Communities or the conditions of employment of agents of the European Communities;*
- 3. any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other agents;*
- 4. to members and employees of bodies created on the basis of Treaties establishing European Communities;*
- 5. to those who, within other Member States of European Union, carry out functions or activities equivalent to those performed by public officials or persons in charge of a public service.*

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<sup>2</sup> Article 322-bis, paragraph 2 is often referred to simply as article 322-bis in this review when it is clear that the offence of bribing a foreign public official is being discussed (as opposed to passive bribery of officials of the European Union).

Article 322-bis refers to articles 321 and paragraphs 1 and 2 of article 322, which establish the offences of bribing a domestic public official. In turn, articles 321 and paragraphs 1 and 2 of article 322 refer to passive bribery offences in relation to domestic officials for the determination of the relevant penalties (i.e. article 321 refers to paragraph 1 of article 318, article 319, article 319-bis, article 319-ter and article 320; and paragraphs 1 and 2 of article 322 refer to article 318 and 319, respectively).

While Italian law does not provide for any general defences that would apply in relation to the bribery offence, two specific provisions of the legislation are worth noting.

Firstly, article 321, referred to by article 322-bis, provides punishments for the briber but does not refer to article 318, paragraph 2. Therefore, according to the Italian authorities, the legislator has not provided any punishment applying to the person who compensates the *public official* for an act which he/she already performed in compliance with his/her office because in such a case the person does not receive any advantage as a consequence of his/her act (v. Cass. 26/6/68, in *Mass. Cass. Pen.*, 1969, 1331). The public official could, however, be prosecuted for a passive bribery offence. Similarly, because the offer or the promise of money or other thing of value must be carried out in order to 'induce' the public official to perform an act or service in compliance with his/her office, incitement does not exist if the act was already performed (v. Cass 12/9/96, Balboni, in *Riv. pen.*, 1997, 216). The situation where payments are made after the performance of a duty is not covered by the Convention. The non-coverage of such payments might, however, in practice weaken the effective application of the Convention.

Secondly, the Italian legislation provides for the offence of concussion [i.e., extortion by a public official (article 317)]. According thereto, " a public officer or a person charged with a public service who, by abusing his position or his power, compels or induce anyone to unduly give or promise, to himself or a third person, money or other thing of value, shall be liable to imprisonment for between four and twelve years". In this particular case only the public official is liable to a criminal sanction. According to the Italian authorities the fundamental distinction between corruption and concussion is the conduct of the public official who, in the latter case, must have provoked a state of fear in the passive person that influenced or annulled his/her will in such a way as to compel or induce him/her to fulfil an undue act in order to avoid serious damages. The offence of concussion, whereby, for example, the public official has forced a person to make a bribe payment in order to award him/her a contract, could potentially be used as a defence by the briber. However, the concept of "concussione" might weaken the effective application of the Convention in cases of international bribery.

The relevant articles can be divided into two basic categories of offences, and each category is based upon the nature of the act that the foreign public official performs (or omits to perform) in return for the bribe. In the first category the bribe constitutes a payment to a foreign public official for performing acts related to his/her office. In the second category the bribe constitutes a payment to a foreign public official for omitting or delaying acts relating to his/her office or for performing acts in breach of his/her official duties. Higher penalties are available for offences under the second category. A brief outline of the operation of these two categories of offences follows:

#### 1. The Performance of Acts related to Office

- (a) This category of offences applies where money or other advantages are offered, promised or given to a public officer or a person in charge of a public service acting in the quality of an employee of a public authority (Giving and promising are criminalised by article 321, and offering and promising are criminalised by paragraph 1 of article 322.). The principle penalty is imprisonment for a term of between 6 months and 3 years. The penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service where he/she acts

in the quality of an employee of a public authority. (see paragraph 1 of article 318 and article 320)

- (b) The penalty is increased to between 3 and 8 years of imprisonment where the offence is committed “ in favour of or against a party to a civil, criminal or administrative proceeding”. Where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, the penalty is increased to between 4 and 12 years of imprisonment. Where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years, the punishment is increased to between 6 and 20 years. (see article 319-ter)
- (c) Where the public official or person in charge of a public service acting in the quality of an employee of a public authority does not accept the offer or promise, the penalty is reduced by one-third. (see the paragraph 1 of article 322)

## 2. Omissions or Delays of Acts relating to Office, or Performance of Acts in Breach of Official Duties

- (a) This category of offences applies where money or other advantages are offered, promised or given to a public official or a person in charge of a public service (Giving and promising are criminalised by article 321, and offering and promising are criminalised by paragraph 2 of article 322.). The principle penalty is imprisonment for a term of between 2 and 5 years. The penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service. (see article 319 and article 320)
- (b) The penalty is increased to between 3 and 8 years of imprisonment where the offence is committed “ in favour of or against a party to a civil, criminal or administrative proceeding”. Where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, the penalty is increased to between 4 and 12 years of imprisonment. Where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years, the punishment is increased to between 6 and 20 years. (see article 319-ter)
- (c) The penalty is increased where the offence concerns the conferring of public offices or salaries or pensions or the making of contracts to which the administration employing the public officer is a party. The legislation does not specify the amount of the increase in this regard. (see article 319-bis)
- (d) Where the public official or person in charge of a public service does not accept the offer or promise, the penalty is reduced up to a maximum of one-third upon the discretion of the judge. (see paragraph 2 of article 322)

The elements of these offences and the availability of reductions and increases in penalties in the various circumstances are discussed below under 1.2 on the “Elements of the Offence”.

### **1.2 The Elements of the Offence**

In discussing each of the elements of the foreign bribery offence under article 322-bis it is necessary to refer also to the elements specified under the active domestic bribery offences under article 321 and paragraphs 1 and 2 of article 322, and the relevant passive domestic bribery offences, due to the interconnected framework of these offences, as discussed above under 1.1.

#### **1.2.1 any person**

The foreign bribery offence under article 322-bis does not specify to whom it applies. However, the domestic active bribery offence under article 321 applies to “any person” and article 322, which provides a reduction in penalty where a public officer has not accepted an offer or promise, applies to “whoever” makes the offer or promise. The Italian authorities explain that because article 27.1 of the Italian

Constitution states that “criminal responsibility is personal”, only natural persons can be criminally liable under Italian law.

### **1.2.2 intentionally**

In order to determine the relevant intent in respect of the two categories of offences (discussed above), it is necessary to look at the domestic offences. In the case of the first category of offences, the person bribing must intend that the public official or person in charge of public service acting in the quality of an employee of a public authority perform acts related to his/her office. Under the second category of offences, the person bribing must intend that the public official or person in charge of a public service omit or delay an act related to his/her office or act in breach of official duties.

In addition, article 322-bis superimposes a further intentional component on the framework based on the domestic offences where the bribery involves a foreign public official not listed in paragraph 1 of article 322-bis (i.e. an official who is not a member of the Commission of the European Community, etc.). In the cases not listed in paragraph 1 of article 322-bis, the bribe must be intended to “procure an undue benefit” for the briber or others “in international business transactions”.

The intent required for the commission of the offence is specific. It consists of the will to give, promise or offer consciously and voluntarily to the public official an amount of money or other utility/advantage for performing an act of his/her office, for omitting or delaying an act of his/her office, or for performing an act contrary to his/her official duties [v. Cass. 12/4/86, Fevarello, *cit.*, Cass. 1/7/80, Francese, in Riv.pen., 1980, 820].

### **1.2.3 to offer, promise or give**

Article 322-bis expressly applies where money or other advantages are “given, offered or promised”. However, the relevant active domestic bribery offences, which are incorporated by reference into article 322-bis, provide a slight variation to this formulation. Promising and giving are criminalised by article 321, and offering and promising are criminalised by article 322.

Articles 318 and 319 concern the conduct of the public official who receives, for himself or a third party, money or other advantage or an undue payment, or accepts the promise thereof. Article 321 extends the penalties provided for in article 318 and article 319 to the briber. Article 322 provides for a punishment for the offence of incitement to bribery. Article 322-bis has extended application to foreign public officials only for the offence of incitement to passive bribery provided for by the first and second paragraphs of Article 322.

The first paragraph of 322 provides for incitement to “impropria” corruption (that is the performance by the public official with regard to official acts). The second paragraph provides for incitement to “propria” corruption (that is the performance, the omission or the delay of an act in breach/contrary to his official duties). These are two independent offences providing cases of attempts of active or passive corruption.

According to the Italian authorities, in all cases, the criminalised conduct consists of the offer [that is a spontaneous act of putting the thing or any other advantage at the disposal of another person] or the promise [that is the future availability of money or any other utility/advantage]. Since this is an offence relating to conduct, the offence is also considered completed where the promise is not known or not accepted by the public official [cf. Cass. 14/3/96, Varvarito, in Riv.pen., 1996, 1131; Cass. 12/5/92, Bigoni, in Cass.pen., 1993, 1993; Cass. 12/4/86, Fevarello, in Cass.pen., 1987, 895; Cass. 13/10/81, Argenti, in Cass.pen., 1982, 1747].

Moreover, according to the case law provided by the Italian authorities the offence of inciting bribery of a foreign public official is considered completed where if the corrupted/bribed public official is unknown or not identified. Thus, for instance, the mere conduct of a lawyer who makes generic but repeated requests for information from the persons in charge of the computerisation of data of a Public Prosecutor's Office ("Procura distrettuale"), claiming that he was able and willing to "pay a lot", without explaining the reasons and without describing in detail the subject of his own interest, has been considered sufficient to complete the offence of incitement to bribery [c.f. Cass. Sez. VI n.21360/98].

