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Anti-Corruption

Italy: Law & Practice

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ITALY

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

Italy is a signatory to several international conventions on bribery and corruption, including:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed in Paris on 17 December 1997 and ratified on 15 December 2000);
- the Convention drafted on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (signed in Brussels on 26 May 1997 and ratified on 6 March 2003);
- the United Nations Convention against Corruption (signed in New York on 31 October 2003 and ratified on 5 October 2010);
- the Council of Europe's Criminal Law Convention on Corruption (signed in Strasbourg on 27 January 1999 and ratified on 13 June 2013); and
- the Council of Europe's Civil Law Convention on Corruption (signed in Strasbourg on 4 November 1999 and ratified on 13 June 2013).

1.2 National Legislation

In the Italian legal system, the legislation concerning corruption offences is provided for in the section dedicated to offences against the public administration of the Criminal Code and in the Code of Criminal Procedure.

However, some fundamental provisions specifically applicable to bribery offences can also be found in Legislative Decree No 231/2001 (referring to the administrative liability of legal entities – see **3.3 Corporate Liability**) and in the Civil Code (which proscribes bribery in the private sector – see **2.1 Bribery**).

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

The interpretation and enforcement of anti-corruption provisions is requested of the Italian courts, whose activity is facilitated by the contributions of legal doctrine. Although Italy does not adopt a stare decisis principle, some important case-law rulings play a significantly persuasive role in the interpretation of anti-corruption rules.

On the administrative side, the National Anti-Corruption Authority has published numerous recommendations and guidelines, which, despite many of them not being binding, do assist in the interpretation and enforcement of the rules on the prevention of corruption (eg, regarding legal services or prevention of corruption in state-owned companies).

1.4 Recent Key Amendments to National Legislation

Since 2012, Italy has embarked on a path of broad-ranging structural reforms, directly or indirectly relating to anti-corruption provisions, which have significantly amended the Italian Criminal Code (ICC), the Code of Criminal Procedure and even the Penitentiary System.

The most effective amendments to the anti-corruption measures were introduced in 2019 by Law No 3/2019 (the so-called "Bribe Destroyer Act"), which takes a significant step towards further advancing the repression of bribery.

This positive process has continued in 2020 and further innovations have been introduced.

Specifically, it is worth highlighting the 14 July 2020 Legislative Decree No 75 (effective since 30 July 2020) entitled "Implementation of the EU Directive no. 2017/1371 (so-called PIF Directive) concerning the contrast, by means of criminal law, of frauds affecting Union's financial interests".

With specific reference to anti-corruption measures, the Decree:

- introduced paragraph no 5-quinquies in Article 322-bis ICC, which extends the liability for the offences of embezzlement (Article 314 ICC), embezzlement by taking advantage of third parties' error (Article 316 ICC), blackmail by a Public Official (Article 317 ICC), undue induction to give or promise benefits (Article 319-quarter ICC), active and passive bribery (Article 318, 319, 319-ter, 320 and 321 ICC), incitement to bribe (Article 322 ICC) persons exercising functions or activities corresponding to those of public officials and persons in charge of a public service in states which are not part of the European Union, when the fact affects the EU's financial interests;
- increased the sanctions provided for the crimes of embezzlement by taking advantage of third parties' error (Article 316 ICC), undue receipt of funds to the detriment of the state (Article 316-ter ICC) and undue induction to give or promise benefits (Article 319-quarter ICC) in the event the offence concerns money or another advantage diverted from financial statements of the EU or its bodies if the subsequent damage is over EUR100,000; and
- listed under Article 25 Legislative Decree No 231/01 the offences of embezzlement (Article 314 ICC), embezzlement by taking advantage of third parties' error (Article 316 ICC) and abuse in office (Article 323 ICC) when the facts affect the EU's financial interest.

Furthermore, 16 July 2020 Law Decree No 76 (converted into Law No 120 on 11 September 2020) amended the crime of abuse in office (Article 323 ICC) in order to restrict the conduct which may be potentially relevant under such provision.

In greater detail, the Decree replaced the words "violations of either rules of Law or secondary regulations" with "violation of specific rules of conduct expressly set forth by rules of either Law or equivalent legislations which are not discretionary".

