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Theme I

Third Evaluation Round

Evaluation Report on Italy Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

Adopted by GRECO
at its 54th Plenary Meeting
(Strasbourg, 20-23 March 2012)

I. INTRODUCTION

1. Italy joined GRECO in 2007. GRECO adopted the Joint First and Second Round Evaluation Report on Italy (Greco Eval I-II Rep (2008) 2E) at its 43rd Plenary Meeting (29 June-22 July 2009). The aforementioned Evaluation Report, as well as its corresponding Compliance Report, is available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current 3rd Evaluation Round (launched on 1 January 2007) deals with the following themes:
 - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption, Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
 - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO evaluation team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Italy from 3 to 4 October 2011, was composed of Ms Despina KYPRIANOU, Counsel of the Republic A', The Law Office of the Republic (Cyprus) and Mr Atle ROALDSØY, Senior Adviser, Ministry of Justice (Norway). The GET was supported by Ms Laura SANZ-LEVIA and Mr Yüksel YILMAZ from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2011) 8E REPQUEST, Theme I).
4. The GET met with officials from the following governmental organisations: Ministry of Justice, National Anticorruption Authority, State Audit Court (*Corte dei Conti*), the Judiciary (Court of Rome, Court of Cassation), the Prosecution Service (Prosecutor Office of Rome) and the Police (*Guardia di Finanza*). Moreover, the GET met with NGO representatives from Transparency International and Libera, academia, media and criminal defence lawyers.
5. The present report on Theme I of GRECO's 3rd Evaluation Round on Incriminations was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the effectiveness of measures adopted by the authorities of Italy in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Italy in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2011) 7E, Theme II.

II. INCRIMINATIONS

a. **Description of the situation**

7. Italy signed the Criminal Law Convention on Corruption (ETS 173) on 27 January 1999; it has not yet been ratified.

8. Italy signed the Additional Protocol to the Criminal Law Convention (ETS 191) on 15 May 2003; it has not yet been ratified.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

9. Criminalisation of bribery is provided for in Articles 318, 319, 319ter and 320 (passive bribery) and Articles 321 and 322 (active bribery) of the Italian Criminal Code (CC).

10. The relevant provisions on passive bribery differentiate between four types of situations, each of which is punished with a different level of sanction depending on whether:

(i) the expected action/omission of the public official/person in charge of a public service in the quality of employee of public authorities relates to his/her official duties (*corruzione passiva impropria*);

(ii) the bribe has been solicited or accepted before or after (*corruzione passiva impropria susseguente*) the performance of the official act:

Article 318, Criminal Code: passive bribery (performance of acts related to office)

The public official who, to perform the duties of his/her office, for him/herself or others, receives an undue remuneration in money or other benefit, or accepts the promise of it, shall be punished with imprisonment from six months to three years.

If the public official receives the remuneration for an already performed official duty, the punishment shall be imprisonment of up to one year.

(iii) the expected action/omission of the public official is in breach of his/her official duties (*corruzione passiva propria*):

Article 319, Criminal Code: passive bribery (performance of acts in breach of official duties)

The public official who, to omit or delay, or having omitted or delayed a duty of his/her office, or rather to perform or having performed an act contrary to the duties of his/her office, for him/herself or others, receives money or other benefit, or accepts the promise of it, shall be punished with imprisonment from two to five years.

(iv) the offence is committed "in favour of or against a party to a civil, criminal or administrative proceeding" (*corruzione in atti giudiziari*)

Article 319ter, Penal Code: passive bribery (in judicial proceedings)

If the facts specified in Articles 318 and 319 are committed with a view to favour or damage a party to a civil, criminal or administrative proceeding, the punishment shall be a term of imprisonment from three to eight years.

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

11. The provisions on passive bribery contained in Articles 318 and 319 are also applicable to persons in charge of a public service.

Article 320, Criminal Code: passive bribery of persons in charge of a public service

The provisions of Article 319 shall also apply to the persons in charge of a public service; those of Article 318 shall also apply to the persons in charge of public service in the quality of employee of public authorities. In any case, penalties shall be reduced by no more than a third.

12. Active bribery of domestic public officials is criminalised in Article 321 CC, which refers to the provisions on passive bribery to establish the level of penalty required. The interpretation of the different elements of passive bribery included in Articles 318 and 319 CC (e.g. concept of advantage, third party beneficiaries, in return for an official act) therefore applies to the offence of active bribery.

Article 321, Criminal Code: active bribery

The punishments provided for under first subsection of the section 318, 319, 319-bis, 319-ter, and 320 in relation with the above-mentioned hypotheses specified in the section 318 and 319 shall apply also to whoever gives or promises money or other benefits to the public official or person in charge of a public service.

13. In addition, the autonomous offences of active and passive incitement to corruption are provided in the Italian CC to cover situations when an offer, promise or request of a bribe is not accepted.

Article 322, Criminal Code: incitement to corruption

Whoever offers or promises undue money or other benefits to a public official or person in charge of a public service in the quality of employee of public authorities, in order to induce him/her to perform a duty of his/her office, if the offer or promise has not been accepted, is bound by section 318 to the punishment provided for in the first subsection, reduced by one third.

If the offer or promise is made to induce a public official or a person in charge of a public service to omit or delay a duty of his/her office, or rather to make an act contrary to his/her office, if the offer or promise has not been accepted, the offender is bound by section 319 to the punishment provided for therein, reduced by one third.

The punishment provided for under first subsection shall apply to the public official or person in charge of a public service in the quality of employee of public authorities who solicits a promise, or giving of money, or other benefits by a private individual, for the purposes specified under section 318.

The punishment provided for under second subsection shall apply to the public official or person in charge of a public service who solicits a promise, or giving of money, or other benefits by a private individual, for the purposes specified under section 319.

14. Finally, there is an autonomous offence of *concussione*, which reads as follows:

Article 317, Criminal Code: *Concussione*

A public official or a person in charge of a public service who, by abusing his/her position or his/her power, compels or induce anyone to unduly give or promise, to himself/herself or a third person, money or other benefit, shall be liable to imprisonment for between four and twelve years.

15. When instances of *concussione* occur, only the public official is liable to a criminal sanction. The individual who has been subject to *concussione* is considered a victim.
16. According to jurisprudence, the principal distinction between bribery and *concussione* is the conduct of the public official who, in the latter case, by abusing his/her power or position, influences the individual in such a way as to compel or induce him/her to fulfill an undue act in order to avoid serious damages (Court of Cassation, Criminal Division, 10 February 1982; Court of Cassation, Criminal Division, 6 July 1984; Court of Cassation, Criminal Division VI, 13 November 1997; Court of Cassation, Criminal Division, 15 September 2000, n. 9737). According to jurisprudence, *concussione* arises when a public official has psychologically coerced an individual; coercion can include: threat, deception, persuasion, obstructionism. A borderline case is represented by the conduct of a public official who, by abusing his/her power or position, obstructs in such a way the individual who is entitled to the public service, that the latter feels moved to take the initiative to offer a bribe (Court of Cassation, VI Section Criminal Division, 6 December 1988, n. 2681).
17. Furthermore, jurisprudence has developed the notion of *concussione ambientale* which occurs when an individual is in a situation which leads him/her to believe that s/he must provide a public official with an advantage, either to avoid harm or to obtain something to which s/he is entitled (Court of Appeal of Rome, 3 June 1993, n. 940018). However, there still has to be a conduct of induction where the official refers to a certain established illicit practice (Court of Cassation, 29 April 1998, n. 5116 and Court of Cassation, n. 13395, 13 July 1998).
18. The distinction between *concussione* and bribery has triggered judicial debate, since the dividing line between both types of offences is not always so clear to draw in practice.

Elements of the offence

“Domestic public official”

19. The notion of “public official” is developed by Article 357 CC as follows:

Article 357, CC: public official

As provided for under criminal law, those who perform a legislative, judicial, or administrative public function are public officials.

As provided for under the same law, the administrative function is public when it is regulated by public law provisions and authority's acts; when it is featured by the formation and statement of the public administration's will or by its implementation by means of authority and certifying powers.

20. In addition, Article 358 CC refers to the term “public officer” as follows:

Article 358, CC: person in charge of a public service

As provided for under 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 simply ordinary tasks and exclusively manual work.

21. There is extensive jurisprudence (and academic studies) reflecting on the notion of public official and confirming that, in the framework of penal legislation, this is to be interpreted to the widest extent possible (beyond administrative law). Any person who carries out a public function is a public official; a formal appointment is not a condition for public official status (Court of Cassation, Criminal Division VI, 7 June 2001, n. 32938).
22. The decisive factor in determining whether an individual is a public official lies with the nature of the functions s/he performs, rather than the public/private law status of the entity that is employing the said person or that s/he represents. In this context, the term “public official” would not only cover those persons carrying out a public function in the State administration (whether at central, regional or local level), but also individuals vested with public authority to perform certain duties of State administration, e.g. employees of public enterprises, employees of companies which have been officially granted particular rights or licences to perform public services, etc., irrespective of their type of contract and the temporary/permanent character of the functions performed (Court of Cassation, Criminal Division VI, 21 February 2003, n. 11417; Court of Cassation, Criminal Division VI, 22 October 2010, n. 37775).
23. The term “public official” necessitates from a certain decision-making power (“*when it is featured by the formation and statement of the public administration’s will or by its implementation by means of authority and certifying powers*”). During the on-site visit, the authorities further explained that the term “person in charge of a public service” refers to a person whose function is in between that of a mere executor and of a public official. Although the definition of “person in charge of a public service” excludes from its scope the performance of simply ordinary tasks and exclusively manual work, the authorities provided numerous examples where the concept of “person in charge of a public service” has been interpreted very broadly by courts, so as to cover clerks of a Government office issuing driving licenses, persons collecting motorway tolls, security guards driving a security convoy from the Government, train ticket inspectors, etc.
24. On the basis of the above, the Italian authorities confirm that the definition of public official, as laid out in legislation and further interpreted by court, covers all individuals who are described as “officials”, “public officers” and “judges, prosecutors and holders of judicial offices” within the meaning of Article 1 (a) and (b) of the Criminal Law Convention on Corruption (ETS 173).

“Promising, offering or giving” (active bribery)

25. The elements of “promising” and “giving” are transposed by Article 321 CC, which does not explicitly refer to the “offering”. The “offering” and “promising” of an undue advantage are covered in Article 322 (1) and (2) CC relating to the incitement to corruption, i.e. situations when a bribe is offered or promised to a public official and the latter does not accept such an offer or promise.