Where an offer or promise is not accepted, the penalty is reduced by a maximum of one-third upon the discretion of the judge. The Italian authorities state that the reason for the restriction is that such a case is less serious than one where the public official accepts or receives a bribe because a third party other than the state is not affected.

#### **1.2.4 any undue pecuniary or other advantage**

Article 322-bis, as well as all the interconnected domestic bribery offences, applies to bribes involving "money or other advantages".

Additionally, pursuant to paragraph 1 of article 318 (bribes for performing acts related to the official's office), the money or other advantages must constitute an "undue payment", and under paragraph 1 of article 322 (offers or promises to induce an official to perform an act related to his/her office where the offer, etc. is not accepted) they must be "unduly" offered or promised. Thus, this notion only applies where the bribe is intended to obtain the performance of an act related to the official's office. Where the bribe is intended to obtain an omission or delay of an act related to the official's office or an act in breach of the official's duty, this requirement does not exist. The Italian authorities state that "undue payment" means that such payment was not legally due to the administration and/or the public official for the performance of the function.

According to the Italian authorities the term "money" includes banknotes and coins. The concept of "any other utilities/advantages/assets" includes everything, material or immaterial, that is considered as a utility/advantage, and includes the performance of an act that is customarily considered to have value [v. Cass. 9/4/98, Clarucci, Riv.pen., 1998, 802; Cass. 4/2/98, Montedoro, Dir.proc.pen., 1998, 433; Cass. 27/2/97, Raimondo, in Riv.pen., 1997, 852; Cass. Sez. Unite 23/6/93, Romano, in Riv.pen., 1997, 852; Cass.Sez. Unite 23/6/93, Romano, in Cass.pen., 1993, 2252 ]. For instance, sexual favours are included in the concept of "other utilities/advantages" [v. Cass. 9/4/98, Clarucci, G.dir, 1998, n. 20, 103; Cass. Sez. Unite 23/6/93, Romano, *cit.*].

With regard to the amount of payment and/or of utility/advantage/assets, recent case law indicates that the offence of corruption is considered completed even when the amount of money, etc. offered is of a low or minimal value. [ cf. Cass. 25/7/97, Cardinale, in G.dir, 1997, n. 37, 81; Cass. 14/3/96, Varvarito, in Cass.pen., 1996, 2184. V. also, before the reform of 1990, Cass. 13/10/81, Argenti, *cit.* ].

#### **1.2.5 whether directly or through intermediaries**

Article 322-bis and the relevant articles on domestic bribery do not expressly provide for cases of bribes made through intermediaries. The Italian authorities explain that bribery that does not involve a direct contact between the public official and the briber is covered where the contact is established through an

intermediary, since the agreement between the briber and the public official can be deduced from the facts.<sup>3</sup>

### **1.2.6 to a foreign public official**

Paragraph 2, subsection 1 of article 322-bis applies to the bribery of the list of persons contained in paragraph 1 of article 322-bis (see list under subsection 1.1 “General Description of Offence”), which includes various categories of officials of the European Communities and “those who, within other Member States of the European Union, carry out functions or activities equivalent to those performed by public officials or persons in charge of a public service”. Paragraph 2, subsection 2 of article 322-bis applies to the bribery of “persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations”. Thus, except for the specific European Communities officials contained in the list in paragraph 1 of article 322-bis, article 322-bis does not provide an autonomous definition of foreign public officials. The Italian authorities state that with respect to the non-autonomous categories, the Italian legislators chose to criminalise the bribery of persons executing in another State or in a public international organisation, functions or activities corresponding to those of a public official or of a person charged of a public service under the Italian legislation.

Article 357 of the Criminal Code defines a “public officer” as follows:

*357. With regard to criminal law, whoever performs public functions in the legislative, judicial or administrative sector shall be considered a public officer.*

*In this same regard, any administrative functions shall be considered to be public if they are governed by public law and administrative act and characterised by the expression and manifestation or, the exercise, of the will of the public administration through authoritative powers or certification.*

From this definition, it is not clear whether, in accordance with the Convention, certain categories of foreign public officials would be covered, including a person exercising a public function for a public agency or a public enterprise. The definition in article 357 contains restrictions on administrative functions that are much narrower than the requirement under Commentary 12 on the Convention that a “public function includes any activity in the public interest delegated by a foreign country”.

Article 358 defines a “person in charge of a public service” as follows:

*358. With regard to criminal law, whoever performs a public service for whatever purpose shall be considered to be in charge of a public service.*

*Public service shall mean an activity that is governed in accordance with the same modalities as a public function, although in the absence of the power vested in the latter, and excluding the performance of simple ordinary tasks and exclusively manual work.*

Although article 358 broadens the ambit of public function by eliminating the restriction under article 357 in relation to “the exercise of the will of the public administration through authoritative powers or certification”, it maintains the restrictions that administrative functions are “governed by public law and actions of authorisation”.

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3 See Cass. 23/2/88, in *Riv. Pen.*, 1989, 852; Cass. 27/11/84, in *Riv. Pen.*, 1986, 94; Cass. 25/1/82, in *Cass. Pen.*, 1983, 1966.

Moreover, the exclusion under article 358 of the “performance of simple ordinary tasks and of exclusively manual work” could place a limit on the concept of public function that is not contemplated by the Convention. Moreover, article 358 does not define the subcategory of persons in charge of a public service referred to under article 320 and paragraph 1 of article 322 as acting “in the quality of employees of public authorities”.

However, the Italian authorities have provided very detailed case law that appears to cover all of the categories of public officials referred to in Article 1 of the Convention. In addition the Italian authorities stress that Italian tribunals have repeatedly affirmed that a formal appointment is not a condition for public official status. Instead, they consider whether the person in question is a *de facto* public official. Thus, a person who carries out a public function with the consent of the Public Administration, independent of a concrete relationship with the State or a public body is considered a public official, except in the case of usurpation of office ( *v. Cass. 24/11/94, Bucci, in Cass. pen., 1996, 1446; Cass. 16/1/91, Susco, in Riv. pen., 1991, 722* ).

In conclusion, the definition of a public official in the Italian legislation appears to cover the different categories referred to in Article 1 paragraph 4 of the Convention.

### **1.2.7 for that official or for a third party**

Article 322-bis does not refer to third party beneficiaries. In addition, the active domestic bribery offences (article 321 and paragraphs 1 and 2 of article 322) do not refer to third party beneficiaries. It is not until working back to the third layer of the offences (i.e. the passive bribery of a domestic public official) that third party beneficiaries are mentioned. These offences (paragraph 1 of article 318 and article 319) apply where a public official receives a bribe “for himself or a third party”.

The Italian authorities state that the case where a benefit is offered, promised or given directly to a third party is covered by their legislation, as third parties are mentioned in Articles 318 and 319 (dealing with passive bribery) to which Article 322 bis ultimately refers to, through Articles 321 and 322, which cover active bribery of public officials without explicitly mentioning third parties. Therefore it is not necessary to verify whether the public official receives an advantage, when the advantage is given to a third party.

### **1.2.8 in order that the official act or refrain from acting in relation to the performance of official duties**

As mentioned throughout this review, the framework of the domestic bribery offences, and thus, the offence of bribing a foreign public official, which is based upon those offences, can be divided into two basic categories of offences, and each category is based upon the nature of the act that the foreign public official performs (or omits to perform) in return for the bribe. The first category applies to the performing of acts related to the foreign public official’s office, and the second category, which is treated as aggravated bribery, applies to omissions or delays of acts relating to the foreign public official’s office or the performance of acts in breach of official duties. As outlined earlier (see 1.1 on “General Description of the Offence”), further provisions provide for increasing or decreasing the penalty for certain acts or omissions. For instance, the penalty is increased pursuant to article 319-ter for acts in favour of or against a party to a civil, criminal or administrative proceeding, and decreased pursuant to paragraphs 1 and 2 of article 322 where the offer or promise is not accepted.

The Italian authorities explain that the misuse of discretionary power by a foreign public official is considered an “act in breach of his/her duties” even where the act is performed in accordance with normal procedures.<sup>4</sup>

The Italian authorities also explain that in order for an offence to have been committed, it is sufficient that the foreign public official has been endowed with “a non-specific competence” to perform the act, derived from his/her office.<sup>5</sup> In other words, it is enough that the public official has a competence which allows him/her to have a practical effect on the performance of an administrative act [ see Cass. 8/2/94, Bonetto, in *Cass. pen.*, 1995, 1511; Cass. 7/9/93, Cappellari, ced 195523; Cass. 20/5/93, di Tommaso, in *Cass. pen.*, 194, 1840; Cass. 14/11/88, Vattermoli, in *Cass. pen.*, 1989, in *Cass. pen.*, 1989, 1996 ]. They further indicate that some courts have stated that an offence is committed, unless it is absolutely impossible for the public official to perform the act.<sup>6</sup>

### **1.2.9/1.2.10 in order to obtain or retain business or other improper advantage/in the conduct of international business**

Subsection 2 of paragraph 2 of article 322-bis, which applies to the bribery of public officials within foreign States other than the European Union or public international organisations, carries the qualification that the offence is committed in order to procure an “undue benefit for (the briber) or others in international business transactions”. This qualification does not apply to officials of the European Union.

According to the Italian authorities this qualification covers the retaining of business or other advantage that has already been obtained. In addition the term “undue benefit” shall be interpreted as also covering the case where the briber was the best qualified bidder or otherwise could have properly been awarded the business.

### **1.3 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Article 110 of the Criminal Code provides that participants in the same offence shall each be subject to the punishment prescribed pursuant to the offence. In addition, pursuant to article 112, the penalty shall be increased where certain aggravating circumstances are present, such as the participation of 5 or more persons in the offence; the promotion or organisation of collaboration in an offence or the direction of persons participating in the same offence; or the inducement of persons subject to the offender’s authority to commit an offence.