Such modification of the legal provision determined three consequences connected to each other:

- violations of secondary regulations are no longer relevant for the crime of abuse in office to be perpetrated;
- only violations both specific and expressly provided by the Law rules of conduct are able to trigger the crime at issue. This means that the offence pursuant to Article 323 ICC cannot be perpetrated by merely violating general principles of the legal system (eg, Article 97 of the Italian Constitution, which states the duties of impartiality and sound management of the public administration); and
- only violations of non-discretionary rules of conduct can be considered for abuse in office charges. This implies that the abuse of power (which may occur when, in discretionary acts, power is used for a purpose which is different from that for which it was granted) can no longer be regarded as criminal.

It follows that, the reform at issue determined a partial abolitio criminis with reference to the violations which are no longer included in the legal provision pursuant to Article 323 ICC.

2. Classification and Constituent Elements

2.1 Bribery

The Italian legislator punishes corruption offences by means of a complex regulatory system aimed at dealing with different types of crimes, which are provided for in Articles 318, 319, 319-ter and 320 (passive bribery) and Articles 321 and 322 (active bribery) of the ICC.

More specifically, the ICC considers as a criminal offence the conduct of a public official or person performing a public service:

- who, to exercise his or her functions or powers, unduly receives, for himself or herself or a third party, money or another advantage, or accepts a promise of them (Article 318 – bribery for the exercise of a function);
- who receives money or any other advantage, or the promise thereof, for himself or herself or a third party, to omit or delay, or for having omitted or delayed acts relating to their office, or to perform or for having performed acts in breach of his or her official duties (Article 319 – bribery for the performance of acts in breach of official duties);
- who commits the offences described in (a) or (b) in favour of or against a party to civil, criminal or administrative proceedings (Article 319-ter – bribery in judicial proceedings).

Punishment for passive bribery shall also apply to whoever gives or promises money or any other advantage to a public official or person performing a public service if the promise is accepted (Article 321 – active bribery).

Conversely, if the offer, promise or request of a bribe is not accepted, the mere conduct of incitement to corruption is considered as a minor criminal offence (pursuant to Article 322, punishment provided for in Articles 318 or 319 is reduced by one third).

Under Italian legislation, bribery offences do not just include cases where the public official performs an act in accordance with or contrary to their official duties because of a previous agreement with the bribe giver. In fact, even the mere agreement (or the mere solicitation) to perform or not perform the functions of a public official in return for a bribe also constitutes conduct punishable under criminal law. In other words, there is no requirement for the results expected by the perpetrators to actually occur.

It is important to note that the Criminal Code does not distinguish between a bribe (money or other advantage) and gifts, promotional expenditures or other facilitation payments. For this reason, even a small amount of money can trigger criminal provisions concerning corruption if related to the exercise of a public function by the receiver.

However, many companies and public authorities have adopted codes of conduct that specifically address this issue by regulating the conditions and extent of facilitation payments.

Finally, it is worth mentioning that the Italian criminal law system does not contemplate the conduct of individuals who fail to prevent bribery as an offence. In fact, the general provision set out in Article 40 of the ICC for cases in which omitting to avert a result is treated as an active act does not cover corruption offences.

Public Official

The definition of "public official" is provided by Article 357 of the Criminal Code as those who perform a legislative, judicial

or administrative public function (ie, an administrative function) that is:

- regulated by the public law provisions and acts of an authority; and
- characterised by the formation and statement of the public administration's will or by its implementation by means of authority and certifying powers.

In addition to that figure, anti-corruption provisions also cover acts committed by a "person performing a public service", which, under Article 358 of the ICC, is defined as whoever performs any activity that is governed in accordance with the same modalities as a public function, excluding the performance of simply ordinary tasks and exclusively manual work.