The authorities explained that, if the offer is accepted by the public official, then Articles 318 to 321 CC apply. The offence of incitement of corruption merely requires for its completion the offer or promise of the briber; the offer/promise requires a minimum of seriousness and concreteness and needs to have the potential to affect psychologically the conduct of the public official/person in charge of a public service. It is not necessary that the promise/offer is justified, nor that the amount or nature of the benefit is specified. For example, a court decision convicts a lawyer who, without specifying his interest or reasons to bribe, had repeatedly offered, in a generic manner, his capacity and will to “pay well” the persons in charge of the computerisation of data of a Public Prosecutor’s Office (Court of Cassation, 29 January 1998, n. 2678) .

“Request or receipt, acceptance of an offer or promise” (passive bribery)

26. The elements of “receipt” or “accept the promise” are explicitly covered in the relevant provisions dealing with passive bribery of a public official in return for a lawful (*corruzione passiva impropria*) or an unlawful act (*corruzione passiva propria*), i.e. Articles 318 and 319 CC. The aforementioned provisions do not specifically refer to the “request” or the “acceptance of an offer”. The “request” (solicitation) of a promise of an undue advantage or the undue advantage itself is covered in Article 322 (3) and (4) CC relating to the incitement to corruption.

“Any undue advantage”

27. Bribes may consist of “money or other benefits” (Articles 318, 319, 321 and 322 CC); the aforementioned terms are understood to be broad enough to cover both material and immaterial advantages.
28. With respect to the “undue” nature of the advantage, Article 318 CC (bribes for performing acts related to the official’s office, *corruzione passiva impropria*) establishes that the money or other benefits must constitute an “undue remuneration”. Likewise, Article 322 (1) CC (offers or promises to induce an official to perform an act related to his/her office where the offer or promise is not accepted, *istigazione alla corruzione passiva impropria*) refers to money and other benefits which have been “unduly” offered or promised.
29. Jurisprudence has generally understood that customary or low value gifts would be excluded from the scope of those provisions where the bribe was received for performing acts related to the official’s office (Article 318, Article 322 (1) CC), as long as those bribes would not influence the public official’s action in service, i.e. when the small gifts cannot be considered a reward for the action of the public official, provided that there is no disproportion between the gift and the public official’s act (Court of Cassation, Criminal Division VI, 1 December 1989, n. 16837).
30. When bribes are received for an official to act in breach of his/her official duties, any benefit would be considered a bribe, independently of its value (Court of Cassation, *Sezioni Unite*, 15 March 1996, n. 2780; Court of Cassation, Criminal Division VI, 9 July 2002, n. 30268); Court of Cassation, Criminal Division VI, 9 June 2009, n. 23776).

“Directly or indirectly”

31. The relevant provisions on bribery in the Italian CC do not expressly provide for cases of bribes made through intermediaries; however, the courts have interpreted the latter provisions in a broad manner so as to cover such instances. In this connection, there is consistent jurisprudence of the Court of Cassation stressing that bribery does not need to involve a direct contact between the public official and the briber; contacts may well be established through an intermediary, who

links the two parties (Court of Cassation, Criminal Division II, 14 November 1988, n. 10962; Court of Cassation, Criminal Division V, 25 March 2004, n. 26625). The provisions on participation (Article 110 CC) are fully applicable in this context.

“For himself or herself or for anyone else”

32. Bribery offences also apply where the gift benefits a third party (*for himself/herself or others*).

“To act or refrain from acting in the exercise of his or her functions”

33. The bribery offences expressly cover “acts” and “omissions” committed in the past or in the future (*corruzione susseguente*) by the public official. More specifically, they concern acts committed relating to the exercise of official duties/functions. This relation is understood broadly: it includes acts that form part of the official’s express powers and authority (even if these are not explicitly laid down in legislation), as well as those instances lying outside of the official’s formal authorities (e.g. discretionary acts). The decisive element of the offence is not whether the official has any discretion to act as requested by the briber, but whether he has been offered, given or promised a bribe in order to obtain something from him/her and therefore, to compromise his/her impartiality (Court of Cassation, 3 June 1987). According to the jurisprudence in this area, the bribery provisions of the Criminal Code aim at safeguarding the principles of efficiency and impartiality of public administration, as enshrined by Article 97 of the Constitution, which would be significantly undermined, even if the official would have acted in the same way without the bribe.

34. Finally, for a bribery offence to occur, it is not required that the induced act or omission by the public official involves a breach of duty or is unlawful as such; however, the commission/omission of an unlawful official act entails more severe sanctions.

“Committed intentionally”

35. In accordance with Article 42 CC, criminal offences in Italian law only include intentional commission, unless the law expressly provides punishment for negligent conduct. This is not the case for corruption offences in Italy. Hence, only intentional action is punishable.

Sanctions

36. Sanctions depend upon the nature of the act (or omission) for which the bribe is intended, i.e. whether in accordance with the public official’s duties (lawful acts or omissions) or whether in breach of his/her official duties (unlawful acts or omissions). Punishment for active and passive bribery ranges from 6 months to 3 years (Articles 318 (1), 321 and 322 (1) CC, lawful acts) and from 2 to 5 years (Articles 319, 321 and 322 (2) CC, unlawful acts) of imprisonment, respectively. In both cases, the applicable sanctions can be reduced, upon the discretion of the judge, by one third if the offer or promise of the undue advantage is not accepted (Article 322 CC, incitement to corruption). The penalty for passive bribery in connection with unlawful acts is to be increased if corruption occurs in the exercise of judicial functions (Article 319-ter, Criminal Code) or if bribery results in the award of civil services, wages, pensions or contracts with public administration (Article 319-bis, Criminal Code).

37. Additional sanctions include disqualification from public office (Article 29 CC): a penalty of no less than 5 years’ imprisonment results in permanent disqualification from holding a public office; a penalty of no less than 3 years’ imprisonment results in disqualification from public office for

5 years. Other general measures are the disqualification from exercising the profession, trade or occupation of the convicted person (Article 31 CC), from holding the position of director in legal persons and companies (Article 32 CC), or from entering into contracts with the public administration (Article 32^{quater} CC).

38. The application of aggravating or mitigating circumstances is at the full discretion of the judge, who is to indicate in the judgement the reasons for the sanctions imposed (Articles 63 to 69 CC). When applying aggravating or mitigating circumstances, consideration must be given to the objective gravity of the offence and the subjective conditions of the offender (Articles 132 and 133 CC).
39. By way of comparison, fraud (*truffa*) carries a prison sentence of 6 months to 3 years and fines ranging from 51 to 1,032 EUR; in aggravated cases, the imprisonment term could increase to a maximum of 5 years and fines can range from 309 to 1,549 EUR (Article 640 CC). Embezzlement (*appropriazione indebita*) is punished with imprisonment for a period of up to 3 years and a fine of up to 1,032 EUR (Article 646 CC). Abuse of office (*abuso d'ufficio*) carries a prison sentence of 6 months to 3 years; the penalty is increased in cases where the advantage or the damage are seriously significant (Article 323 CC)

Court decisions

40. There is a large number of court decisions dealing with bribery of several categories of public officials (e.g. judges and holders of judicial office, elected representatives, doctors, employees of private companies carrying out tasks of a public nature, etc). The interpretation of the key elements (e.g. definition of public official, object of corruption, scope of official act) contained in the relevant bribery offences has been largely developed in the light of those decisions, as illustrated by the paragraphs above.

Bribery of members of domestic public assemblies (Article 4 of ETS 173)

41. Members of domestic public assemblies are considered public officials in the meaning of Article 357 CC which encompasses “those who perform a legislative, judicial, or administrative public function”. Therefore, the definition of public official is wide enough to also cover members of any other public representative body whose members are elected or appointed and which exercise legislative or administrative powers. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies.

Bribery of foreign public officials (Article 5 of ETS 173)

42. With a view to implementing the obligations under the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, as well as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter OECD Anti-Bribery Convention)¹, a new provision, i.e. Article 322bis, was introduced in the Italian CC.

¹ Italy ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 15 December 2000; the aforementioned Convention entered into force in respect of Italy on 13 February 2001.

Article 322bis, Criminal Code: bribery of foreign officials

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

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

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

1. *to persons who are referred to in the first paragraph of this article;*
2. *to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.*

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

Elements of the offence

“Foreign public official”

43. The Italian CC does not provide an autonomous definition of the term “foreign official”. However, Article 322bis *in fine* establishes that the definition of “public official” and “person in charge of a public service” in Articles 357 and 358 CC are to be extrapolated to foreign public officials.
44. It must be noted that Article 322 provides for:
 - (i) active and passive bribery of (a) members of the EU institutions (European Commission, European Parliament, Court of Justice, Court of Auditors), contracted officials and agents, seconded persons and other servants of the EU institutions or any of their bodies, and (b) foreign officials who carry out public functions or activities within other Member States of the European Union;
 - (ii) active bribery of foreign officials or officials of public international organisations in the context of international business transactions.

45. In other words and to sum up: active and passive bribery of foreign officials is covered in the Italian CC in all cases when involving members, agents, seconded and contracted personnel of the EU institutions and bodies, as well as foreign officials of EU Member States. Active bribery of all other types of foreign officials (i.e. not working in EU institutions or bodies, or not performing a public function in an EU Member State) is only covered when it occurs in the framework of an international business transaction. Passive bribery of all other types of foreign officials (i.e. not working in EU institutions or bodies, or not performing a public function in an EU Member State) is not covered.

“Promising, offering or giving” (active bribery)

46. The elements of “promising”, “offering” and “giving” are explicitly covered by Article 322bis CC, which punishes the bribing or attempt to bribe a foreign public official through the use of money or other benefits.
47. As stated above, active bribery of foreign public officials is only criminalised if the official act (whether lawful or unlawful) is committed (a) in the context of international business transactions or, independently of the nature of the transaction, (b) if the foreign public official is a member of the EU institutions and their bodies, or if the foreign public official is serving in an EU Member State.

“Request or receipt, acceptance of an offer or promise” (passive bribery)

48. Passive bribery of foreign public officials is criminalised in so far as it involves (a) members of EU institutions, (b) contracted officials and agents, seconded persons and other servants of the EU institutions or any of their bodies, or (c) foreign officials who carry out public functions or activities within other Member States of the European Union.

Other elements

49. What is described concerning other specific elements/concepts of the offence (“undue advantage”, “intermediaries”, “third party beneficiaries”, “to act or refrain from acting in the exercise of his or her functions”, “committed intentionally”) in respect of bribery of domestic public officials applies also in respect of bribery of foreign public officials.