The relevant provisions in the Criminal Code do not define the type of participation that qualifies as an offence, therefore it is not evident whether incitement, aiding and abetting, and authorisation are covered. However, the Italian authorities provide that the jurisprudence applies article 110 to any contribution,

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4 See: Constitutional Court 1/3/79, in *Giust. Pen.*, 1979, I, 337; Cass. 3/6/87, in *Riv. Pen.*, 1989, 89; Cass. 27/9/84, in *Giur. It.*, 1986 II, 281; Cass. 25/1/82, in *Cass pen.*, 1983, 1966.

5 See: Cass. 21/11/83; Cass. 2/5/83; Cass. 26/3/79 in *Giust. Pen.*, 1980, II, 696; Cass. 112/12/72 in *Riv. Pen.*, 1974, 1139.

6 See; Cass. 23/1/80 in *Giust. Pen.*, 1980, II, 696; Cass. 112/12/72 in *Riv. Pen.*, 1974, 1139.

material or psychological, provided at any stage in the planning, organising and executing of an offence, including the encouragement or reinforcement of the will to commit it.<sup>7</sup>

## **1.4 Attempt and Conspiracy**

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

### **1.4.1 Attempt**

The Italian authorities indicate that the provision covering the incitement to bribe (see Article 322 of the Criminal Code) applies to cases that "substantially constitute an attempt", and pursuant to the principle of "speciality", this provision overrides the general provision (Article 56) on attempts.

### **1.4.2 Conspiracy**

Conspiracy does not exist under Italian law.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".

### **2.1 Criminal Responsibility**

The Italian legal system does not establish criminal responsibility of legal persons.

#### **Administrative Responsibility**

##### **2.2.1 Generally**

Article 11 of the implementing legislation enables the Government to issue, within eight months of the entry into force of the legislation, a legislative decree in order to regulate the administrative responsibility of certain bodies (see below under 2.2.2 on "Legal Entities") in accordance with the guidelines and principles set out therein.

Pending entry into force of the legislative decree, this part of the review focuses on the substance of the principles and guidelines contained in article 11. This legislative Decree, once in force, will constitute an important reform of the legal system in Italy, as it introduces the administrative responsibility for legal persons for bribery of public officials. Until now, fines could be pronounced against companies solely by violations of money laundering legislation.

Paragraph (a), subsection 1 of article 11 states that the government is enabled to issue a legislative decree that provides for the administrative responsibility of legal persons, etc. for the offences set forth in a number of articles in the Criminal Code, including the offence of bribing a foreign public official in article

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<sup>7</sup> Cass. 1/7/87, in Riv. Pen., 1988, 644; Cass. 6/4/87, in Cass. Pen., 1988, 2063; Cass. 12/1/87, in Riv. Pen., 1987, 930; Cass. 11/2/85, in Giust. Pen., 1986, II, 88; Cass. 5/12/84, in Riv. Pen., 1986, 312.

322-bis and the articles concerning domestic bribery that interconnect with it. The other offences to which the delegation of authority applies also concern actions in relation to public authorities.<sup>8</sup>

### 2.2.2 Legal Entities

Subsection 1 of article 11 enables the government to regulate the administrative responsibility of the following types of bodies in accordance with the guidelines and principles set out in article 11:

1. legal persons; and
2. companies, associations, and bodies without legal personality that do not carry out statutory functions (partnerships).

To the extent that administrative responsibility applies to bodies without legal personality that do not carry out constitutional functions, it appears that the responsibility exceeds the requirements under the Convention.

“Legal persons” are defined under subsection 2 of article 11 as “entities endowed with legal personality, excluding the State and other public entities that exercise public powers”. The term “other public entities that exercise public powers” covers the various levels of local administration (such as regions and municipalities).

According to the Italian authorities these terms must be interpreted narrowly and therefore state-owned and state-controlled companies that exercise public powers are not excluded from the ambit of administrative responsibility. These bodies perform commercial activities and therefore should be treated as private bodies pursuant to the system of administrative responsibility.

### 2.2.3 Standard of Liability

Paragraph (1)(e) of article 11 provides the following requirements that must be satisfied in order for a body to be administratively liable for the relevant offences:

1. The offence must be committed for the benefit or interest of the body. No offence is committed where the person responsible commits the offence exclusively in his/her own interest or in the interest of a third party.
2. The offence must be committed by a person acting as a representative, director or manager (*de facto*), a person exercising powers of management and control, or a person subject to the direction or control” of one of the aforementioned persons.
3. The offence must be committed through non-compliance with the duties connected to the functions of the responsible person.

### 2.2.4 Sanction Related Issues

Paragraph (1)(f) of article 11 reiterates the basic principle in the Convention that penalties shall be “effective proportionate and dissuasive”. This is followed by paragraphs (g) to (z), which provide the specifics of the sanctions as well as other related matters such as confiscation and the statute of limitations. The key features of these provisions are the focus of this part of the review.

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<sup>8</sup> For example, paragraph 2, subsection 1 of article 640, which concerns cheating for the purpose of obtaining a benefit to the detriment of the State or another public body, and article 640-bis, which concerns aggravated fraud to obtain public funds.

## Pecuniary Sanctions

The principle penalty is provided for in paragraph (1)(g), which states that an administrative pecuniary sanction shall be between 50 million Lire (24,000 USD) and 3 billion Lire (1,440,000 USD).<sup>9</sup> Paragraph (g) further states that the following factors shall be considered in determining the appropriate fine:

1. The amount of the proceeds of the offence; and
2. The patrimonial and economic conditions of the entity.

Where these two factors are “especially slight”, the fine shall be between 20 million Lire (9,600 USD) and 200 million Lire (96,000 USD).

Article 11 provides two limitations on the amount of the fines shown above. The first limitation is established in paragraph (1)(h), which states that the fine shall not exceed the “social capital or the total assets” of an enterprise. In practise, this provision only applies to bodies without legal personality and sets a limit on the fine equivalent to the assets of such bodies. The second limitation is established in paragraph (1)(n), which states that the fine shall be reduced by one-third to one-half where the body has adopted “conduct ensuring an effective compensation or restoration with regard to the offence committed”.

Articles 10 and 11 of the legislative decree provide that the amount of the monetary sanction is mainly determined by the seriousness of the offence and the financial capacity of the enterprise.

## Additional Sanctions

Paragraph (1)(l), which will be replaced by Article 9 of the legislative decree, provides for the application of one or more of the following sanctions in addition to a pecuniary sanction in “particularly serious cases”:

1. The closing (temporary or permanent) of the place of business;<sup>10</sup>
2. Suspension or revocation of authorisations, licences or permits instrumental to the commission of the offence;
3. Disqualification (temporary or permanent) from carrying out the activity of the body and possible appointment of another body to carry out the activity where necessary to prevent damage to third parties;
4. Prohibition (temporary or permanent) from dealing with the public administration;
5. Temporary exclusion from obtaining any allowances, funding, contributions or aid, and possible revocation of those already granted;
6. Prohibition (temporary or permanent) from advertising goods and services.
7. Publication of the sentence.

Paragraph (1)(n) also applies to the non-pecuniary sanctions listed in paragraph (1)(l) and provides for the non-applicability of one or more of them where an enterprise has adopted “conduct ensuring an effective compensation or restoration with regard to the offence committed”.

Paragraph (1)(o) states that the non-pecuniary sanctions in paragraph (1)(l) shall also apply in connection with “provisional measures”.

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9 On 24 July 2000, 1000 Italian Lire were valued at 0.48 USD.

10 . Article 9 of the draft legislative decree no longer mentions the dissolution of the place of business

Paragraph (1)(p) provides for sanctions where a body violates any of the sanctions ordered under paragraph (1)(l). In such a case the natural person who commits the offence is liable to imprisonment for between 6 months and 3 years, and the body is liable to the pecuniary sanction provided in paragraph (1)(g), confiscation (see below) as provided in paragraph (1)(i), or in the most serious cases, the application of one or more of the non-pecuniary sanctions in paragraph (1)(l) that have not already been ordered. The sanctions in paragraph (1)(p) also apply to violations of non-pecuniary sanctions under paragraph (1)(l) that were ordered as provisional measures.

#### Confiscation

Article 322 ter of the Italian implementing law as well as paragraph (1)(i) of article 11 provides for the confiscation of the “proceeds or the price of the offence” or their “equivalent value”. The draft legislative Decree (Article 19) provides for the confiscation of the bribe and the proceeds thereof.

The “particularly serious cases” to which the additional sanctions previously described apply, refer to offences that procure a substantial profit or which are committed by the chief executive officer. The equivalent value is confiscated when the proceeds cannot be found.

The Italian authorities confirm that confiscation is mandatory.

#### Statute of Limitations

Pursuant to paragraph (1)(r), the statute of limitations with respect to the application of administrative sanctions on a body for the commission of an offence is 5 years “from the commission of the offence”. It states further that the relevant provisions in the Civil Code shall regulate suspension of the statute.

Article 11, paragraph 1(r) refers to acts that interrupt the course of the limitations period. According to the Italian authorities, acts that interrupt the period include a request for the application of provisional/investigative measures. Thus the limitations period shall run until the judgement becomes final.

#### Procedural Requirements

Paragraph (1)(q) (Article 36 of the draft legislative decree on administrative responsibility of the legal persons) states that the administrative sanctions for bodies shall be determined by the judge having jurisdiction over the offence in relation to the natural person (i.e. the criminal courts). It states further that the proceedings in respect of the body shall comply with those provided for natural persons in the Criminal Procedure Code to the extent that they are compatible, and adequate opportunity shall be provided for the body to present a defence.