Moreover, according to international conventions ratified by Italy, Article 322-bis of the ICC extends the provisions applicable to domestic public officials to foreign public officials. More specifically, the offences of embezzlement (Article 314 ICC), embezzlement by taking advantage of a third parties' error (Article 316 ICC), blackmail by a public official (Article 317 ICC), undue induction to give or promise benefits (Article 319-quarter ICC), active and passive bribery (Articles 318, 319, 319-ter, 320 and 321 ICC), and incitement to bribery (Article 322 ICC) are triggered in all cases when involving:

- members of European Union institutions;
- contracted officials and agents in accordance with either staff regulations applying to European Union officials or to the provisions applying to European Union agents;
- any person seconded to the European Union by the member states or by any public or private body, which carries out functions corresponding to those performed by the officials or agents of the European Union;
- members and servants of bodies created on the basis of founding Treaties of the European Union;
- those who, within European Union member states, carry out functions or activities corresponding to those performed by public officials or persons performing a public service;
- members of the International Criminal Court;
- persons exercising public functions or activities within the framework of international public organisations and members of international parliamentary assemblies or of an international or supranational organisation, and judges and officials of international courts (paragraph introduced by Law No 3/2019);
- persons exercising functions or activities corresponding to those of public officials and persons in charge of a public service in states which are not part of the European Union, when the fact affects the Union's financial interests (paragraph introduced by Legislative Decree No 75/2020).

Private Bribery

In accordance with the Council of Europe's Criminal Law Convention on Corruption, the Italian legislator criminalises the conduct of bribery between private parties.

More specifically, Article 2635 of the Italian Civil Code punishes directors, general managers, managers responsible for preparing a company's financial reports, statutory auditors, liquidators or any other employees of private entities who solicit or receive undue money or other advantages (or accept the promise thereof) to perform or omit an act in breach of their duties.

The same sanctions also apply to whoever, even through an intermediary, offers, promises or gives money or other undue benefits to the persons mentioned in the paragraph above.

It is important to note that Anti-corruption Law No 3/2019 has introduced the opportunity to punish ex officio bribery in the private sector by eliminating the procedural requirement of a complaint by the victim.

2.2 Influence-Peddling

In addition to corruption offences, the Criminal Code also punishes the conduct of active and passive trading in influence.

In particular, under Article 346-bis ICC the conduct of any private person or official who, by exploiting or claiming a real or apparent influence on a public official or a person in charge of a public service, unduly receives money or other financial advantage, as the price for his or her own illicit mediation or for the payment of the public official, to act in contrast to his or her duties or to omit or delay an act of his or her duties is considered criminal.

As a result of Anti-corruption Law No 3/2019, Article 346-bis ICC has extended its scope to the influence-peddling of foreign public officials as defined by Article 322-bis ICC (see **2.1 Bribery**).

2.3 Financial Record-Keeping

As required by international conventions, the Italian legislator criminalises certain conduct deemed preparatory to bribery offences.

For this reason, Article 2621 of the Civil Code punishes directors, general managers, managers responsible for preparing the company's financial reports, statutory auditors and liquidators who, in order to obtain an undue profit for themselves or for others, falsify financial statements, reports or other corporate communications addressed to shareholders or the public, by presenting a misleading picture of the financial situation of the company (or group).

More severe penalties are envisaged for accounting fraud regarding listed companies (Article 2622 of the Civil Code).

2.4 Public Officials

Within the Criminal Code, the misappropriation of public funds carried out by a public official is relevant under the offence of embezzlement set forth by Article 314 of the ICC.

In greater detail, such offence expressly punishes the public official who, having possession, or in any case having available, money or other things by reason of his or her functions, makes them his or her own.

In this case, no unlawful request or order must arise from the public official, whose behaviour is limited to embezzling money or other things of which he or she has possession.

On the other hand, the potentially unlawful taking of interest or showing of illicit favouritism by a public official might trigger, respectively, the crime of abuse in office or the endangerment of fairness of tenders.

Abuse in Office

In the Italian legal system, public officials have the general duty to abstain in the case of a personal conflict of interests (or in the event of a relative's conflict of interests) and failure to do so may fall under the crime of abuse in office, as set forth in Article 323 of the ICC.

However, mere inobservance of the duty to abstain is sufficient to be deemed abuse in office (the other conduct described by the legal provision is breach of the law or regulations), but is not enough to trigger the offence at issue.

Indeed, for the occurrence of the offence under Article 323 of the ICC, the law also requires:

- an undue financial advantage for the public official or others or, alternatively, an unjust detriment to others;
- the specific intention of the public official who must act in order to obtain an undue advantage for himself or herself or others, or to cause a detriment to a third party.