Sanctions

50. The applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign public officials.

Court decisions

51. There are several court decisions concerning bribery of foreign public officials. In this connection, the latest Progress Report (2011) of Transparency International concerning enforcement of the OECD Anti-Bribery Convention refers to Italy as one of the 7 OECD Convention countries (out of 37) which performs active enforcement of the aforementioned Convention.
52. An interesting example is an Oil-for-Food case involving allegations that an Italian company paid bribes to Iraqi public officials. The owner of the company, a manager and an adviser were sentenced to 2 years in prison in March 2009. The case is relevant for jurisprudence purposes since it carries out an exegesis of the incrimination of foreign bribery provided in

Article 322bis CC. Firstly, the Court observes that the cross reference made by Article 322bis to Articles 318, 319, 221 and 322 serves as a basis for interpretation of the foreign bribery offence in the light of the elements of the domestic bribery offence. Secondly, the Court analyses whether their payment of bribes could be authorised or consented to by written laws or regulations, or by case-law, of the foreign country. In this connection, the Court considered that even if a note by the Iraqi Oil Ministry established that, from September 2000 onwards, a surcharge should be demanded on the selling of oil, the note in question did not allow waiving of the liability of the Italian company. Thirdly, the Court qualified the alleged acts as bribery for unlawful acts (*corruzione propria*), considering that even if the public officials acted following the guidelines established by the Iraqi regime, the receipt of bribes was contrary to their duties. Moreover, the Court took the view that bribery occurred to obtain the undue benefit deriving from the conclusion of the contracts, but also to maintain those already concluded and partially executed. As a consequence, the Court considered the facts as a continuing offence.

53. In another judgement, the Court of Cassation ruled that, in the trial for the offence of bribery of a foreign official, the judge must proceed, also *ex-officio*, to acquire the foreign legislation that disciplines the functions and the activities pertaining to the said foreign official, so as to determine whether the corrupt official was actually performing functions or activities equivalent to those of public officials or representatives of a public service (Court of Cassation, Criminal Division VI, 5 November 2009, n. 49532).

Bribery of members of foreign public assemblies (Article 6 of ETS 173)

54. Members of foreign public assemblies would be covered by the relevant provisions concerning active bribery of domestic public officials (i.e. Article 321 and Article 322, first and second paragraphs) if (a) bribery takes place in the context of international business transactions, pursuant to Article 322bis CC, paragraph 2, point 2; or, independently of the nature (public/private) of the transaction in which bribery takes place, the member of the foreign public assembly carries out functions or activities corresponding to those performed by public officials or persons in charge of a public service, within an EU Member State.
55. Members of foreign public assemblies would be covered by the relevant provisions concerning passive bribery of domestic public officials (i.e. Articles 318, 319 and 322, third and fourth paragraphs) when they carry out public functions or activities within other Member States of the European Union.

Article 322bis, Criminal Code: bribery of foreign officials

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

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

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

1. *to persons who are referred to in the first paragraph of this article;*
2. *to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.*

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

56. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of foreign public assemblies. There are no court decisions/case law concerning bribery of members of foreign public assemblies.

Bribery in the private sector (Articles 7 and 8 of ETS 173)

57. The Italian Criminal Code does not criminalise bribery in the private sector. The main provision on bribery in the private sector is contained in Article 2635 of the Civil Code (as amended by Legislative Decree No. 61/2002 and Legislative Decree No. 39/2010), which provides for criminal sanctions, as follows:

Article 2635, Civil Code: Bribery in the private sector

Managers, general directors, directors in charge of the drafting of balance sheets, mayors and liquidators who, upon receiving or accepting the promise of any advantage, act or refrain from acting in breach of their duties, providing damage to the legal person, are punished with imprisonment of up to three years.

The same punishment is applicable to those who give or promise the advantage to the above-mentioned persons.

The punishment is doubled when it comes to a listed company.

The offence is not punishable ex officio, but on complaint of the victim.

58. Another provision on bribery in the private sector is included in Article 353 of the Criminal Code concerning the limitation of freedom of public auctions. The illicit conduct criminalised by this provision consists in preventing or upsetting tenders for public contracts through gifts or promises. The offence is committed regardless of whether a prejudice or an advantage results from the illicit conduct, because it consists in troubling the normal procedure of the auction and the freedom of fair competition. The offence is committed through obstructing or jeopardizing the auction or sending away one of the competitors (Court of Cassation, Criminal Division II, 26 January 2006, n. 4925). Gifts can be given and/or promises can be made not necessarily to competitors.
59. Other offences which are of relevance to the issue of private sector corruption are the ones provided for in Articles 170, 171 and 172 of Royal Decree 1265/1934 (offences of “*comparaggio*” or improper payments to doctors), Article 233 of the Bankruptcy Law on vote bargaining, and Article 1 of Law 401/1989 on fraud in sport.

Bribery of officials of international organisations (Article 9 of ETS 173)

60. The Italian CC criminalises active and passive bribery of members of the EU institutions or bodies, who are explicitly covered by Article 322bis CC.

Article 322bis, Criminal Code: bribery of foreign officials

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

1. *to the members of the Commission of the European Communities, of the European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;*
2. *to contracted officials and agents in accordance to either Staff Regulations applying to officials of the European Communities or to the provisions applying to agents of the European Communities;*
3. *to any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions corresponding to those performed by the officials or agents of the European Communities;*
4. *to members and servants of bodies created on the basis of Treaties establishing European Communities;*

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

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

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

61. Active bribery of members of other international organisations is covered only if bribery occurs in the context of international business transactions. Passive bribery of members of international organisations, other than EU institutions and bodies, is not covered in Italian legislation.

Article 322bis, Criminal Code: bribery of foreign officials

.....The provisions set forth in article 321 and 322, first and second paragraphs, shall also apply whereas the money or other benefits are given, offered or promised:.....

2. *to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.....*

62. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of officials of international organisations, as appropriate.

Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)

63. The Italian CC criminalises active and passive bribery of members of the European Parliament, who are explicitly covered by Article 322bis CC.

Article 322bis, Criminal Code: bribery of foreign officials

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

- 1. to the members of the Commission of the European Communities, of the European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;.....*

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

- 1. to persons who are referred to in the first paragraph of this article;.....*

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

64. Active bribery of members of other international parliamentary assemblies is covered insofar as bribery occurs in the context of international business transactions. Passive bribery of members of international parliamentary assemblies, other than the European Parliament, is not covered in Italian legislation.

Article 322bis, Criminal Code: bribery of foreign officials

The provisions set forth in article 321 and 322, first and second paragraphs, shall also apply whereas the money or other benefits are given, offered or promised:.....

- 2. to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.....*

65. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply, as adequate.

Bribery of judges and officials of international courts (Article 11 of ETS 173)

66. The Italian CC criminalises active and passive bribery of members of the European Court of Justice and the European Court of Auditors, who are explicitly covered by Article 322bis CC.

Article 322bis, Criminal Code: bribery of foreign officials

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

- 1. to the members of the Commission of the European Communities, of the European Parliament, of the Court of Justice and of the Court of Auditors of the European Communities;*

The provisions set forth in article 321 and 322, first and second paragraphs, shall also apply whereas the money or other benefits are given, offered or promised:.....

- 1. to persons who are referred to in the first paragraph of this article;*

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

67. Active bribery of members of other international courts is covered insofar as bribery occurs in the context of international business transactions. Passive bribery of members of international courts, other than the European Court of Justice and the European Court of Auditors, is not covered in Italian legislation.

Article 322bis, Criminal Code: bribery of foreign officials

The provisions set forth in article 321 and 322, first and second paragraphs, shall also apply whereas the money or other benefits are given, offered or promised:.....

2. *to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.....*

68. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply, as adequate.

Trading in influence (Article 12 of ETS 173)

Definition of the offence

69. According to the authorities, passive trading in influence is covered in Article 346 CC on “millantato credito” (fraudulent representation).

Article 346, Criminal Code: “Millantato credito”

Whoever makes a fraudulent representation of his/her influence with a public official or a person in charge of a public service, receives or causes to be given or promised to himself/herself or others, money or other benefit, as the price for his/her good offices with the public official or person in charge of a public service, shall be punished by a term of imprisonment from one to five years and a fine from 309 EUR to 2,065 EUR.

The penalty shall be a term of imprisonment from two to six years and a fine from 516 EUR to 3, 098 EUR, if the offender receives or causes to be given or promised to himself/herself or others, money or other benefit, on the pretext that s/he must obtain the favour of a public official or state employee or must compensate him/her.

70. Active trading in influence (i.e. the promising, giving or offering of an undue advantage to the influence peddler) is not criminalised.

Elements of the offence

“Promising, offering or giving” (active trading in influence)

71. At present, the conduct of a private individual who promises, offers or gives an undue advantage to the person who is willing to exert an improper influence over a public official is not punished.

“Request or receipt, acceptance of an offer or promise” (passive trading in influence)

72. The request, the receipt and the acceptance of the promise is explicitly covered.

“Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]”

73. Trading in influence consists in showing an inexistent influence (*fraudulent representation of influence*) or pumping up the one which really exists. Trading in influence can be committed also without necessarily mentioning the name of the public official on whom influence is to be exerted.

74. For the offence of trading in influence to occur, it is not necessary that the influence is actually exerted and leads to the intended result, the mere assertion of the trader in influence that s/he could exercise such influence would be sufficient for the criminal offence to be committed. It is to be noted, however, that the offence requires a deception by the influence peddler on his/her ability to exert influence.

“Any undue advantage”

75. Article 346 CC does not use the term “undue” to qualify the advantage. In this connection, it is understood that any “money or any other benefit” may come under the scope of the offence if its purpose is to influence the decision-making process of public officials.

“Directly or indirectly”

76. The direct or indirect nature of the intermediation is not explicitly covered, but the general rules on participation apply.

“For himself or herself or for anyone else”

77. Third party beneficiaries are explicitly covered (*for himself/herself or for others*).

“Committed intentionally”

78. Intentionality is an implicit component of the trading in influence offence.

Sanctions

79. Trading in influence is punished with imprisonment from 1 to 5 years and fines ranging from 309 to 2,065 EUR (Article 346, paragraph 1 CC); if deception occurs (Article 346, paragraph 2 CC) the penalty increases to imprisonment from 2 to 6 years and fines from 5,016 to 3,098 EUR.

80. In addition, interdiction from public office as well as other professional disqualifications and bans from entering into contracts with the public administration apply (see paragraph 37).

Court decisions

81. Several court decisions have clarified some of the elements of Article 346 CC. Particular mention should be made of a recent judgment (Court of Cassation, 21 January 2010, n. 12822) which interprets Article 346, paragraph 2 CC as an autonomous offence (and not an aggravating circumstance of the offence under Article 346, paragraph 1 CC) and stresses that it is irrelevant

that the initiative originates from the person who is asked to give the money or any other advantage; nor is it necessary that the influence peddler mentions the names of the officials or employees whose “good offices” must be bought or paid. The influence peddler was therefore convicted although his/her conduct was “generic” in the sense that he/she did not mention the public employees he/she would turn to buy their “good offices”.

Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191)

82. Bribery of domestic arbitrators is not criminalised in Italy. In particular, Article 813 of the Code of Civil Procedure specifically states that arbitrators cannot be considered “public officials” or “persons in charge of a public service”.

Bribery of foreign arbitrators (Article 4 of ETS 191)

83. Bribery of foreign arbitrators is not criminalised in Italy.

Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191)

84. Bribery of domestic jurors (*giudice popolare*) is punishable in so far as this category of persons would be considered public officials exercising public functions in the context of Article 357 CC. In practice, this concerns citizen jurors or their substitutes sitting, together with career judges, in the assize court of first instance or appeal (Articles 3 and 4, Law on the Reorganisation of Judges of the Assize Court). The office of juror is compulsory and equates to public elective office; active service jurors are equal to judges of the equivalent rank (Article 11, Law on the Reorganisation of Judges of the Assize Court).

Bribery of foreign jurors (Article 6 of ETS 191)

85. Foreign jurors would be covered by the relevant provisions concerning active bribery of domestic public officials (i.e. Article 321 and Article 322, first and second paragraphs) if (a) bribery takes place in the context of international business transactions, pursuant to Article 322bis CC, paragraph 2, point 2; or, independently of the nature (public/private) of the transaction in which bribery takes place, the foreign juror carries out functions or activities corresponding to those performed by public officials or persons in charge of a public service, within an EU Member State.
86. Foreign jurors would be covered by the relevant provisions concerning passive bribery of domestic public officials (i.e. Articles 318, 319 and 322, third and fourth paragraphs) when they carry out functions or activities corresponding to those performed by public officials or persons in charge of a public service, within an EU Member State.

Article 322bis, Criminal Code: bribery of foreign officials

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

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

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

- 1. to persons who are referred to in the first paragraph of this article;*
- 2. to persons carrying out functions or activities corresponding to those performed by public officials and persons in charge of a public service in other foreign States or public international organisations, whereas the offence was committed in order to obtain an undue advantage to their benefit or to the benefit of a third party in international business transactions.*

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

87. According to the authorities, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply to foreign jurors. There are no court decisions/case law concerning bribery of foreign jurors.

Other questions

Participatory acts (Article 15 of ETS 173)

88. The general rule is that participatory acts (aiding and abetting) are punishable as principal offences (Article 110 CC). Moreover, the punishment of the principal offence can be increased when certain aggravating factors exist, 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 (Article 112 CC). Finally, the modulation of the responsibility of accomplices is to take into account the aforementioned general rules in combination with the specific rules laid out in the incrimination of the offence itself (consequently, for corruption offences, Articles 110 and 112 CC are to be read in the context of Articles 318, 319, 321, 322 and 322 bis).
89. Pursuant to well established case law, the rules on participation also apply to any contribution 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 (e.g. Court of Cassation, Criminal Division VI, 4 December 2002, n. 3388).

Jurisdiction (Article 17 of ETS 173)

90. Jurisdiction is established over acts committed, partially or in whole, within the territory of Italy (principle of territoriality, Article 6 of the Criminal Code). Territorial jurisdiction is established over offences that are committed both wholly or partially within the national territory, and even in those cases where the consequences of the conduct take place in the national territory.

Article 6, Criminal Code: Territorial jurisdiction

Whoever commits an offence on the territory of the State shall be punished according to Italian law.

An offence is considered as committed on the territory of the State when the action or omission constituting it, occurred there in whole or in part, or when an event which is a consequence of the action or omission took place there.

91. Concerning nationality jurisdiction, Italy has jurisdiction:

(i) over a citizen or a foreigner for an offence committed by a public official in the service of the State by abusing the powers or violating the duties of his/her office (Article 7 (4) CC)

Article 7, Criminal Code: Universal jurisdiction

An Italian national or a foreign person who commits any of the following offences on foreign territory shall be punished according to Italian law:

- (1) Offences against the personality of the State.*
- (2) Offences of counterfeiting the seal of the State and of using such counterfeited seal.*
- (3) Offences of counterfeiting money which is legal tender in the territory of the State, or duty-bearing paper of Italian public credit securities.*
- (4) Offences committed by public officers serving the State by abusing their powers or violating the duties connected with their functions.*
- (5) Any other offence for which specific provisions of law or international conventions prescribe the applicability of Italian criminal law.*

(ii) over an Italian national for an offence committed abroad that is not referred in Articles 7, 8 and 9 CC (namely non-political offences other than offences against the personality of the State and counterfeiting) when the offence is punishable under Italian law by life imprisonment or at least 3 years of imprisonment. If the offence is punishable for a shorter period, jurisdiction can only apply 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 the EU or any foreign country or a foreigner, jurisdiction can only be established at the request of the Minister of Justice (Article 9 CC)

Article 9, Criminal Code: Applicability of criminal legislation of Italy to nationals who commit a criminal offence abroad (national jurisdiction)

An Italian national who, apart from the cases specified in the two previous articles, commits on foreign territory an offence for which Italian law provides death penalty, or life imprisonment, or a term of imprisonment of not less than three years in the minimum, shall be punished in compliance with Italian law, provided that he is on the territory of the State.

If it is an offence for which a penalty restricting personal freedom for a shorter period is provided for, the offender shall be punished at the request of the Minister of Justice or following an application or a complaint by the victim.

In the cases provided for by the provisions above, when it is an offence committed to the detriment of European Communities or a foreign State or a foreign person, the offender shall be punished at the request of the Minister of Justice, provided that his extradition has not been granted or has not been accepted by the Government of the State in which he committed the offence.

(iii) over a foreigner for an offence committed abroad that is not referred in Articles 7 or 8 CC when the offence is committed to the detriment of the Italian State or an Italian citizen and is punishable by life imprisonment or at least 1 year of imprisonment, as well as when the offence is committed to the detriment of the EU or any foreign country or foreigner and is punishable by life imprisonment or at least 3 years of imprisonment. If the offence is committed to the detriment of the Italian State or an Italian citizen, jurisdiction can 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 the EU or any foreign country or foreigner, jurisdiction can only be established at the request of the Minister of Justice (Article 10 CC).

Article 10, Criminal Code: Applicability of criminal legislation of Italy to foreigners who commit a criminal offence abroad (conditional universal jurisdiction)

A foreign person who, apart from the cases specified in Articles 7 and 8, commits in a foreign territory, to the detriment of the State or a citizen, an offence for which Italian law prescribe the punishment of life imprisonment or imprisonment for a minimum of not less than one year, shall be punished according to Italian law, provided s/he is within the territory of the State and there is a request by the Minister of Justice, or a petition or complaint by the victim.

If the offence was committed to the detriment of a foreign State or a foreign person, the offender shall be punished according to Italian law, on request of the Minister of Justice, provided that:

(1) s/he is within the territory of the State;

(2) the offence is one for which the punishment prescribed is life imprisonment or imprisonment for a minimum of not less than three years; and

(3) extradition has not been granted, or has not been accepted by the Government of the State in which the offence was committed, or by that of the State to which the perpetrator belongs.

92. Dual criminality is not required for Italy to establish jurisdiction over an offence that takes place abroad.

Statute of limitations

93. The period of limitation for the conclusion of a prosecution depends on the maximum term of the sanctions which can be imposed for the offence in question (Article 157 CC). The base limitation period for a prosecution of bribery/trading in influence offences is six years; the only exception is bribery in judicial proceedings where the absolute limitation period extends to eight years.
94. The limitation period commences when the offender completes the offence or, in the case of an attempt, when s/he ceases to perform the activities that constitute an attempt (Article 158 CC). There have been several court decisions determining when the limitation period is to start to run for bribery offences, the latest of which confirms that when the promise is followed by the giving-receiving of the bribe, it is only at this last stage that the offence itself is deemed to be committed (Court of Cassation, *Sezione Unite*, 25 February 2010, n. 15208). The decision ruled a case where, after the promising of the bribe, the giving consisted of a deposit in a bank account in the name of a company and not in the name of the defendant. The Court of Cassation stated that the offence was committed when the defendant used the money that was deposited in the bank account.
95. The limitation period may be suspended or interrupted in certain circumstances (Articles 159, 160 and 161 CC)². A suspension merely stops the running of time temporarily. An interruption resets

² The limitation period is suspended (i) where suspension is required by a particular provision of the law; (ii) when the public prosecutor submits the application to prosecute (in which case the limitation period continues from the date the competent authority grants the application); (iii) when the case is referred for another ruling (iv) in the event of circumstances impeding either party or their respective lawyers, or by request of the accused person or his/her lawyer. In this latter instance, a trial can be suspended for no more than 60 days from the time when the circumstances for which the suspension was granted cease to exist (Article 161 CC).

An interruption is allowed when there is: a judgment or a conviction; an order applying precautionary measures; an order confirming arrest; an examination in front of the prosecutor or the judge; a summons to appear for examination in front of a

the limitation period and time runs anew from the end of the event causing the interruption. The effects on an interruption are limited in time. In particular, Article 161 CC provides for a maximum term caused by interruptions (absolute statute of limitation); when this term is reached, the proceedings must be permanently stopped. This absolute statute of limitation is mainly based on the subjective condition of the accused person:

- no maximum limit for offences not provided with a statute of limitation (i.e. offences sanctioned with a life sentence) and for mafia-related crimes;
- extension of a quarter of the statute of limitations for contraventions, culpable and intentional offences committed by a simple recidivist;
- extension of a third of the statute of limitations for intentional offences committed by the aggravated recidivist;
- extension of a two third of the statute of limitations for intentional offences committed by the repeated recidivist;
- extension to the double of the statute of limitation for intentional offences committed by the habitual criminal.

96. Both the base and the absolute limitation periods commence at the same time. The only difference between the two periods is that no suspensions or interruptions apply to the absolute limitation period.