Italy indicates that for the purpose of establishing the liability of a legal person, it is not necessary that the natural person involved have imposed upon him/her the sanction of imprisonment. In fact, pursuant to Article 37 of the draft legislative decree, it is possible to proceed against a legal person and to impose sanctions in cases where criminal proceedings against the natural person cannot be pursued (e.g., because of the death of the natural person).

### **3. ARTICLE 3. SANCTIONS**

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary

sanctions”. The Convention mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. The Convention also requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Additionally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

### **3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official**

#### **3.1.1/3.2.1 Natural Persons**

The penalties are the same for domestic and foreign bribery. The principal penalty depends upon the nature of the act (or omission) for which the bribe is intended.

Where the bribe is offered, promised or given to a public official or a person in charge of a public service acting in the quality of an employee of a public authority to obtain the performance of acts related to the public official’s office, the base penalty is 6 months to 3 years of imprisonment (paragraph 1 of article 318, article 321 and paragraph 1 of article 322). The base is raised to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”, to between 4 and 12 years where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, and to between 6 and 20 years where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (article 319-ter). From this base, the penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service where he/she acts in the quality of an employee of a public authority (article 320). The penalty is also reduced by one-third where the public official or person in charge of a public service acting in the quality of an employee of a public authority does not accept the offer or promise (paragraph 1 of article 322).

Where the bribe is offered, promised or given to a public official or a person in charge of a public service to obtain an omission or delay of an act relating to his/her office or the performance of an act in breach of official duties, the base penalty is 2 to 5 years of imprisonment (article 319, article 321 and paragraph 2 of article 322). The base is raised to between 3 and 8 years of imprisonment where the offence is committed “in favour of or against a party to a civil, criminal or administrative proceeding”, to between 4 and 12 years where the offence results in another being wrongfully sentenced to a term of imprisonment of up to 5 years, and to between 6 and 20 years where the offence results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (article 319-ter). From this base, the penalty is reduced by one-third where the recipient of the bribe is a person in charge of a public service (article 320). The penalty is also reduced by one-third where the public official or person in charge of a public service does not accept the offer or promise (paragraph 2 of article 322). Moreover, the penalty is increased where the offence concerns the conferring of public offices or salaries or pensions or the making of contracts to which the administration employing the public officer is a party (article 319-bis). The legislation does not specify the parameters of the increase in this regard.

The Italian authorities confirm that there is no other sanction applicable to a natural person for the foreign bribery offence other than imprisonment.

With respect to the increase in punishment, general rules apply (article 64 - 69) and, in particular, according to article 64 (increase of punishment in the case of a single aggravating circumstance) :

*“when an aggravating circumstance occurs, and the increase in punishment is not defined by law, the punishment which would be imposed for the offence committed shall be increased by up to one-third.*

*However, the punishment of imprisonment applied as a result of this increase may not exceed thirty years“.*

The determination of the penalty is within the discretion of the judge who, pursuant to articles 64 to 69 of the Criminal Code, must balance the relevant aggravating and mitigating circumstances listed therein and, pursuant to articles 132 to 133, must weigh the objective gravity of the offence and the subjective conditions of the offender. The judge is required to indicate, in the judgement, the specific reasons for the sanction imposed.

### **3.1.2/3.2.2/3.5 Legal Persons**

Criminal penalties do not apply to legal persons in the Italian legal system. The administrative sanctions in relation to legal persons for the foreign bribery offence are discussed above (see 2.2.4 on the Administrative Responsibility of Legal Persons).

### **3.3 Penalties and Mutual Legal Assistance**

Article 696 of the Code of Criminal Procedure states that relationships with foreign authorities in respect of criminal law including international letters of request are governed by the international conventions in force in Italy and general international law. It states further that in the absence of provisions in this respect, the Code of Criminal Procedure shall apply.

The Code of Criminal Procedure does not provide for any requirement concerning the penalty of imprisonment with respect to the provision of mutual legal assistance. Italy is not party to any treaties that require a penalty of imprisonment in order to be able to provide Mutual Legal Assistance.

### **3.4 Penalties and Extradition**

Similarly, article 696 of the Code of Criminal Procedure states that extradition is governed by international conventions in force in Italy and general international law, and that in the absence of provisions in this respect the Code of Criminal Procedure shall apply.

The Code of Criminal Procedure does not contain any requirement concerning the penalty of imprisonment in order to be able to provide extradition. However all bilateral extradition treaties to which Italy is a party require a minimum of one year imprisonment for the provision of extradition.

### **3.6 Seizure and Confiscation of the Bribe and its Proceeds**

#### Seizure

The Italian legal system provides for pre-trial seizure for two purposes: criminal (probatory) seizure and preventative seizure. Not only does the purpose of each type of seizure differ, but there are considerable differences in the applicable procedures.

Preventative seizure is essentially available for the purpose of preventing the continuation or perpetration of further offences. Probatory seizure is available to provide evidence of the offence.

While probatory seizure may be carried out by the police (in certain cases) or ordered by a prosecuting attorney, preventative seizure is ordered by a judge, at the request of a prosecuting attorney (exceptions, however, are always possible in urgent cases, subject to the approval of a judge).

No plans for changes regarding seizure are presently under examination in Parliament. The Italian authorities indicate that a proposal concerning the management of confiscated properties in the form of business concerns to prevent adversely affecting production and workers is currently under study.

Law no. 109 of 7 March 1996 provides for the management and destination of seized or confiscated assets. One of the characteristics of the Italian penal system is that, in addition to the laws providing for the punishment of crimes, it contemplates special preventative "ante delicto" measures that may be applied prior to, or regardless of, the execution of a crime, on the basis of a presumed threat posed by the relevant person. The basic law regulating this matter was introduced in Italy in the mid-fifties (Law 1423/1956). It continues in force, and covers exclusively preventative measures aimed at the individual person by setting limits on personal freedom (including but not limited to: special police supervision) prohibition of residence and forced residence in a specific location). In the wake of the 1956 law, subsequent laws have enlarged its original scope so as to include new types of suspects [e.g., suspected terrorists, and in the mid-sixties (L. 675/1965), suspected members of mafia-like criminal organisations].

At the beginning of the 1980s, not only did laws specifically define mafia-like syndicates, placing on an equal footing camorra and other crime syndicates pursuing the same objectives and by the same means, but it was also understood that to fight organised crime in a more effective and proactive manner, it was necessary to mount an attack on their enormous wealth by applying preventative measures of a financial nature, both provisional (seizure) and final (confiscation), thus expanding the concept of control to include the financial resources of the suspects (L 646/1982). In order to cope with third-party registrations of businesses and property, laws were passed to extend probatory and investigation powers over the financial resources of persons linked in one way or another to the suspect (e.g., spouse, common-law spouse, children etc.) as well as over the natural and legal persons whose assets are freely available to suspects, in whole or in part, directly or indirectly.

Financial-related measures are also applied to people that, even though not considered members of mafia-like organisations, are suspected of normally engaging in the same types of illegal activities as those carried out by crime syndicates, such as extortion, usury, money laundering, reinvestment of illegal proceeds and smuggling.

### Confiscation

The new article 322 ter provides for confiscation in respect of passive domestic bribery, active domestic bribery, the passive bribery of an official of the European Union and the bribery of a foreign public official under article 322-bis. However, with respect to the bribery of a foreign public official, the new provision only applies where the offence has been committed "as per article 321" (i.e. a gift or promise but not an offer).

Article 322-ter provides that where "goods representing the proceeds" of the offence of bribing a foreign public official under article 322-bis (para.2) is committed "as per article 321"(i.e. a promise or gift but not an offer) "confiscation shall always be ordered of anything representing the proceeds thereof, unless they belong to a person who has not committed the offence". It further provides that where such "confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to said proceeds and, nonetheless, not inferior to that of money or other advantages given or promised to a public official..."

In conclusion, pursuant to article 322-ter, it would appear that upon conviction of the offence of bribing a foreign public official under article 322-bis, the judge shall order the confiscation of "anything that represents the proceeds of the offence" where the bribe was offered to the foreign public official and is not

in the possession of a *bona fide* third party. Where it is not possible to confiscate “goods representing the proceeds” of the offence, and the offence was committed “as per article 321” (i.e. a promise or gift), the judge shall order confiscation of anything of the same value, which is at the offender’s disposal, but not less than the value of money or other advantages given or promised to the public official.

### **3.8 Additional Civil or Administrative Sanctions**

A natural person who is subject to sanctions for the bribery of a foreign public official is also subject to the following civil or administrative sanctions:

1. The Italian law provides for a penalty of not less than 5 years of imprisonment results in permanent disqualification from holding public office. A penalty of not less than 3 years of imprisonment results in a disqualification from holding public office for 5 years.
2. A person sentenced to imprisonment for not less than 6 months for a crime committed either by abusing the powers of his/her office or in breach of official duties shall be temporarily disqualified from holding management positions (see article 32-bis of the Criminal Code).
3. An offence committed in favour of or to the prejudice of business activities or linked to them shall result in a loss of capacity to enter into contracts with the public administration (except in order to obtain necessary services) for between 1 and 3 years (see article 32-ter and 32-quarter<sup>11</sup> of the Criminal Code).
4. Pursuant to article 185 of the Criminal Code, any offence gives rise to an obligation to make restitution and pay damages in accordance with the rules of civil law.
5. Article 18 of law no. 88/92 bars registration of an enterprise in the special registry of auditing companies if its administrator is temporarily disqualified or suspended from holding a directing position, or where he/she is convicted of an intentional offence carrying a sentence of imprisonment of not less than 1 year or an offence against the public administration (e.g. bribery) carrying a sentence of imprisonment of not less than 6 months.