According to this provision, the public official is punished whenever he or she acts intentionally in breaching the law or, otherwise, fails to abstain in circumstances of conflict of interests (relevant even in the case of a third party's interest), obtaining – in this way – an undue profit for himself or herself (or for others) or, alternatively, causing a detriment to others.

Endangerment of Fairness of Tenders

The conduct linked to favouritism on the part of a public official, who guarantees an undue advantage to a third party by acting in breach of the law ensuring free and equal access to bidders for the granting of contracts, is relevant from a criminal law perspective and is punished by two different provisions included in the Criminal Code.

The offence under Article 353 of the ICC (disturbing the fairness of tenders) punishes anyone who, by means of violence or threat, gifts, promises, collusion or other fraudulent means, prevents or disrupts the fair course of the tender, or prevents tenderers from competing in it.

Moreover, in the event such conduct is carried out by a person designated by law or a public authority to manage the tender, the sanctions (fine and imprisonment) are increased. In this case, the designated person is considered to hold the office of a public official.

The second offence to be considered is the crime or offence of "Disrupting the fairness of the procedure for choosing a bidder" as set forth in Article 353-bis of the ICC.

This legal provision punishes anyone who, by means of violence or threat, gifts, promises, collusion or other fraudulent means, alters the administrative proceedings intended to determine the content of the call for bids, or any other equivalent notice, pursuing the intention to influence the methods adopted by the Tender Authority for choosing the successful bidder.

2.5 Intermediaries

Some of the specific offences against the Public Administration (ie, Articles 317, 318, 319, 319-quater, 323 of the ICC) provide for the liability of a public official, both in the event that the act is committed by him or her, and in the event the advantage or money (as forms of payment for the performance or omission of the due or undue act, or merely as a result of the role the public official holds) is received by a third party.

Furthermore, all the above-mentioned offences may hypothetically be committed through an intermediary: indeed, the criminal system states a general rule, set forth in Article 110 of the ICC, according to which any person who participates in the commission of a crime (through conscious behaviour and causally linked to the fact) is liable for it. In this way, any third party who acts together with the agent is equally liable for the crime committed.

3. Scope

3.1 Limitation Period

The statute of limitations of the offences discussed in **2. Classification and Constituent Elements** differs from crime to crime and must be calculated starting from the time the offence was perpetrated.

According to Article 157 of the ICC, the crime is extinguished in the period corresponding to the maximum prison term provided for each offence and, in any case, in a period not less than six years.

Furthermore, according to Articles 160 and 161 of the ICC, this term can be suspended by one of the suspending acts provided for by the law (eg, the request for committal to trial) and may be extended by up to one quarter of its ordinary duration. Note that the term of extension is half of the ordinary duration for the crimes under Articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis of the ICC.

At the same time, according to the new legislation introduced by Law No 103 of 23 June 2017, in the event of a conviction, the statute of limitations is also suspended for a maximum of one year and six months from the expiration term to file the grounds of the sentence, to the decision of the following stage of the proceedings (Article 159, paragraph 2 ICC).

Such suspension may occur both between the first-degree sentence and the decision before the Court of Appeal, and the decision before the Court of Appeal and the sentence of the Court of Cassation. This means that the maximum suspended period is three years.

Finally, the reform introduced by Law No 9/2019 widely amended the statute of limitation provisions, stating that the statute of limitations is suspended from the first instance verdict (regardless of whether it is a conviction or an acquittal) until the final judgment becomes enforceable. This means that, after the first instance judgment, the statute of limitations cannot expire until the end of the proceedings.

Such amendment came into force on 31 January 2020 and, therefore, it is applicable only to offences committed after 31 January 2020.

With reference to the administrative liability of legal entities, Article 22 Legislative Decree No 231/01 states that the limitation period is five years from the occurrence of the crime.

Such term can be suspended by a request to apply precautionary measures and by an entity being charged with having committed the administrative offence. In the latter event, the statute of limitations does not run until the final judgment becomes enforceable.