97. A limitation period can always be expressly waived by a defendant.

98. The following table illustrates the applicable limitation periods for bribery and trading in influence:

| Offence | Maximum penalty | (Base) Statute of Limitation | Absolute Statute of Limitation | | | |
|---|--------------------|------------------------------|--------------------------------------|---|---|---|
| | | | Recidivism (simple) Art 99 (1) CC | Recidivism (aggravated) Art. 99 (2) CC | Recidivism (reiterated) Art. 99 (4) CC | Habitual criminal (Arts. 102, 103, 105 CC) |
| (Art. 318 CC) Passive bribery lawful official acts | 3 yrs | 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs |
| (Art. 319 CC) Passive bribery unlawful official acts | 5 yrs | 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs |
| (Art.319-ter CC) Passive bribery judicial proceedings | 8 yrs | 8 yrs | 8 yrs + 1/4 10 yrs | 8 yrs + 1/2 12 yrs | 8 yrs + 2/3 13 yrs and 4 months | 8 yrs + double 24 yrs |
| (Art. 321 CC) Active bribery | Art. 318: 3 yrs | Art. 318: 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs |
| | Art.319: 5 yrs | Art. 319: 6 yrs | | | | |

judge; an order by a judge setting a hearing in Council Chamber; a request of committal for trial; an order for a preliminary hearing; an order disposing of a summary proceeding; an order for a hearing to decide on the application of a sanction/penalty; an appearance or summons for immediate judgment; a decision disposing of an immediate judgment; a decision disposing of a proceeding; and an order to subpoena a witness (Article 160 CC).

| Offence | Maximum penalty | (Base) Statute of Limitation | Absolute Statute of Limitation | | | | |
|--|--------------------|------------------------------|--------------------------------------|---|---|---|---|
| | | | Recidivism (simple) Art 99 (1) CC | Recidivism (aggravated) Art. 99 (2) CC | Recidivism (reiterated) Art. 99 (4) CC | Habitual criminal (Arts. 102, 103, 105 CC) | |
| (Art. 322 CC) Incitement to bribery | 2 yrs | 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs | |
| (Art. 322-bis CC) Foreign bribery | Art. 318: 3 yrs | Art. 318: 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs | |
| | Art. 319: 5 yrs | Art. 319: 6 yrs | | | | | |
| | Art.322 2 yrs | Article 322 6 yrs | Art.319-ter 8 yrs | Article 319-ter 8 yrs | 8 yrs + 1/4 10 yrs | 8 yrs + 1/2 12 yrs | 8 yrs + 2/3 13 yrs and 4 months |
| (Article 346 CC) Trading in influence | 5 yrs | 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs | |
| (Article 2635 Civil Code) Private bribery | 3 yrs | 6 yrs | 6 yrs + 1/4 7.5 yrs | 6 yrs + 1/2 9 yrs | 6 yrs + 2/3 10 yrs | 6 yrs + double 18 yrs | |

Statistics

Committed offences and suspected persons (2004-2011)

| | | Offences | | | | | | | | | |
|-------------------|-----------------|-------------------------------------|-------|------------------------------|-----|---------------------------------|-------|---------------------------|--------|----------------------------------|-------|
| | | Bribery (Arts. 318, 319, 320 CC) | | Concussione (Art. 317 CC) | | Abuse of power (Art. 323 CC) | | Fraud (Art. 640bis CC) | | Embezzlement (Art. 316ter CC) | |
| Number of reports | | 939 | | 881 | | 7,386 | | 7,515 | | 3,099 | |
| | Reported people | M | F | M | F | M | F | M | F | M | F |
| | | 6,490 | 1,199 | 1,846 | 159 | 18,574 | 2,978 | 28,531 | 14,247 | 5,371 | 3,944 |
| | | 7,689 | | 2,005 | | 21,552 | | 42,778 | | 9,315 | |

Source: Data from Central Directorate of Criminal Police. Criminal Analysis Service. Ministry of the Interior.

Main offences against public administration³: committed crimes and suspected persons (2004-2011)

| | | 2004 | | 2005 | | 2006 | | 2007 | | 2008 | | 2009 | | 2010 | |
|-------------------|-----------------|--------|-------|--------|--------|--------|--------|--------|--------|--------|--------|--------|-------|--------|--------|
| Recorded offences | | 3,403 | | 3,550 | | 5,498 | | 3,367 | | 3,413 | | 3,230 | | 3,076 | |
| | Reported people | F | M | F | M | F | M | F | M | F | M | F | M | F | M |
| | | 2,812 | 9,935 | 2,944 | 10,903 | 5,785 | 15,019 | 3,561 | 10,418 | 3,091 | 11,309 | 3,651 | 9,963 | 3,591 | 10,233 |
| | | 12,747 | | 13,847 | | 20,804 | | 13,979 | | 14,400 | | 13,614 | | 13,824 | |

Source: Data from Central Directorate of Criminal Police. Criminal Analysis Service. Ministry of the Interior⁴.

³ These are the cases considered according to Articles 317, 318, 319, 319 ter, 320, 322, 322 bis, 323, 353, 354, 355, 356, 640 bis of the Criminal Code, within which the offences of bribery.

Data on judicial decisions concerning offences against public administration (2009-2010)

| Offence | 2009 | 2010 |
|---|-------------|-------------|
| Embezzlement | 11 | 8 |
| Bribery in the exercise of an official duty | 13 | 4 |
| Aggravated bribery in the exercise of an act contrary to official duties | 1 | 1 |
| Bribery in judicial proceedings | 15 | 2 |
| Bribery of a person in charge of a public service | 2 | 0 |
| Incitement to bribery | 123 | 37 |
| Extortion by members of the EU bodies and by officials of the EU and foreign States | 1 | 0 |
| Fraud in public procurement | 229 | 93 |
| Fraud | 1,051 | 159 |

*Registered, pending and concluded criminal proceedings
Prosecution Offices*

| | <i>Registered proceedings</i> | <i>Involved people</i> | <i>Pending proceedings</i> | <i>People involved in pending proceedings</i> | <i>Concluded proceedings</i> | <i>People involved in concluded proceedings</i> | <i>Registered proceedings</i> | <i>Involved people</i> | <i>Pending proceedings</i> | <i>People involved in pending proceedings</i> | <i>Concluded proceedings</i> | <i>People involved in concluded proceedings</i> |
|------------|-------------------------------|------------------------|----------------------------|---|------------------------------|---|-------------------------------|------------------------|----------------------------|---|------------------------------|---|
| Art.316bis | 61 | 245 | 78 | 363 | 61 | 382 | 55 | 123 | 70 | 321 | 44 | 123 |
| Art.316ter | 106 8 | 1,877 | 511 | 1,669 | 111 2 | 1,602 | 1,264 | 1,522 | 569 | 1,133 | 1,140 | 1,910 |
| Art. 318 | 43 | 347 | 73 | 710 | 45 | 472 | 31 | 62 | 63 | 385 | 34 | 110 |
| Art.319bis | 59 | 341 | 69 | 758 | 55 | 398 | 37 | 135 | 64 | 672 | 35 | 155 |
| Art.319ter | 19 | 57 | 35 | 340 | 25 | 141 | 14 | 68 | 30 | 299 | 13 | 65 |
| Art.320 | 25 | 200 | 23 | 308 | 25 | 247 | 16 | 57 | 22 | 312 | 14 | 73 |
| Art.322 | 175 | 548 | 171 | 676 | 169 | 594 | 120 | 145 | 149 | 410 | 117 | 330 |
| Art.322bis | 13 | 18 | 24 | 106 | 9 | 16 | 4 | 28 | 13 | 63 | 12 | 67 |
| Art.640 | 782 5 | 1,491 1 | 496 3 | 1,570 3 | 704 1 | 1,416 3 | 5,498 | 9,623 | 4,981 | 14,922 | 4,069 | 7,744 |
| Art.640bis | 191 8 | 4,762 | 209 4 | 9,361 | 168 7 | 4,557 | 1,492 | 3,018 | 1,928 | 7,161 | 1,583 | 4,481 |

*Registered, pending and concluded criminal proceedings
Judges*

| | <i>Registered proceedings</i> | <i>Involved people</i> | <i>Pending proceedings</i> | <i>People involved in pending proceedings</i> | <i>Concluded proceedings</i> | <i>People involved in concluded proceedings</i> | <i>Registered proceedings</i> | <i>Involved people</i> | <i>Pending proceedings</i> | <i>People involved in pending proceedings</i> | <i>Concluded proceedings</i> | <i>People involved in concluded proceedings</i> |
|------------|-------------------------------|------------------------|----------------------------|---|------------------------------|---|-------------------------------|------------------------|----------------------------|---|------------------------------|---|
| Art.316bis | 81 | 323 | 78 | 303 | 59 | 108 | 73 | 333 | 67 | 213 | 50 | 307 |
| Art.316ter | 787 | 1,143 | 268 | 360 | 100 4 | 1,358 | 691 | 1,066 | 248 | 297 | 651 | 856 |
| Art. 318 | 41 | 272 | 27 | 434 | 23 | 87 | 26 | 240 | 20 | 155 | 35 | 174 |
| Art.319bis | 56 | 427 | 41 | 269 | 35 | 259 | 36 | 458 | 43 | 334 | 82 | 190 |

⁴ Data drawn on 2 and 3 March 2011.

| | Registered proceedings | Involved people | Pending proceedings | People involved in pending proceedings | Concluded proceedings | People involved in concluded proceedings | Registered proceedings | Involved people | Pending proceedings | People involved in pending proceedings | Concluded proceedings | People involved in concluded proceedings |
|------------|------------------------|-----------------|---------------------|--|-----------------------|--|------------------------|-----------------|---------------------|--|-----------------------|--|
| Art.319ter | 32 | 135 | 12 | 57 | 18 | 75 | 15 | 22 | 18 | 74 | 13 | 35 |
| Art.320 | 17 | 185 | 16 | 173 | 4 | 30 | 12 | 91 | 16 | 96 | 68 | 78 |
| Art.322 | 158 | 305 | 100 | 148 | 105 | 204 | 108 | 136 | 119 | 205 | 74 | 75 |
| Art.322bis | 13 | 12 | 18 | 17 | 38 | 4 | 13 | 15 | 19 | 16 | 12 | 5 |
| Art.640 | 323 1 | 5,371 | 264 6 | 5,475 | 239 9 | 3,469 | 2,330 | 4,312 | 2,788 | 5,156 | 1,874 | 2,440 |
| Art.640bis | 891 | 3,124 | 669 | 2,644 | 692 | 1,919 | 602 | 1,965 | 603 | 2,342 | 879 | 1,006 |

Acquittal or non-suit orders concerning corruption offences (2005-2011)

| Offence | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|----------------|------|------|------|------|------|------|------|
| Art. 317 CC | | 2 | | | | | |
| Art. 318 CC | | | | | | | |
| Art. 319 CC | | | | | | | |
| Art. 319ter CC | | | | | | | |
| Art. 320 CC | | | | | | | |
| Art. 321 CC | | | | | | | |
| Art. 322 CC | | | 2 | | 1 | | |
| Art. 322bis CC | | | | | | | |
| Art. 2635 CvC | | | | | | | |

Source: Information System of the Criminal Records Office.

Note: The acquittal orders in the Criminal Records Office are only those for which a security measure has been ordered.