## **4. ARTICLE 4: JURISDICTION**

### **4.1 Territorial Jurisdiction**

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Article 6 of the Criminal Code establishes territorial jurisdiction over an offence as follows:

*Whoever commits an offence in the territory of the State shall be punished according to Italian law. An offence shall be deemed committed in the territory of the State when the act or omission, which constitutes it, occurred therein in whole or in part, or when an event which is a consequence of the act or omission took place therein.*

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11 Article 6 of the implementing legislation amends article 32-quater of the Criminal Code to expressly apply to the offence of bribing a foreign public official under article 322-bis.

The Italian authorities indicate that by and large the courts have interpreted the partial link requirement to cover each act that facilitates the commission of the offence.<sup>12</sup> Where participants<sup>13</sup> are involved in the commission of the offence, territorial jurisdiction applies where the offence commences abroad and is completed in Italian territory as well as where it is committed wholly abroad with the participation of another person in Italian territory.<sup>14</sup>

The Italian authorities confirm that Italian territory includes Italian aircraft and ships.

## 4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirements of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Italy has jurisdiction over offences committed abroad in certain cases as established in articles 6, 7, 8, 9 and 10 of the Criminal Code. The provisions relevant to the application of jurisdiction over an offence of bribing a foreign public official committed abroad can be summarised as follows:

1. Pursuant to subsection 4 of article 7, Italy has jurisdiction over a citizen or an alien for an offence committed by a public officer in the service of the State by abusing the powers or violating the duties of his/her office. This provision applies regardless if the citizen or alien is found within Italian territory.
2. Pursuant to article 9, Italy has jurisdiction over an Italian national for an offence committed abroad that is not referred to in articles 7,8 and 9 (essentially non-political crimes other than crimes against the personality of the State and counterfeiting) where the following requirements are met:
  - (a) The offender must be within Italian territory.
  - (b) The offence must be punishable under Italian law by life imprisonment or a least 3 years of imprisonment. Where the offence is punishable for a shorter period, jurisdiction shall only be applied at the request of the Minister of Justice or upon the application or complaint of the victim.
  - (c) Where the offence was committed to the detriment of European Communities or any foreign country<sup>15</sup> or an alien, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed.
3. Pursuant to article 10, Italy has jurisdiction over an alien (the Italian authorities have confirmed that non-Italians having their permanent residence in Italy are considered “aliens” under the

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12 Cass. 13/6/86, in Giust. Pen., 1986, III, 609; Cass. 7/4/64, in Foro it., 1965, II, 113; Cass. 20/3/63, in Riv. It. Dir. Proc. Pen., 1965, 118.

13 Participation in an offence includes incitement and a promise to collaborate, but not the mere determination to commit the act.

14 See Cass. 29/4/80, in Cass. Pen., 1981, 1558; Cass. N. 4582/73.

15 Article 9 of the Criminal Code has been amended by adding the language “to the detriment of European Communities” to the previous wording (“to the detriment of a foreign country”) by subsection 1 of article 5 of the implementing legislation.

Criminal Code) for an offence committed abroad that is not referred to in articles 7 or 8 where the following requirements are met:

- (a) The offender must be within Italian territory.
- (b) The crime must be committed to the detriment of the Italian state or an Italian citizen and be punishable under Italian law by life imprisonment or at least 1 year of imprisonment; or it must be committed to the detriment of European Communities<sup>16</sup> or any foreign country or an alien and be punishable under Italian law by life imprisonment or at least 3 years of imprisonment.
- (c) In the case where the offence was committed to the detriment of the Italian State or an Italian citizen, jurisdiction shall only be established at the request of the Minister of Justice or upon the application or complaint of the victim. Where the offence was committed to the detriment of European Communities or a foreign State or an alien, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed or by the State to which he/she belongs.

Although there are no general guidelines on the exercise of the discretion of the Minister of Justice, in practice he/she considers the importance of the case, the damaging effects caused by the offence, the interest in the matter as expressed by individuals and public authorities concerned therein, etc.

The Italian authorities further explain that the Supreme Court of Cassation has stated that dual criminality is not a requirement for establishing jurisdiction over an offence that takes place wholly abroad (see Cass. 6 December 1991, in *Foro it. Rep.*, 1992, n. 2653 ).

### **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Italian authorities explain that Italy does not have a formal mechanism for resolving jurisdictional conflicts, but that it is compulsory, according to its legal principles (e.g., principle of mandatory prosecution) to exercise jurisdiction in cases where jurisdiction can be applied.

They indicate that in practice few problems are likely to arise as prosecutions of acts committed abroad generally require a prior request from the Minister of Justice.

### **4.4 Review of Current Basis for Jurisdiction**

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against bribery of foreign public officials, and if it is not, to take remedial steps.

Italy considers that the relevant provisions on jurisdiction comply with the requirements under Article 4 of the Convention.

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16 Article 10 of the Criminal Code has been amended by adding the language “to the detriment of European Communities” to the previous wording (“to the detriment of a foreign country”) by subsection 2 of article 5 of the implementing legislation.

## 5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “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”.

### 5.1 Rules and Principles Regarding Investigations and Prosecutions

#### Preliminary Investigations

A preliminary investigation commences when a “notice of crime” is given to the judicial police. The notice of crime can be presented by any person who has knowledge of a crime including the police themselves or the public prosecutor (notice by “denunciation”). It can also be given by someone who in the exercise of a medical profession has rendered assistance in cases that possibly involve the commission of an offence for which prosecution must be automatically initiated (notice by “medical report”). The judicial police are in turn obliged to inform the public prosecutor [article 347 of the Code of Criminal Procedure (CPP)] about the notice of crime, and the public prosecutor is required to enter the notice in the “register of the news of the crime” (article 335 of CPP). The judicial police and the public prosecutor are required to take notice of offences on their own initiative (article 330 of CPP) and provide a notice of crime where this is only a suspicion that an offence has been or is being committed.

Once the public prosecutor receives and registers the notice of crime, he/she must evaluate the evidence to decide on the exercise of a “criminal action”. The criminal action can either involve a request for “filing in the archives” (i.e. the case does not proceed beyond the investigation stage) or a request for an indictment.

#### Criminal Action

A request for “filing in the archives” is normally made before a judge without a hearing.<sup>17</sup> The public prosecutor makes such a request when it does not appear that there is enough evidence to take the case to trial or on the basis of issues of law, such as where the offence is extinguished by the statute of limitations, the conduct does not constitute a crime, etc. If the judge agrees with the request, he/she pronounces that the notice of crime is “unfounded” and issues an acquittal. Once a “filing in the archives” has been ordered the public prosecutor cannot re-open an investigation without obtaining a “motivated decree” from the judge for a preliminary investigation.

A request for an indictment is made before a judge in a preliminary hearing. A decree ordering a trial is issued by the court where the judge does not order an acquittal. An acquittal is pronounced in the following cases (article 425 of CPP):

1. Where a cause extinguishing the offence exists (e.g. the statute of limitations has expired).
2. A condition for prosecutability has not been satisfied (e.g. request for the prosecution by the Minister of Justice or a complaint by the victim, where required).
3. The conduct in question does not constitute an offence.
4. It is unlikely that there would be a conviction based on the evidence presented.
5. The accused person is not punishable due to a lack of criminal responsibility.

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17 A hearing is, however, held where the judge denies the request for the filing in the archives or the victim of the offence objects to the filing.

## 5.2 Considerations such as National Economic Interest

The Italian authorities state that the factors listed in Article 5 of the Convention shall not influence the investigation and/or prosecution of the offence of bribing a foreign public official.

## 6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

The Italian authorities provide that the statute of limitations for the offence of bribing a foreign public official under article 322-bis is 10 years. However, pursuant to subsection (4) of article 157 of the Criminal Code, the limitations period is 5 years for offences in which the minimum punishment of imprisonment is less than 5 years, which is the case for all the penalties applicable to the foreign bribery offence, except aggravated bribery that results in another being wrongfully sentenced to a term of imprisonment of more than 5 years (see article 319-ter). In the latter case, the offence is punishable by a term of imprisonment of between 6 and 20 years, and, thus, has a limitations period of 10 years [subsection (3) of article 157].

Pursuant to article 158, the triggering event for the running of the limitations period is as follows:

1. the date of consummation, for a completed offence,
2. the date on which the offender ended his/her activities, for an attempted offence, and
3. the date on which the offence ceased to persist or continue, for a persisting or continuing offence.

The limitations period shall be suspended in the following cases<sup>18</sup>:

1. When the public prosecutor submits the application to prosecute. In this case the limitations period shall recommence the date on which the competent authority grants the application.
2. Where suspension is required by a particular provision of the law. In this case the period shall recommence the date on which the basis for the suspension ceases to exist.

Pursuant to article 160, the limitations period shall be interrupted in the following cases:

1. When various acts are taken by the authorities in the pre-trial stage, including an order confirming police custody or detention, interrogation before the public prosecutor or the judge, a summons to appear in court for a summary trial, and an order to stand trial.
2. When the judgement or decree of conviction is made.

Superimposed on the statute of limitations is the deadline for preliminary investigations. Where an investigation concerns an unknown person, within 6 months of having entered the notice of the crime in the register, the public prosecutor must either ask for a filing in the archives because the offender is unknown or request an extension (paragraph 1 of article 415 of the Code of Penal Procedure). There is no limit on extensions where the offender is unknown. Where an investigation concerns a known person, within 6 months of having entered the notice of the crime in the register with the person's name, the public

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18 Pursuant to article 161 of the Criminal Code, suspension and interruption of the period of limitation shall apply to every participant in the offence.

prosecutor must request an indictment for trial, a filing in the archives or an extension. The deadline is 1 year for “serious offences” or organised crime [subsection (a), paragraph 2 of article 407]. In such cases the limit on an extension is normally 18 months, but in the case of more serious crimes or more complex investigations it may be extended to 2 years (article 407 CPP).