3.2 Geographical Reach of Applicable Legislation

Italian criminal law applies to crimes committed on Italian territory. More specifically, under Article 6 ICC, territorial jurisdiction is established (a) over conduct which occurred either wholly or partially within the territory of the state, or (b) even in those circumstances where the offence is wholly committed abroad but its effects take place in the national territory.

Nevertheless, with regard to certain serious offences, such as corruption, Articles 9 and 10 of the Criminal Code establish national or universal jurisdiction over cases not covered by the above-mentioned Article 6.

Specifically, Italy has extraterritorial jurisdiction over conduct wholly committed abroad which do not have any effect in the national territory when three conditions are met:

- the perpetrator is within Italian territory;
- the double criminality principle is satisfied; and
- a request for punishment is made by the Minister of Justice or the injured party.

However, it should be mentioned that Anti-corruption Law No 3/2019 has recently facilitated the prosecution of corruption offences committed by a national or foreign citizen by eliminating the condition that a request for punishment for such crimes is made by the Minister of Justice or the injured party.

3.3 Corporate Liability

Legislative Decree No 231/2001 introduced administrative liability against legal entities in the event that any of the crimes listed in Legislative Decree No 231/2001 (including crimes against public administration) is perpetrated by directors, managers or employees for the benefit, or in the interest, of the company.

This is an autonomous liability of the legal entity (so-called "organisational negligence") for not having adopted organisational models capable of preventing the crimes listed in the Decree from being committed (for further details, see **4.5 Safe Harbour or Amnesty Programme** and **6.1 National Legislation and Duties to Prevent Corruption**).

In connection with this point, it is worth mentioning that a company's liability arising from crimes committed is completely independent of corporate events following the perpetration of the crimes. Indeed, according to Articles 28, 29 and 30 Legislative Decree No 231/01, in the case of changes to a legal entity's organisational structure, the company remains liable for the

offences committed before the date on which the changes took effect; in the same way, in the event of a merger or takeover, the resulting legal entity is liable for the offences for which the previous entities were responsible before the merger or takeover. On the other hand, in the event of a partial split-up, the divided company remains liable for crimes committed before the split.

4. Defences and Exceptions

4.1 Defences

In general terms, the Italian criminal system is founded on the presumption of innocence, so that the burden of proof in demonstrating that a crime has been committed lies with the prosecutor. This means that, if there is any doubt about the defendant's guilt, he or she must be acquitted in accordance with the in dubio pro reo rule.

With regard to an individual's liability, the first defence for any crime (not only bribery or other crimes against the public administration) may be based on the demonstration that the so-called "objective elements" of the offence have not been satisfied or sufficiently proved by the prosecutor.

Furthermore, another defence strategy may consist in attempting to demonstrate the lack of intent by the defendant to commit a crime (lack of mens rea), which is a mandatory condition for punishment.

Another argument that may be used as a defence for the above offences relates to so-called "mitigating" or "exonerating" circumstances (see **7.4 Discretion for Mitigation** and **4.5 Safe Harbour or Amnesty Programme**).

Regarding the legal entity's liability, see **6. Compliance and Disclosure**.

4.2 Exceptions

There are no exceptions to the above defences.

4.3 De Minimis Exceptions

In general, there are no de minimis exceptions under Italian Law: a bribe of any value will constitute an offence.

The only exception – the relevance of which is, in any case, subject to the court – can be configured if the "advantage" is permitted by the law or if its value is very small as, for instance, in the case of a mere courtesy gift (the so-called munuscula). Please consider that Decree No 62/2013 provides exceptions for munuscula or donations of modest value to be identified, for public employees, in an amount of EUR150.

The value of the bribe could also be taken into account by the court as a mitigating factor in determining the quantum of sanction to be imposed: according to the mitigating circumstance provided by Article 323-bis of the ICC, if the offences under Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-quarter, 320, 322, 322-bis and 323 of the ICC are particularly slight, the sanction is reduced by up to one third.

4.4 Exempt Sectors/Industries

In Italy, no sectors or industries are exempt from corruption offences.

It is, however, important to bear in mind that most of the offences described require, as an "objective element" of the crime, the fact that the unlawful advantage is granted or promised to a public official or a public service provider.