Convictions concerning corruption offences (2005-2011)

| Offence | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|----------------|------|------|------|------|------|------|------|
| Art. 317 CC | 166 | 138 | 138 | 232 | 144 | 106 | 0 |
| Art. 318 CC | 27 | 67 | 12 | 26 | 16 | 15 | 0 |
| Art. 319 CC | 435 | 348 | 336 | 472 | 117 | 111 | 0 |
| Art. 319ter CC | 6 | 4 | 4 | 4 | 15 | 4 | 0 |
| Art. 320 CC | 3 | 1 | 15 | 9 | 2 | 0 | 0 |
| Art. 321 CC | 158 | 56 | 83 | 105 | 60 | 27 | 0 |
| Art. 322 CC | 168 | 131 | 169 | 158 | 143 | 69 | 1 |
| Art. 322bis CC | 1 | 0 | 0 | 1 | 2 | 0 | 0 |
| Art. 2635 CvC | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

Source: Information System of the Criminal Records Office.

Note: Statistics may differ from actual data owing to the backlog in offices.

III. ANALYSIS

99. Italy is one of the few GRECO members which have not ratified the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) nor the Additional Protocol thereto (ETS 191). Nevertheless, Italy, like any other member of GRECO, is subject to peer review according to the standards of the Convention and its Additional Protocol which are under examination in the Third Evaluation Round (for details, see paragraph 2). The GET notes that Italy was one of the founding members of GRECO and that it signed the Convention on 27 January 1999. The GET further notes that Italy ratified, on 5 October 2009, the United Nations Convention against Corruption (UNCAC), which – regarding the corruption offences – covers very much the same ground and is inspired by the same underlying philosophy as the Council of Europe Convention.
100. As the GET explored the outstanding issue of ratification of the Convention, the authorities expressed their intention to become a Party to this instrument: a number of initiatives have been tabled to this aim, one of which included the introduction of specific amendments to the Criminal Code (hereinafter CC) in those areas where the authorities deemed that further alignment with international standards would be necessary, i.e. by simplifying the classification of bribery offences and better harmonising their wording, by increasing the available sanctions for bribery, by explicitly criminalising active and passive trading in influence, and by expanding the definition of public officials to cover foreign and international officials. The latest legislative proposal on ratification of the Convention, however, does not include any reference to the aforementioned suggested amendments and simply authorises the President of the Republic to proceed with ratification. The Senate adopted, on 14 March 2012, the act authorising ratification of the Convention; authorisation by the Chamber of Deputies is now pending. With respect to the Additional Protocol, although the authorities also confirmed their willingness to ratify, no legislative initiative has so far been put forward in this area.
101. The GET recommends **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191)**. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion, the Committee of Ministers appealed to States “which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.” The recommendations contained in paragraphs 107 (passive bribery of foreign public officials, bribery of members of foreign public assemblies, bribery of members of international parliamentary assemblies), 108 (bribery of foreign arbitrators and jurors), 110 (bribery in the private sector), 111 (trading in influence) and 127 (jurisdiction) of this report are without prejudice to the right of Italy to enter declarations and reservations pursuant to Article 37 of the Convention and Article 9 of its Additional Protocol.
102. In Italy, the legislative framework providing for the criminalisation of corruption offences has a number of shortcomings as compared to the standards under review, which will be described below. The latest amendments to the CC in this area (i.e. offences against public administration) were introduced in the year 2000. As explained above, some proposals (i.e. draft law nos. 850 and 2058-A) have been made lately to simplify and provide greater coherence to bribery offences, as well as to better align domestic legislation with international standards in this area. The GET is of the opinion that simplification and greater consistency regarding the wording of the bribery offences would clearly enhance legal certainty vis-à-vis practitioners and the public at large. In addition, the so-called draft Anticorruption Bill (draft law no. 4434), which is currently

awaiting its second reading by the Senate, proposes a number of improvements to better tackle corruption and maladministration in Italy, including by amending the CC in order to increase the available sanctions for bribery offences (Article 9 of draft Anticorruption Bill). Despite the somehow complex articulation of corruption offences, it became evident to the GET, during the on-site visit, that both judges and prosecutors were making best use of the provisions in force by adding to their interpretation in a broad and pragmatic manner. The GET wishes to acknowledge, in particular, the proactive attitude of judges and prosecutors when dealing with this type of offences. That said, practitioners held the view that more had to be done to enable them to better tackle corruption, a phenomenon which continues to be acknowledged as a significant source of concern in Italy. They referred to specific deficiencies in the current system which may hinder the effectiveness of the investigative, prosecutorial and adjudicating functions. Such shortcomings relate both to the legislative framework (lacunae with respect to private sector bribery, trading in influence, bribery of foreign and international officials, etc.) and its enforcement in practice (level of sanctions, statute of limitations, etc.). The GET is confident that the issues raised in this report will be taken on board by the authorities to better align national law with the Convention and its Additional Protocol, as recommended.

103. The criminalisation of bribery in the public sector in the Italian CC (Articles 317 to 322), although formulated in quite complex terms, generally meets the standards of the Convention. The law differentiates between: bribery for an unlawful official act, i.e. an act against the official duties (*corruzione propria*), bribery for a lawful official act, i.e. an act related to the official duties (*corruzione impropria*), aggravated bribery occurring in connection with judicial proceedings (*corruzione in atti giudiziari*), and incitement to bribery (*istigazione alla corruzione*). *Concussione* (see also paragraphs 119 to 122) is criminalised in Article 317 CC, according to which only the public official is liable to criminal sanctions and not the bribe-giver. The level of sanctions varies according to the type of corruption offence. The difference between one or another type of offence, as described above, is not always so clear to delimit in practice.
104. The GET noted that the Italian CC goes beyond the requirements of the Convention, since it also criminalises the reception of a remuneration after the act has been performed by the public official, without prior offer, request or acceptance, i.e. so-called passive bribery *a posteriori* (*corruzione passiva susseguente*). The CC, however, does not criminalise active bribery in those cases. The GET was told that this lacuna has resulted in instances of bribery *a posteriori* where, while the courts were able to secure a conviction for the public official receiving the remuneration, the briber went unpunished. While refraining from issuing a formal recommendation on this point, the GET takes the view that this matter deserves appropriate follow-up by the authorities.
105. As far as the category of persons falling under the scope of bribery offences in the public sector is concerned, the authorities stressed during the on-site visit that the concepts of “public official/person in charge of a public service” which are defined in Articles 357 and 358 of the CC, respectively, and further developed by jurisprudence, are extremely wide and flexible. The GET was told that a formal appointment is not a condition for the public official status, but that for a person to be a public official, s/he should have a certain decision-making power. If not covered by Article 357 CC, all other categories of persons performing a public service would fall under the definition of Article 358 CC on “persons in charge of a public service”. The GET noted that Article 358 CC excludes from its scope those persons who “perform simply ordinary tasks and exclusively manual work”. Moreover, the GET noted certain inconsistencies in the wording of the different bribery provisions which sometimes only refer to “public officials” (e.g. Articles 318 and 319 CC), others to “persons in charge of a public service” (Articles 317 and 321 CC), but also to “persons in charge of a public service in the quality of employees of public authorities” (Articles 320 and 322 CC) – a notion that is not further elaborated anywhere else in the CC. The

authorities, nevertheless, provided extensive jurisprudence according to which numerous categories of persons fall under the relevant bribery provisions including, for example, examiners of driving tests, doctors fulfilling public duties, employees of companies operating public services under a concession and employees of public enterprises, etc. Likewise, the authorities explained that even persons performing a public service, without managerial or decision-making authority would be covered, e.g. persons collecting motorway tolls, security guards driving a security convoy of the Government, train ticket inspectors; detailed case law was provided in this respect. The GET welcomes the flexible and far-reaching approach taken and considers that the concept of public official/authority – as understood in criminal legislation and relevant jurisprudence – is in line with Article 1(a) and (b) (public official) and Article 4 (members of domestic public assemblies) of the Convention.

106. The concept of undue advantage is in conformity with that of the Convention: it goes beyond material gain, and, thus, also extends to immaterial and intangible advantages (“money or other advantages”), even when such advantages are of a low value, in so far as their purpose is to influence the public official’s action in service. The advantage need not necessarily be given to the public official him/herself; it can also be given to a third party. It is possible to punish bribery committed through intermediaries through the general rules on participation in criminal offences. In this connection, pursuant to Article 110 CC, participants in the same offence are subject to the punishment prescribed by the offence. On the basis of the extensive explanations by the authorities which were supported by concrete jurisprudence, the GET concludes that Italian legislation covers a significant range of corruption-related behaviours which are likely to occur in practice in the domestic public sector.
107. That said, more attention needs to be paid to the international dimension of bribery, i.e. bribery of foreign public officials and officials of international organisations, which is criminalised under a separate provision, Article 322bis CC. The GET notes that this provision is limited to (i) active bribery of foreign public officials and officials of international organisations with a view to obtaining or retaining an advantage in the context of international business transactions, and (ii) active and passive bribery of officials belonging to the European Union (EU) and officials from EU Member States. The GET was told that Article 322bis CC deals with Italy’s obligations in respect of the relevant OECD⁵ and EU⁶ requirements. The GET recalls that the Council of Europe Convention is broader in scope since it covers active and passive bribery of any foreign public official (Article 5 of the Convention), member of a foreign public assembly (Article 6 of the Convention), official of an international organisation (Article 9 of the Convention), member of an international parliamentary assembly (Article 10 of the Convention) and judge and official of an international court (Article 11 of the Convention), irrespective of whether bribery takes place in the context of an international business transaction, or whether such an official works in an EU institution or Member State. As explained above, at present, the corresponding provisions contained in the criminal legislation of Italy are more restricted in scope than those of the Convention. Consequently, the GET recommends **to enlarge the scope of application of the legislation concerning active and passive bribery to all foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies as well as judges and officials of international courts, in order to fully comply with the requirements of Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173).**

⁵ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

⁶ Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union.