The Italian authorities confirm that the offence of bribing a foreign official constitutes a “serious offence” for the purpose of determining the deadline and extension for investigations. In addition, they indicate that Article 22 of the legislative decree will regulate the prescription.

## **7. ARTICLE 7. MONEY LAUNDERING**

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

### Money Laundering Offence

Article 648-bis of the Criminal Code states that “apart from participation in the [predicate] offence” it is an offence for any person to substitute, transfer or conceal money goods or assets obtained by means of an intentional criminal offence for the purpose of concealing “the fact that the said money, goods or assets are the proceeds of such offences”. It would therefore appear that article 648-bis applies to the laundering of the proceeds of bribing a foreign public official, not the bribe.

The Italian authorities state that the money laundering offence does not apply to the person(s) who has committed the predicate offence, but only to third parties who conceal, etc., goods, etc., knowing that they are the proceeds of an intentional offence.

The money laundering offence is committed regardless if the person who has laundered the goods, etc. is chargeable or punishable for the predicate offence, and regardless of the presence of the legal conditions for prosecuting the predicate offence (see article 648-bis and paragraph 2 of article 648). The money laundering offence is committed in relation to proceeds of bribery regardless if the offence was committed abroad. The Italian authorities state that it is not necessary that the predicate offence is criminal under the laws of the jurisdiction in which it was committed for the money laundering offence to apply, because according to articles 9 and 10 of the Criminal Code it is only required that the act is considered an offence under Italian law.

The penalty for the money laundering offence is 4 to 12 years of imprisonment and a fine of 2 million (960 USD) to 30 million lire (14, 440 USD). The penalty, which is cumulative, shall be increased if the offence is “committed in the course of a professional activity”, and decreased if the goods, etc. are the proceeds of a criminal offence for which the punishment is imprisonment for 5 years or less.

### Reporting Requirements for Financial Institutions

Article 3 of Decree-Law no. 143 of 3 May 1991, amended by Article 1 of the legislative Decree no 153 of 26 May 1997, provides the reporting requirements for the financial institutions listed in article 4, which includes credit institutions, money brokers, trusts, insurance companies, the Monte Titoli company and intermediaries whose principal activity concerns financial services. Subsection (1) of article 3 requires that the person responsible for the branch, office or other establishment of such a financial institution report to the head office<sup>19</sup> without delay every transaction that leads him/her to believe that the money, etc. is the

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19 The report may also be made to the legal representative or his/her delegate.

object of the money laundering offence under 648-bis or the offence of utilising money, etc. of unlawful origin under 648-ter. In turn the head office is required to consider the information, and where the concerns appear founded it is required to transmit the information without delay to the Italian Foreign Exchange Office (Ufficio italiano dei cambi: UIC) before performing the transaction. Pursuant to subsection (4), the UIC is required to carry out the necessary investigations.

Subsection (7) states that the transmission of information in accordance with article 3 shall not constitute a breach of confidentiality.

Subsection (8) states that the institutions required to transmit the information pursuant to paragraph (1) and any other person having knowledge of the type of transaction described therein shall only disclose such information in accordance with article 3.

Pursuant to subsection (5), “except in the cases of criminal offences” the failure to transmit information referred to in article 3 is punishable by a pecuniary penalty of up to one-half the value of the transaction. Moreover, pursuant to subsection (6) of article 5, “except in the cases of criminal offences” a breach of the prohibition in subsection (8) of article 3 against transmitting information except in accordance with article 3 is punishable by detention for 6 months to 1 year or a fine of between 10 million (4,800 USD) and 100 million lire (48,000 USD).

The role of the UIC is not limited to the simple acquisition of financial information, but involves the analysis of the financial significance of each single transaction, in co-operation with the sector's supervisory authorities (and especially with the Bank of Italy). The UIC is not authorised to decide whether transactions are to be investigated, but to render technical opinions in light of the data available, etc.

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### **8.1/8.2 Accounting Requirements/Companies Subject to Requirements**

Article 13 of the Presidential decree 600/73 states that the following entities are obliged to keep account books for fiscal purposes:

- (a) companies subject to income tax of legal persons;
- (b) public and private bodies other than companies, which are subject to income tax of legal persons, whose exclusive or principal purpose is to carry out commercial activities;
- (c) general and limited partnership companies and equivalent companies according to article 5 of Presidential Decree n. 597 of 29/9/73;
- (d) natural persons carrying out commercial activities according to article 51 of the said Presidential decree.
- (e) natural persons performing arts and professions according to article 9, paragraph 1 and 2, of the Decree sub c);

- (f) artists' and professionals' associations or companies according to article 5, sub c), of the said Decree;
- (g) public and private bodies other than companies that are subject to income tax of legal persons, whose principal or exclusive purpose is not the performance of commercial activities.

Article 18 of the Presidential decree further states that the provisions of the preceding articles are also applicable to the entities that, pursuant to the Civil Code, are not obliged to keep the account books provided for therein. However, companies can keep simplified accounts where their profits do not exceed 360 million lire (173,000 USD) in the case of companies providing services, and 1 billion lire (482,000 USD) in the case of companies exercising different activities.

Article 22 of the presidential decree 600/73 states that for fiscal purposes, accounting books should be kept even after the Civil Code term of ten years (article 2220) until an assessment relating to the correspondent taxation period is carried out.

Article 2423 states that in the annual accounts consisting of a balance sheet, the economic account and the integrative note must be drawn up with clarity and represent in a true and correct way the assets, liabilities, financial position and the profits and losses of the company. This principle overrides any other that is incompatible.

Article 2423 bis states that the annual account should be drawn up in accordance with the following principles:

- items should be evaluated on a prudential basis (the “prudential principle”);
- only profits made at the end of the fiscal year may be included;
- incomes shall be listed in the year in which they were gained irrespective of the date of receipt of effective payment;
- losses and risks shall be included in the fiscal year in which they were suffered even if they became known after the closing of the year.

### **8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements**

#### **8.1.1.1/ 8.2.1.1 Internal Audits/Companies Subject to Internal Audits**

The Italian authorities report that stock and co-operative companies must have an internal auditing body (*collegio sindacale*) appointed in the articles of association and confirmed by the meeting of shareholders (articles 2364 and 2400 of the Civil Code). Auditors are chosen from the members of the Register of Accounts (article 2397) and from the partners of co-operative companies.

The same provisions apply to limited liability companies if the capital is not lower than 200 million lire (96,000 USD) [article 2397 of the Civil Code] or if the articles of association so provide (article 2488). It is also compulsory to have a board of auditors if for two consecutive fiscal years the limits of article 2435 have been exceeded.<sup>20</sup>

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20 The limits laid down by art. 2435 are the following:  
 -total assets: 4,700 billion liras;  
 -revenues from sale and services: 9,500 billion liras;  
 -average employees: 50 units

### Duties of the Internal Auditors

The internal auditing body supervises the management of the company and the observance of the law and the articles of association. It also is required to verify the regular keeping of the company's accounts, whether the balance sheet is consistent with the company's books and compliance with the rules in article 2426 for the evaluation of a company's assets. The auditors can inspect a company's books without notice and they can request the directors to provide information relating to the company's business or to specific transactions (article 2403 of the Civil Code). According to the Civil Code, they also have the following duties:

- the application of controls regarding a company's management;
- at least every three months verification of the amount of cash on hand and the existence of securities, whether owned or received by the corporation in pledge as collateral or for safekeeping;
- attendance at directors' meetings in an advisory role as to whether the directors' decisions are within the provision of the Civil Code.

Statutory auditors also certify whether the reported accounts agree with the accounting records and have been kept in accordance with the law

The Civil Code further states that these duties should be fulfilled with "the diligence of a mandatory". The auditors are responsible for the truth of their statements. In addition they are responsible *in solido* with the directors for acts or omissions committed by the latter that would not have occurred had they exercised proper vigilance (article 2407). Moreover, it is stated that the auditors "shall keep secret the facts and the documents of which they have knowledge by reason of their office".

Presidential Decree-Law n. 136 of 31 March 1975 requires companies whose shares are quoted on the stock exchange to have their annual financial statements examined by auditing firms whose names are published on a special roll.

### **8.1.1.2/ 8.2.1.2 External Audits/Companies Subject to Requirements**

#### Companies Subject to External Audits

In addition to internal auditing, listed companies are required to be audited by independent companies specialised in this field.

#### Duties of the External Auditing Companies

The duties of independent auditing companies are stated in the legislative decree 58/98, which requires them to do the following:

- (a) verify that the accounting books are kept orderly and that the management activities are correctly recorded in the books;
- (b) verify that the annual budget and the consolidated balance sheet correspond to the account books and to the controls carried out and that they comply with provisions governing them. The auditors have the right to ask the directors for further information. In addition, it is their duty to report "objectionable

acts" to the "Commissione Nazionale per le Società e la Borsa" (National Commission for the Societies and the Stock Exchange Market: CONSOB).<sup>21</sup>

A further form of control is exercised by Banca d'Italia in respect of companies carrying out banking activities.

### **8.3 Penalties**

#### Civil Sanctions

Article 2409 of the Civil Code, which is applicable to stock companies and to limited liability companies, provides that if there is a basis for suspicion of serious irregularities in the discharge of the duties of the directors and auditors, "as many members as represent one-tenth of the company's capital can report the facts to the tribunal". In the most serious cases, the tribunal can order the discharge the directors and auditors and appoint a judicial administrator, specifying his/her powers and the time for which he/she will hold office.