4.5 Safe Harbour or Amnesty Programme

With reference to corruption crimes, a new exonerating circumstance – introduced by Law No 3/2019 – is provided by Article 323-ter of the Criminal Code in the event of self-incrimination and effective co-operation with the judicial authority.

For more details, see **7.4 Discretion for Mitigation**.

Regarding the specific exonerating consequence for legal entities, arising from the adoption of an adequate compliance system, see **6.1 National Legislation and Duties to Prevent Corruption**.

5. Penalties

5.1 Penalties on Conviction

Penalties upon conviction for the above offences are different for individuals and legal entities.

With specific regard to penalties provided for legal entities, penalties arising from crimes can be "financial" or "disqualifying": according to Article 10 of Decree No 231/2001, financial penalties are always applied for administrative offences arising from a crime and are applied in terms of not less than 100 units (the so-called quotas) and not more than 1,000 units. The amount of each unit is not below EUR258 and not above EUR1,549, according to Article 11 of Decree No 231/2001.

Penalties for the following offences when committed by individuals or legal entities are:

- for the crime of misappropriation pursuant to Article 314 of the Criminal Code:
  (a) individuals: imprisonment from four to ten years and six months (imprisonment from six months to three years in the event of temporary misappropriation);
  (b) legal entities: fine up to 200 units (when the act affects EU financial interests);
- for the crime of blackmail by a public official pursuant to Article 317 of the Criminal Code:
  (a) individuals: imprisonment from six to 12 years;
  (b) legal entities: fine from 300 to 800 units and disqualifying penalties (Article 9 paragraph 2 Decree 231);
- for the crime of bribery pursuant to Article 318 of the Criminal Code:
  (a) individuals: imprisonment from three to eight years;
  (b) legal entities: financial penalty up to 200 units;
- for the crime of bribery pursuant to Article 319 of the Criminal Code:
  (a) individuals: imprisonment from six to ten years;
  (b) legal entities: fine from 200 to 600 units (from 300 to 800 units in the event of significant profit by the company as a consequence of the crime) and disqualifying sanctions (Article 9 paragraph 2 Decree 231);
- for the crime of bribery in relation to judicial acts pursuant to Article 319-ter of the Criminal Code:
  (a) individuals: imprisonment from six to 12 years;
  (b) legal entities: fine from 200 to 600 units (from 300 to 800 units in the event of significant profit by the company as a consequence of the crime) and disqualifying sanctions (Article 9 paragraph 2 Decree 231);
- for the crime of undue inducement to give or promise benefits pursuant to Article 319-quater of the Criminal Code:
  (a) individuals: imprisonment from six to ten years and six months for the public officer. Imprisonment of up to three years (or up to four years when the act affects EU financial interests and the damage or profit is greater than EUR100,000) for the corruptor;
  (b) legal entities: fine from 300 to 800 units and disqualifying of "suspension or revocation of authorisations, licences or concessions functional to the commission of the crime";
- for the crime of misconduct by a public official pursuant to Article 323 of the Criminal Code:
  (a) individuals: imprisonment from one to four years;
  (b) legal entities: fine up to 200 units (when the act affects EU financial interests);
- for the crime of influence-peddling pursuant to Article 346-bis of the Criminal Code:
  (a) individuals: imprisonment from one to four years and six months;
  (b) legal entities: fine of up to 200 units;
- for the crime of keeping inaccurate corporate books and records pursuant to Article 2621 of the Civil Code:
  (a) individuals: imprisonment from one to five years;
  (b) legal entities: fine from 200 to 400 units;
- for the crime of keeping inaccurate corporate books and records in listed companies pursuant to Article 2622 of the Civil Code:
  (a) individuals: imprisonment from three to eight years;
  (b) legal entities: fine from 400 to 600 units;
- for the crime of private corruption pursuant to Article 2635 of the Civil Code:
  (a) individuals: imprisonment from one to three years;
  (b) legal entities: fine from 400 to 600 units and disqualifying sanctions (Article 9 paragraph 2 Decree 231).