108. Turning to bribery of jurors and arbitrators, as already mentioned, Italy has not yet ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). With respect to domestic jurors, this category of persons is covered by the broad definition of public official contained in Article 357 CC which refers to persons performing a public function. Likewise, the authorities explained that bribery of foreign jurors would be captured by Article 322bis CC on bribery of foreign public officials. In this connection, the GET wishes to recall the shortcomings identified in the aforementioned provision (see paragraph 107) as compared to the Council of Europe standards under review. Moreover, bribery of arbitrators, whether domestic or foreign, is not criminalised in Italy. In particular, the authorities explained that domestic and foreign arbitrators are not covered by the relevant provisions on bribery in the public sector since Article 813 of the Code of Civil Procedure specifically states that arbitrators cannot be considered “public officials” or “persons in charge of a public service”. The GET recommends **to (i) enlarge the scope of application of the legislation concerning active and passive bribery of foreign jurors in order to fully comply with the requirements of Article 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and (ii) criminalise active and passive bribery of domestic and foreign arbitrators**. This would facilitate the ratification of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), as recommended in paragraph 101.
109. Acts of bribery in the private sector are dealt with in Article 2635 of the Civil Code. The GET has numerous misgivings as regards the conformity of this provision – which is construed in Italian legislation as a form of breach of trust – with the standards of the Convention. At the start, and on a conceptual note, it emerged from the discussions held on-site, as well as the statistics available, that no experience had been gathered concerning the application of Article 2635 of the Civil Code. No conviction for this offence has ever occurred. Moreover, the GET noted, when discussing bribery in the private sector and connected issues during the on-site visit, that most interlocutors shared the opinion that corruption in private business was of less importance for society at large than public sector corruption. The GET recalls that the drafters of the Convention deliberately assumed a pioneering role when opting for the criminalisation of private sector corruption, an area which had traditionally been dealt with by civil or labour laws. Criminalisation of private sector corruption was also deemed to be necessary in order to avoid gaps in a comprehensive strategy to fight corruption (paragraph 52, Explanatory Report to the Convention). In this connection, the GET is of the firm view that criminalisation of bribery in the private sector remains crucial, especially, since this form of corruption may cause significant damage to society at large, given the value of the sums (and potential bribes) often involved in business transactions.
110. In the view of the GET, Article 2635 of the Civil Code has several flaws in relation to requirements of the Convention. Firstly, as regards the range of possible perpetrators, the article merely covers managers, director generals, directors in charge of the drafting of balance sheets, mayors and liquidators. The Convention, however, addresses bribery in the private sector committed by any person who directs or works for, in any capacity, a private sector entity, as emphasised in the Explanatory Report (paragraph 54). Articles 7 and 9 of the Convention also cover other types of relationships such as partners, lawyers and clients and others in which there is no contract of employment. Secondly, as regards the beneficiaries of the bribe, nothing is said in Article 2635 of the Civil Code as to third parties. Thirdly, with particular reference to the material acts of which bribery consists, the offering of a bribe and the request of a bribe are not explicitly covered. Fourthly, there is no explicit reference as to the indirect commission of the offence, e.g. through intermediaries. Fifthly, under Italian law damage to the legal person needs to concur, which is not required by the Convention. Finally, the offence is not punishable ex-officio, but requires a complaint from the victim. In light of the foregoing, the GET recommends **to**

criminalise bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).

111. As concerns trading in influence, the authorities referred to the provision on *millantato credito* (fraudulent representation) in Article 346 CC. The authorities indicated that the aforementioned provision would cover instances of passive trading in influence. The GET has, however, significant concerns as to the concrete coverage of Article 346 CC. In particular, the GET notes that the essence of *millantato credito* is not the influence peddling as such but the deception by the influence peddler on his/her ability to exert influence. The receipt of an advantage by an influence peddler who is actually in a position to exert influence on public authorities and who actually exerts this influence is not criminalised under Article 346 CC. By contrast, Article 12 of the Convention addresses trading in influence irrespective of “whether or not the influence is exerted or whether or not the supposed influence leads to the intended result”. Concerning active trading in influence (i.e. the promising, giving or offering of an undue advantage to the influence peddler), the authorities acknowledged that, at present, there are no provisions in domestic law which will cover this offence. In view of the above, the GET concludes that trading in influence is not adequately criminalised in Italy. Consequently, the GET recommends **to criminalise active and passive trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173)**.
112. The severity of the penalties available for active/passive bribery in the public sector depends on the unlawful/lawful nature of the act of the public official bribed and generally ranges from 3 to 5 years. More severe sanctions can apply when bribery occurs in the context of judicial proceedings – in which case imprisonment is increased to a maximum term of up to 8 years. In case of *concussione*, the penalty may be up to 12 years’ imprisonment. Additional sanctions include disqualification from public office. The applicable sanctions are to be reduced by one third if the offer or promise of the undue advantage is not accepted by the public official. In this connection, it is questionable that unilateral conducts by the briber, which are not accepted by the public official, are less punishable than those in which acceptance occurs. In the Convention, corruption offences are considered completed once the unilateral act is carried out, independently of the action that follows thereafter (i.e. whether the offer or promise is accepted or not by the public official). It is difficult to understand why the legislator has chosen the solution of reducing the penalty for the briber if the offer or promise is not accepted by the public official. Bribery in the private sector is punishable with up to 3 years’ imprisonment. Trading in influence is punished with imprisonment from 1 to 5 years and fines.
113. A series of concerns were raised by practitioners themselves as to the effectiveness of the applicable sanctions. In this context, it was brought to the attention of the GET that the draft Anticorruption Bill already envisages some slight increase in the imprisonment sanctions for the relevant offences dealing with passive bribery in the public sector. Judges themselves questioned the current levels of sanctions when comparing them to other offences: for example, the GET was told that robbery without resorting to violence would entail an imprisonment sanction of up to 10 years. Likewise, some interlocutors had difficulty understanding why the current provisions on bribery in the public sector offences do not include the use of a fine as a sanction, when this is the case, for example, for trading in influence, embezzlement or fraud⁷. Moreover, an important concern raised with respect to the practical application of sanctions is the fact that, in Italy, it is possible to suspend a sentence of less than two years’ imprisonment. The GET was told that, given the fact that judges were generally resorting to the lowest level of the

⁷ The authorities explained that, pursuant to Article 24 CC, it is possible for the judge to apply fines (from 50 to 25,000 EUR) when the offence is committed to gain profit and the sanction provided by law for that particular offence entails only imprisonment.

statutory sanction provided for by law, suspension is, in practice, granted on an almost automatic basis. According to an academic study, which analysed court statistics collected from 1983 to 2004, 87.63% of corruption-related convictions turned into suspended sentences⁸. Another measure that has affected the effective enforcement of sanctions relates to the general pardon (*indulto*) introduced by Act 241/2006, which provided for a reduction of 3 years of punishment for every final conviction to a custodial sentence for those crimes committed before 2 May 2006, including corruption-related convictions. Finally, it would appear, from the statistics provided by the authorities, that there is a very significant decrease in the number of convictions for corruption offences in 2009 and 2010, as compared to the conviction rates of previous years; the sharp decrease in the number of convictions in recent years (and generally speaking after the 1990s *Mani Pulite* investigations) was already noted in the Joint First and Second Round Evaluation Report on Italy⁹.

114. Taking all the aforementioned factors into consideration, the GET has concerns as to whether the current sanctioning regime, and its enforcement in practice, are sufficiently proportionate, dissuasive and effective, as required by Article 19 of the Convention. The GET believes that any improvement in this particular area needs to go beyond increasing the available level of sanctions, as currently envisaged by the authorities. The GET considers that initiatives have to be taken by the relevant authorities in order to convey a strong signal to potential perpetrators that corruption will not be tolerated and will be punished appropriately. Consequently, the GET recommends **to take appropriate steps, in close consultation with the institutions concerned, to ensure that the applicable provisions for bribery and trading in influence offences are actively enforced in practice and facilitate an effective, proportionate and dissuasive sanctioning regime for corruption offenders, as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173).**
115. Furthermore, as already recognised in the Joint First and Second Round Evaluation Report, a decisive factor hindering the effectiveness of the existing sanctioning regime concerns the issue of the statute of limitations in Italy, and more particularly, the risk that prosecutions for corruption fail because they are time-barred. This issue was analysed extensively in the aforementioned GRECO report¹⁰, but the GET had the opportunity again, during the on-site visit, to discuss with practitioners, the media and non-governmental representatives why this continues to be a pressing concern in Italy.
116. According to the general rules of the CC, the period of limitation for the conclusion of a prosecution depends on the maximum term of the sanctions which can be imposed for the offence in question; for corruption offences, the GET was told that it generally extends to 7.5 years. The limitation period commences when the offender completes the offence and runs until the end of the last appeal. Although the length of the statute of limitations on paper does not significantly deviate from that in other GRECO member States, the way in which the limitation period is calculated and the role that other factors play in the investigation of corruption offences (e.g. complex nature of such investigations, the lapse of time that may occur between the date on which the offence is committed and the day on which it is reported to law enforcement authorities, the available appeal channels, change of judges during the trial process, the delays and overload in criminal justice, etc.) can very easily result in the limitation period expiring in many cases. The judges and prosecutors with whom the GET met referred to the different mechanisms to which they were resorting in order to prevent cases from being time-barred (e.g. use of plea bargaining, relying on civil or administrative procedures to ensure the financial

⁸ Corruption in Italy. Piercamillo Davigo and Grazia Mannozi. Editori Laterza. Roma-Bari, 2007.

⁹ Joint First and Second Round Evaluation Report on Italy (Greco Eval I-II Rep (2008) 2E), paragraph 21.

¹⁰ Joint First and Second Round Evaluation Report on Italy (Greco Eval I-II Rep (2008) 2E), paragraphs 54 to 57.

recovery of corruption proceeds, broad interpretation of the notion of “commission of the offence” so that it will come as close as possible to the moment in which the investigation is opened, etc.).

117. Although there are no comprehensive statistics on cases of corruption being dismissed due to the expiry of the statute of limitations, the GET had access to several studies and press articles released in recent years and specifically pointing at the pervasive effect of the statute of limitations on corruption investigations. Of particular relevance in this context is a Transparency International research study on statutes of limitations which estimates, *inter alia*, that, since 2005, one in 10 cases has been dismissed due to the expiry of the limitation period¹¹. Likewise, the latest activity report of the State Prosecutor’s Office of Milan warns that the applicable limitation requirements do not allow a final decision to be reached in most cases of corruption of significant seriousness and complexity¹².
118. The GET recalls that, in its Joint First and Second Round Evaluation Report, GRECO had recommended the authorities to carry out an in-depth study of the possible negative effects of the statute of limitation on the adjudication of corruption offences. In the Joint First and Second Round Compliance Report¹³, GRECO did not consider that the measures taken by the authorities in this field were sufficient to conform to the recommendation. This is therefore a pending recommendation, which continues to be of full relevance in the framework of the Third Round Evaluation. Consequently, the GET can only recommend, in line with the Joint First and Second Round Evaluation Report, that **in order to ensure that cases are decided before the expiry of the statute of limitations, to (i) undertake a study of the rate of limitation period-related attrition in corruption cases to determine the scale and reasons for any problem which may be identified as a result; (ii) adopt a specific plan to address and solve, within a specified timescale, any such problem or problems identified by the study; (iii) make the results of this exercise publicly available.**
119. Strictly speaking, the Italian CC does not provide for defences in the field of corruption by which the bribe-giver could be exonerated if s/he reports the crime before the authorities learn that it has taken place. There is, however, an autonomous offence defined as *concussione* which, in the GET’s view, in some cases might be misused by bribe-givers in order to avoid prosecution. *Concussione* occurs when a public official, or a person in charge of public service, compels or induces an individual to unduly give to himself/herself or to a third party, money or other benefits. In that case, while the public official is guilty of *concussione*, the individual is considered a victim. A public official who is found guilty of *concussione* can be punished by more severe sanctions than those provided for bribery and may receive an imprisonment sentence ranging from 4 to 12 years; furthermore, the absolute time limit for the conclusion of a *concussione* investigation is longer – i.e. 16 years – than the one provided for bribery offences. The distinction between *concussione* and bribery has triggered some judicial debate, since the differences between these two offences can be difficult to draw in practice. Furthermore, the GET was told that, pursuant to the latest reform of the CC concerning offences against public administration, the offence of “incitement to corruption” was introduced and has resulted thereby in much more terminological and jurisprudential controversy. The latter offence occurs when someone offers or promises money or other benefits to a public official and the latter does not accept the offer or promise that was unduly made. The GET was told that the dividing line between *concussione* and incitement to corruption can be difficult to draw in practice; this is also illustrated by the extensive jurisprudence of the Court of Cassation in recent years to differentiate these two forms of bribery.