#### Penal Sanctions

There are sanctions for providing false information and the unlawful distribution of profits for companies subject to registration. Article 2621 of the Civil Code states that "unless the act constitutes a more serious offence", a punishment consisting of imprisonment from 1 to 5 years and of a fine of 2 million (963 USD) to 20 million lire (9636 USD) is imposed on the following persons:

1. promoters, founders, managers and directors, general managers, auditors, and liquidators who in reports, annual accounts, or other information concerning the affairs of the company, fraudulently represent facts that do not correspond to the truth about the formation or the financial condition of the company or who conceal, wholly or in part, facts concerning such condition (paragraph 1 of article 2621);
2. managers and directors and general managers who, in the absence of or contrary to an approved annual accounts, or on the basis of a false annual accounts, in any way collect or pay profits that are fictitious or which cannot be distributed (paragraph 2 of article 2621). Auditors who commit this offence are, except in cases of "participation", subject to a punishment of imprisonment from 6 months to 3 years and a fine of 200 thousand lire (96 USD) to 2 million lire (963 USD).

In addition, directors and general managers who do not distribute payments on account of dividends in accordance with the annual accounts or in an amount higher than the amount of the profits obtained since the closing of the previous fiscal year shall be liable to the same sanctions. (see article 2621 and article 2433 bis of the Civil Code).<sup>22</sup>

Article 2626 further states that managers, directors, auditors and liquidators who, in violation of a duty imposed on them by law, fail to make a report or a notification to, or a deposit of documents with the office

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21 CONSOB is an independent body that is responsible for the supervision on quoted share companies, public economic bodies issuing negotiable instruments, companies issuing instruments negotiable at the secondary market. It has the authority to obtain relevant information from such a company and also the identity of the trustees.

22 The Court of Cassation applied this article also in the case of false accounts (See Cass., Sez.V, 21.1.98, Cusani, in *Foro italiano*, 1998, II, pp.517 ff. )

of the register of enterprises within the prescribed time limit, or do it or cause it to be done in an incomplete manner, may be fined with an administrative sanction of between one hundred thousand lire (48 USD) and 2 million lire (963 USD).

The falsification of accounts or balance sheets statements in respect of any type of company or partnership is criminally punishable under article 2621 of the Civil Code.

A taxpayer's failure to comply with his/her tax obligations may result in administrative and criminal penalties. The regime for tax offences is currently based on the application of monetary penalties. A new system of criminal tax penalties has been introduced ( Legislative Decree n. 74 of 10 March 2000 ). The same penalties apply for both income taxes and value added tax. If the taxpayer files a false return by using fake invoices or other documents on false transactions, the penalty is imprisonment between 18 months and 6 years. Where the tax evaded does not exceed ITL 300 million, the imprisonment is between 6 months and 2 years. If the false return is based on false entries in books and accounts or on other false information to prevent a correct assessment, and (i) the amount of unpaid tax is higher than ITL 150 million and (ii) the amount of the undeclared taxable base is higher than 5% of the total taxable base disclosed in the return or, in any event, higher than ITL 3 billion, the penalty is imprisonment between 18 months and 6 years.

In cases other than the above, if the taxpayer wilfully files a false return and (i) the unpaid tax is higher than ITL 200 million and (ii) the amount of undeclared taxable base is higher than 10% of the total taxable base disclosed in the return or, in any event, higher than ITL 4 billion, the penalty is imprisonment from 1 to 3 years. If, in order to avoid the payment of taxes a taxpayer does not file a tax return, the penalty is imprisonment from 1 to 6 years, where the amount of tax evaded exceeds ITL 150 million. A return filed within 90 days from the deadline, unsigned or filed on a non-standard form, is nevertheless regarded as not filed.

The hiding or destruction of books and accounts for the purposes of avoiding taxes is punishable with imprisonment from 6 months to 5 years.

None of the above penalties apply if a taxpayer's actions conform with an advanced ruling issued by the tax administration.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to the criminal investigation and proceedings, and non-criminal proceedings against a legal person that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

## 9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

### 9.1.1 Criminal Matters

Pursuant to article 696 of the Code of Criminal Procedure (CCP), “letters of request” can be executed pursuant to international conventions in force in Italy. Italy is a Party to the to the European Convention on legal assistance in criminal matters (Strasbourg, 1959) and to a number of bilateral treaties. It has therefore a treaty relation with 31 of the 33 signatories of the OECD Convention. In the absence of a treaty, etc., assistance in criminal matters can be granted pursuant to the relevant provisions in Title III of the CCP.

Title III of the CCP provides for the execution of a letter of request for the purposes of communication, notification and the taking of evidence. Two levels of decision making are required in order for a request to be executed: the Court of Appeal<sup>23</sup> in the place where the requested acts are to be carried out and the Minister of Justice. It is presumed that the Minister of Justice would make the final determination.

Pursuant to Title III, the Court of Appeal and the Minister of Justice are required to refuse to grant the execution of a letter of request when certain criteria are met. There is some overlap between the criteria to be followed by both decision-makers with the result that they both “shall not grant” the execution of a letter of request in the following cases:

1. The requested acts are expressly prohibited by law or are in conflict with the fundamental principles of the Italian legal system [subsection (2) of article 723 and subparagraph (5)(a) of article 724].
2. There are reasonable grounds to believe that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social circumstances may negatively affect the trial or its outcome and the defendant does not appear to have freely given his/her consent to the letter of request [subsection (2) of article 723 and subparagraph (5)(c) of article 724].

In addition, the Court of Appeal shall refuse to grant a letter of request where the offence for which the request is sought does not constitute an offence under Italian law (i.e. dual criminality) and the defendant does not appear to have freely given his/her consent to the letter of request [subparagraph (5)(b) of article 724].

The Minister of Justice is also required to refuse to grant execution of a letter of request in the following cases:

1. Where he/she considers that the requested acts would affect the sovereignty, security or other fundamental interests of the State [subsection (1) of article 723].
2. Where the request concerns the summons of a witness, an expert witness or a defendant before the foreign judicial authority and the requesting country does not provide sufficient assurances regarding the “immunity” of that person [subsection (3) of article 723].

Moreover, the Minister of Justice has the discretion to refuse to grant execution where the requesting party does not give sufficient assurances as to reciprocity [subsection (1) and (4) of article 723].

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23 The requirement that the Court of Appeal grant the execution of a letter of request does not apply where, pursuant to article 726, the request concerns a summons of a witness resident or domiciled in the State’s territory.

### ***Mutual Legal Assistance Concerning Confiscation and Provisional Measures.***

Law 328/93 introduced certain changes into the Italian Code of Penal Procedure as a result of the ratification of the Strasbourg Convention.

Requests for confiscation made to Italy are carried out by executing the confiscation order issued by the requesting party.

Moreover, the confiscation of properties of corresponding value, previously not provided for in the Italian system, has been made possible.

A foreign confiscation order can be executed in Italy if the same conditions are fulfilled as those which in general must be fulfilled for the recognition of a foreign judgement (i.e., the order to be executed must be irrevocable, it must not be contrary to the fundamental principle of the Italian legal system, in the relevant proceeding there must have been no conditions of race, religion, sex, nationality, language, etc., the dual criminality clause and the "ne bis in idem" principle must be observed, the properties must be confiscable under domestic laws and the right to a defence must have been observed).

Since a state will necessarily request the search and seizure of property to be confiscated, special legislative provisions have been introduced in this regard.

The Italian authorities state that a request for the execution of a foreign confiscation order may be denied for the following two reasons: (1) the legislation is contrary to the principles of the Italian legal system or would be prohibited or not allowed thereunder; or (2) the conditions required for a foreign confiscation order to be put into effect do not exist.

To obtain execution of a confiscation order, the relevant request must be sent to the Ministry of Justice which, if it deems it advisable, starts the relevant procedure.

In particular, the Ministry sends the documentation to the competent Public Prosecutor attached to the Court of Appeal who, in turn, asks the Court of Appeal to recognise the confiscation order, or to order the seizure.

Once seized, property may be retained for two years from the time of execution, and the term can be renewed for two more years.

Based on the data of the Ministry of Justice, from 1 January 1996 to 12 September 1997 a total of 11 requests were received concerning the seizure of assets or valuables held by banks for money-laundering offences.

#### **9.1.2 Non-Criminal Matters**

The Italian authorities have confirmed that, following ratification of the OECD Convention, Italy will be able to comply with a request for assistance in relation to non-criminal proceedings against a legal person.

#### **9.2 Dual Criminality**

The Italian authorities indicate that in addition to the dual criminality requirement that applies to the Court of Appeal's decision-making authority pursuant to Title III of the CCP (see above under 9.1.1), dual

criminality is usually required under the bilateral treaties with non-European countries where coercive measures are requested (e.g. search and seizure)<sup>24</sup>.

Italy states that, in any case, MLA will be provided where the offence for which it is sought is within the scope of the Convention.

### **9.3 Bank Secrecy**

Italy provides that foreign requests for mutual legal assistance in criminal investigations cannot be denied on the ground of bank secrecy. According to the Italian authorities, such requests do not have to be supported with evidence and requests can be made at an early stage of the proceedings. It is even possible to request information about bank records for so-called “fishing expeditions” to ascertain the existence of bank accounts for the purpose of obtaining evidence or for executing a confiscation order.

Banking secrecy has no basis in statutory provisions, but rests on custom or contractual obligations. The Italian authorities state that it cannot under any circumstance be invoked in criminal proceedings. The law-enforcement authorities may be given the power to obtain any documents and information from banks and financial institutions in criminal proceedings or investigations under special authorisation from the judicial authorities. Banking secrecy cannot be invoked before the Bank of Italy or the UIC, when acting in their capacity as supervisory authorities. Neither can banking secrecy be invoked before the NSPV of the Guardia di Finanza when conducting law-enforcement activities, when following up on reports of suspicious transactions and, finally, when investigating possible capital flows in and out of the country through unofficial channels.