¹¹ Timed Out: Statutes of Limitation and Prosecuting Corruption in EU Countries. Transparency International, November 2010. http://www.transparency.ee/cm/files/statutes_of_limitation_web.pdf

¹² General Activity Report of the Milan Prosecutor’s Office (2010).

¹³ Joint First and Second Round Compliance Report on Italy (Greco RC-I/II (2011) 1E), paragraphs 32 to 41.

Furthermore, the interpretation of the aforementioned offences has been further complicated by the notion of *concussione ambientale*, as developed by the jurisprudence of the Court of Cassation, which is thought to occur when an individual is in an environment which leads him/her to believe that s/he must provide a public official with an advantage, either to avoid harm or to obtain something to which s/he is entitled.

120. The authorities indicated that the offence of *concussione* could prove to be a valuable tool in prosecuting corruption instances. In this connection, several interlocutors mentioned that public prosecutors would prefer trying a case for *concussione*, rather than other forms of bribery, since it may be easier to prove – it is easier to prompt the individual who bribes a public official to give testimony – and also since the statutory period of limitation is considerably longer than that provided for other bribery offences¹⁴. Some interlocutors, however, indicated that, during the pre-trial and/or trial phase, the offence of *concussione* has often been used by the defence attorneys of those indicted as bribe givers to claim that their clients were forced by public officials to commit an act of bribery, or induced by a generalised environment of malpractice, in order to ultimately waive liability. The GET was told that such claims are often not accepted by the Court of Cassation.
121. Whenever *concussione* occurs, the private party (the individual induced or compelled to bribe) is a victim, not an offender, even if s/he obtains a gain or rent from the undue advantage. The GET considers that there is a danger that the provision might lead to unreasonable results, since the bribe giver in fact has an undisputable legal right to be exempted from punishment. The potential risk of misuse of the offence of *concussione* as a defence mechanism (a way to waive liability) by private individuals who commit corruption in the context of international business transactions has repeatedly been raised as a source of concern by the OECD Working Group on Bribery in International Business Transactions in its regular evaluations of Italy.
122. Against this background, the GET was told that some of the legislative initiatives tabled to reform the Italian CC, in order to better comply with international requirements, looked specifically into this issue and included a reclassification of bribery offences to eliminate the distinction between *concussione* and bribery, and to enable for the punishment of the briber, whenever necessary; however, this legislative proposal was rejected by the Senate. In view of the concerns raised in the preceding paragraphs, the GET recommends **(i) to examine in depth the practical application of the offence of *concussione*, as established in Article 317 of the Criminal Code, in order to ascertain its potential misuse in the investigation and prosecution of corruption; (ii) in the light of such examination, to take concrete measures to review and clarify the scope of the offence, as necessary.**
123. The GET found that the Italian jurisdictional rules are, in general, rather broad and do not establish any dual criminality requirement. Italy establishes territorial jurisdiction over offences committed in whole or in part on its territory, including on Italian aircrafts and ships (Article 6 CC). Furthermore, pursuant to Article 7 CC, Italy is able to establish (unconditional universal) jurisdiction for offences committed by public officials when abusing their powers or violating their official duties, irrespective of whether the persons concerned are Italian nationals or foreigners. The GET, nevertheless, identified some limited deficiencies with respect to the jurisdiction provisions contained in Articles 9 CC (jurisdiction over offences committed by nationals abroad) and Article 10 CC (jurisdiction over offences committed by foreigners abroad).

¹⁴ The analysis of the available data (see last table of section entitled “Statistics”, page 26) show that the conviction ratio of *concussione* (Article 317 CC) has substantially increased, as compared to active bribery (Article 321) from 1.05 to 3.9 from 2005 – the year in which the statute of limitations was cut by half pursuant to the so-called *Ex-Cirielli* reform – to 2010.

124. In particular, with reference to jurisdiction over bribery/trading in influence offences committed abroad by nationals, when the offence carries a sanction of less than 3 years' imprisonment, the request of the Minister of Justice, or a complaint from the victim, is required. The GET was told that there were no general guidelines based on which the discretion of the Minister of Justice is exercised; however, in practice, the request by the Minister of Justice would be quasi-automatic. The GET has no reason to doubt this information, but can only conclude that this additional requirement deviates from the Convention and may lead to the risk of a political decision. Likewise, the requirement of a victim's complaint constitutes an unnecessary restriction which is not foreseen by the Convention.
125. When the offence is committed abroad by a foreigner, and to the detriment of Italy or one of its citizens, jurisdiction is possible at the request of the Minister of Justice or upon a victim's complaint. If the offence entails a detriment to a foreign country or a foreign citizen, Italy would be able to establish jurisdiction only when the offence is punished with imprisonment of not less than 3 years and upon request of the Minister of Justice. The GET's previous remarks concerning the requirement of the request by the Minister of Justice/complaint by the victim apply *mutatis mutandis* in this context.
126. Moreover, the GET notes that, in connection with the requirements of Article 17, paragraph 1, subparagraph c of the Convention, concerning jurisdiction over offences committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts – who are at the same time Italian nationals – Italy would not be able to establish jurisdiction over corruption offences causing a detriment to a third country or one of its citizens, if the offence in question carries a punishment of less than 3 years' imprisonment. The GET concedes that this shortcoming refers to very specific situations but it does, however, represent a lacuna as compared to the standards under review.
127. In light of the foregoing considerations, the GET recommends **(i) to abolish the condition, where applicable, that the prosecution of acts of corruption committed abroad must be preceded by a request from the Minister of Justice or a victim's complaint; (ii) to extend jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are, at the same time, nationals of Italy.**

IV. CONCLUSIONS

128. The criminalisation of bribery and trading in influence in the Italian Criminal Code suffers from several shortcomings. The offence of bribery in the public sector, although articulated in a rather complex manner, generally meets the standards of the Criminal Law Convention on Corruption (ETS 173). However, the international dimension of the offence has some deficiencies as the offence only covers active bribery of foreign officials in international business transactions, as well as bribery acts committed by EU officials and foreign officials of EU Member States in so far as those acts are committed against the financial interests of the European Union. Likewise, the offence of bribery in the private sector, which is regulated in the Italian Civil Code, is very narrow in that it only applies to certain categories of persons working in a company (i.e. managers, directors and liquidators), when harm to the company has occurred and, unlike other corruption-related offences. Moreover, it is not prosecutable ex-officio; criminal proceedings can only be initiated by the person who sustains the loss. Trading in influence is only partially addressed, in its passive form, by the offence of *millantato credito* (fraudulent representation), which falls short of the standards set by the Convention.

129. Despite the aforementioned lacunae, a notable number of corruption cases have been prosecuted in Italy; this has been possible through the proactive work of prosecutors and judges alike who have acquired extensive expertise in prosecuting and adjudicating corruption-related offences and have assisted in developing far-reaching jurisprudence in this area. That said, the judicial authorities themselves did raise concerns during the on-site visit as to the effectiveness, dissuasiveness and proportionateness of the available sanctions when applied in practice. The possibility provided by the offence of *concussione* to exempt from punishment the individual who bribes a public official when s/he has been compelled or induced to do so should be reconsidered and appropriate action taken, as necessary, in order to reduce its potential for possible misuse. Finally, a decisive factor that puts at risk the work of both prosecutors and judges relates to the expiry of the statute of limitations. Lengthy delays for concluding corruption cases can clearly represent a most serious problem in the fight against corruption, especially when those delays result in cases being dismissed on limitation grounds rather than ending in decisions on the merits. This problem gave rise to a specific recommendation in the Joint First and Second Round Evaluation Report on Italy and remains an outstanding issue.

130. In view of the above, GRECO addresses the following recommendations to Italy:

- i) **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) (paragraph 101);**
- ii) **to enlarge the scope of application of the legislation concerning active and passive bribery to all foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies as well as judges and officials of international courts, in order to fully comply with the requirements of Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 107);**
- iii) **to (i) enlarge the scope of application of the legislation concerning active and passive bribery of foreign jurors in order to fully comply with the requirements of Article 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191); and (ii) criminalise active and passive bribery of domestic and foreign arbitrators (paragraph 108);**
- iv) **to criminalise bribery in the private sector in accordance with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 110);**
- v) **to criminalise active and passive trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 111);**
- vi) **to take appropriate steps, in close consultation with the institutions concerned, to ensure that the applicable provisions for bribery and trading in influence offences are actively enforced in practice and facilitate an effective, proportionate and dissuasive sanctioning regime for corruption offenders, as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 114);**
- vii) **in order to ensure that cases are decided before the expiry of the statute of limitations, to (i) undertake a study of the rate of limitation period-related attrition in corruption cases to determine the scale and reasons for any problem which may be identified as a result; (ii) adopt a specific plan to address and solve, within a**

specified timescale, any such problem or problems identified by the study; (iii) make the results of this exercise publicly available (paragraph 118);

viii) (i) to examine in depth the practical application of the offence of *concussione*, as established in Article 317 of the Criminal Code, in order to ascertain its potential misuse in the investigation and prosecution of corruption; (ii) in the light of such examination, to take concrete measures to review and clarify the scope of the offence, as necessary (paragraph 122);

ix) (i) to abolish the condition, where applicable, that the prosecution of acts of corruption committed abroad must be preceded by a request from the Minister of Justice or a victim's complaint; (ii) to extend jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are, at the same time, nationals of Italy (paragraph 127).

131. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Italy to present a report on the implementation of the above-mentioned recommendations by 30 September 2013.

132. Finally, GRECO invites the authorities of Italy to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.