## **10. ARTICLE 10. EXTRADITION**

### **10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Pursuant to article 696 of the Code of Criminal Procedure (CCP), extradition can be executed pursuant to international conventions in force in Italy.

Where an extradition treaty applies, Italy is obliged to extradite the subject, on the condition that all requirements are fulfilled (see the list of criteria below) and without prejudice to reasons for refusal provided for by the treaty in question. In the absence of a treaty, extradition can be granted pursuant to the relevant provisions in Title II of the CCP. Title II provides for extradition to enforce a judgement in the requesting country and for the purpose of standing trial.

Pursuant to Title II, three layers of decision-making are involved in requests for extradition. First, upon receipt of a request for extradition, the Minister of Justice is required to forward the request to the Court of Appeal, unless of the opinion that the request is to be dismissed [subsection (1) of article 703]. Next, the

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24 As Italy has not made any reservations provided for in article 5 of the Strasbourg Convention, 1959 on Mutual Legal Assistance in Criminal Matters, a request for MLA thereunder cannot be refused on the ground of dual criminality with the parties thereto.

Court of Appeal decides whether to consent to a request [subsection (1) of article 701], although a decision of the Court of Appeal to consent thereto does not make extradition compulsory [subsection (3) of article 701]. Finally, once the Court of Appeal decides in favour of granting extradition, the Minister of Justice makes the final determination (article 708).

The Court of Appeal cannot consent to a request for extradition unless the following criteria are satisfied<sup>25</sup>:

1. Where a final sentence has not been passed, there must be “serious grounds to believe” that the accused person is guilty. Where a final sentence has been passed, the same offence must not be the subject of a pending criminal proceeding or a final judgement in Italy (subsection 1 of article 705).
2. The accused person must not have been and will not be the subject of a proceeding that does not ensure that fundamental human rights are respected [subsection 2(a) of article 705].
3. Enforcement of the judgement for which extradition is requested must not include provisions that conflict with the basic principles of the Italian legal system [subsection 2(b) of article 705]. This would appear to encompass the principle of dual criminality, which the Italian authorities confirm must be met to provide extradition.
4. The offence for which extradition is requested must not be of a political nature. In addition, there must not be grounds to believe that the accused person will be persecuted or discriminated against on account of his/her race, religion, sex, nationality, language, political opinions or personal or social circumstances, or that he/she may undergo a cruel, inhuman or degrading punishment or treatment, or be the subject of another act amounting to a violation of fundamental human rights [paragraph 2(c) of article 705].
5. If the offence for which extradition is sought is punishable by death under the law of the requesting country, sufficient assurance must be provided that the accused will not be sentenced to death, or where the sentence has already been passed, that he/she will not be executed [subsection (2) of article 698].

Pursuant to subsection (1) of article 706, the decision of the Court of Appeal may be appealed before the Court of Cassation by the person for whom extradition is requested, defence counsel, the general public prosecutor or the requesting country.

Once the decision of the Court of Appeal to consent to a request for extradition is final, the Minister of Justice shall decide whether to grant extradition within 45 days of receipt of the report thereof [subsection (1) of article 708]. In making a determination, pursuant to subsection (4) of article 699, the Minister of Justice has the discretion to make extradition conditional upon such further requirements as he/she deems appropriate.

### **10.3/10.4 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

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25 A decision of the Court of Appeal is not necessary where the person for whom the request concerns consents to the extradition. Such consent must be given in the presence of defence counsel and mentioned in the relevant report. [subsection (3) of article 701].

Pursuant to article 26 of the Constitution, it is only possible to extradite an Italian citizen pursuant to a treaty.

Where an extradition treaty applies, it is compulsory for Italy to extradite an Italian citizen and in the absence of a treaty, Italy may cooperate in the extradition proceedings in compliance with the principles provided for by Article 697 of the Penal Code.

### **10.5 Dual Criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Italian authorities confirm that in determining whether the requirement of dual criminality is satisfied, the facts upon which the request is based are assessed in order to determine whether the conduct constitutes an offence in Italy. They state that, consequently, dual criminality would be satisfied if the requesting country fulfilled the requirements under the Convention for criminalising the offence of bribing a foreign public official.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The Italian authorities have informed the Secretary-General, in his capacity of depositary of the Convention, that the Ministry of Justice, is appointed as the authority responsible for the matters listed in Article 11.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. Tax Deductibility**

The Italian authorities explain that the relevant legislation does not provide for the tax deductibility of bribes paid to foreign public officials.

While there is no explicit provision in the tax legislation which provides for the non-tax deductibility of bribes, Italy has already considered that illicit payments may not be deducted as they are not considered to be legitimate business expenses ( v. Comm. Trib. Prov. Milano, Sez. 34, 11/11/96, n.111, in *Boll. trib.* ).

According to the Italian authorities, the denial of deductibility is not dependent on a criminal conviction. Information is not available concerning whether non deductability also applies to legal persons. Furthermore, information is not available about whether the tax authorities are authorised to share information about suspicious transactions with criminal law enforcement authorities.

## EVALUATION OF ITALY

### General remarks

The Working Group commended the Italian authorities for their excellent co-operation during all stages of the examination. In particular, delegates thanked the Italian authorities for the comprehensive and informative responses that significantly assisted in the evaluation process.

Italy implemented the Convention by Law n°300 of 29 September 2000, which amended the Penal Code, by adding Article 322bis which establishes the offence of bribing a foreign public official, linking it to the existing domestic offence relating to active and passive corruption, which makes the law complex. The law also adds article 322ter to the Penal Code, providing for confiscation of the bribe and the proceeds or an equivalent value, in order to meet the requirement set by article 3.3 of the Convention.

The Working Group considered in the light of the available documentation and explanations provided by the Italian authorities that Italy's legislation conforms to the requirements of the Convention<sup>26</sup>. However, certain aspects of the Italian implementing legislation, listed below, have been identified and should be followed up in Phase 2.

### Specific issues

#### 1. Third party

Article 322bis of the Italian Penal Code does not directly mention the case where a benefit is offered, promised or given directly to a third party. The Italian authorities stated that this element was covered, as third parties are mentioned in articles 318 and 319 (dealing with passive bribery) to which article 322bis ultimately refers, through articles 321 and 322 which cover active bribery of public officials without explicitly mentioning third parties.

In view of the complexity of the cross-references, the Working Group recommended that this issue be followed up in Phase 2.

#### 2. Payments after performance of duty

In the absence of a prior offer or promise of a bribe, the Italian law does not criminalise the mere act of making a payment after the performance of an act by the foreign public official in compliance with his duties (although a passive bribery offence would be committed by the official).

The Working Group recognised that this situation is not covered by the Convention, and is of the opinion that it should be considered on a horizontal basis at a later stage, to establish whether it may weaken the effective application of the Convention.

#### 3. Exception: abuse of power by the public official (*concussione*)

The Italian law does not extend criminalisation to the payment (or the offering, promising or giving) of any undue pecuniary or other advantage to a public official in cases covered by article 317 where a public official "takes advantage of his/her functions or power to oblige or induce another to unduly give or

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26. The Italian authorities informed the Group that the Council of Ministers enacted the legislative decree on 2 May 2001. It will enter into force as soon as it is published in the Official Journal (26 June 2001).

promise money or other assets to himself or a third party". In this case, article 317 provides for the punishment of the public official only. The Italian authorities explained that this implied coercion on the part of the public official and that it was in practice up to the defendant to prove that he/she was the victim of the public official's behaviour and that this argument has been very rarely invoked successfully.

The Working Group was concerned that any reference to the concept of *concussione* in cases of international bribery may weaken the effective application of the Convention and will review this matter in Phase 2.

#### **4. Responsibility of legal persons**

The Italian legal system had not established a general system of responsibility for legal persons. However, pursuant to Article 11 of the implementing legislation the Government has adopted on 11 April 2001, a draft legislative decree in order to establish administrative responsibility of legal persons for the bribery of domestic or foreign public officials, which has undergone a consultation process before Parliament. The Italian authorities informed the Working Group that Parliament has rendered its (non-binding) opinion and that final adoption of the legislative decree by the Government took place on 2 May 2001.

The Working Group was satisfied that the legislative Decree complies with the requirements of the Convention and intends to follow its practical application in Phase 2 in view of its novelty.

#### **5. Sanctions**

The Convention requires each Party to institute "effective, proportionate and dissuasive" criminal sanctions. The Italian law does not provide any pecuniary sanctions (apart from confiscatory measures) for natural persons in the case of bribery of a public official.

The Working Group considered that in addition to deprivation of liberty, the introduction of financial sanctions may constitute a useful additional deterrent. The Italian delegation felt however that the sanctions provided for are adequate and underlined that the monetary sanctions against natural persons are not required by the Convention.

#### **6. Overlapping jurisdictions**

The Convention requires that where more than one party has jurisdiction over an offence, they shall (at the request of one of them) consult with a view to determining the most appropriate jurisdiction for prosecution. In so far as Italian prosecutors may not have discretion to refrain from prosecuting where Italian jurisdiction can be taken, the consultations envisaged by the Convention might therefore be of limited value in some cases. The Italian authorities assured the Group that practical problems were unlikely to arise in Italy, as prosecutions of acts committed abroad generally require a prior request from the Minister of Justice. Furthermore, they affirm that jurisdiction of legal persons for bribery acts committed outside Italy exists only according to the above-mentioned Legislative Decree when the State where the acts were committed does not proceed. In any case, this situation is not unique to Italy and may need to be considered on a horizontal basis.