5.2 Guidelines Applicable to the Assessment of Penalties

The only guidelines or principles applicable to the assessment of the penalties are provided by the "general part" of the Criminal Code in Articles 132 and 133. The first states that the application of penalties shall be at the judge's discretion, within the limits (minimum and maximum) established by the law for each crime; the second specifies the principles to be applied by the judge in the exercise of his or her discretionary power (eg, the judge has to take into account the seriousness of the offence and the individual's attitude to the crime). Sanctions are increased in the event of a repeat of the crime, in accordance with Article 99 ICC.

Articles 11, 14 and 20 Legislative Decree No 231/2001 state similar principles for the administrative liability of legal entities.

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Legislative Decree No 231/01 states an autonomous administrative liability of legal entities, in the event that one of the crimes listed in the Decree (including bribery and corruption offences) is perpetrated in the interest or to the benefit of the company by persons who have representative, administrative or management functions or by persons under the direction or supervision of one of these persons.

All such provisions are enforced by the Criminal Court (following an initiative put in place by the prosecutor), which has the duty to assess – usually in the same proceedings – both individual and corporate liabilities and, as a consequence, issue judgments of acquittal or conviction.

In order to avoid liability in the event a crime has been committed in the interest or to the benefit of the company, according to Articles 6 and 7 of Legislative Decree No 231/2001, entities may adopt the so-called "organisational models" in order to prevent the crimes listed in the Decree from being committed.

According to Legislative Decree No 231/2001, the model must be considered "effective"; this means that, according to Article 6 paragraph 2 of the Decree, the model must:

- identify the activities in which the crimes listed in the Decree could be committed;
- provide specific protocols designed to assist the company in formulating and implementing company decisions, in relation to the crimes to be prevented;
- identify procedures for managing the financial resources needed to prevent crimes from being committed;
- provide obligations of disclosure to the supervisory board; and
- provide a suitable disciplinary system.

The adoption of the model is not mandatory for the company but is a necessary condition to avail of the exonerating circumstance provided for by Legislative Decree No 231/2001.

Indeed, as highlighted in **3.3 Corporate Liability**, the company has a duty to prevent bribery as an offence (as well as all the other crimes listed in Legislative Decree No 231/2001) and, in the event of failure of such obligation, an autonomous liability might arise for not having adopted organisational models capable of preventing the crimes listed in the Decree from being committed.

Other essential tools for the implementation of the model – as usually stated by the courts – are disclosure of the content of the model and staff training:

- communication is usually reserved to HR functions and is necessary in order to ensure employees are completely aware of the organisational model and the Code of Ethics; and
- training is crucial in order to comply with the requirement of Article 6 of the Decree 231/2001, according to which, in order to be able to determine an "exonerating effect" in favour of the company, the model must be "effectively implemented".

6.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

In the Italian criminal system, there is no obligation for individuals (who are not public officials) or companies to report bribery or other crimes against the public administration, of which they become aware, to the judicial authority.

6.3 Protection Afforded to Whistle-Blowers

Law No 179/2017 – which came into force on 29 December 2017 – introduced a public and private system of protection for whistle-blowers in Italy.

In the Public Sector

Starting from the public sector, according to the law, a public employee who, in the interest of the integrity of the public administration, reports to the "person responsible for preventing corruption and transparency" (pursuant to Article 1, paragraph 7, of Law No 190, 6 November 2012), or to the National Anti-Corruption Authority (ANAC), or by complaint to the ordinary judicial authority or the accounting authority, unlawful conduct of which he or she has become aware due to his or her employment relationship, cannot be sanctioned, demoted, dismissed, transferred, or subjected to any other organisational measure with detrimental effects, direct or indirect, on his or her working conditions determined by the report.

Furthermore, the law guarantees protection for the whistle-blower by providing for two sanctioning powers by ANAC:

- a fine of up to EUR30,000 for those who adopt retaliatory measures against the whistle-blower; and/or
- a fine of up to EUR50,000 for the person responsible for transparency and anti-corruption who failed to examine the report received from the public employee.

In Private Legal Entities

From the standpoint of private legal entities, the law provides specific protection to whistle-blowers according to Decree No 231/2001 (but only for those companies which have adopted an organisational model).

In greater detail, according to Article 6, paragraph 2-bis, of Decree No. 231/2001, companies are required to provide:

- one or more channels enabling senior managers and subordinates to raise detailed disclosures of unlawful conduct pursuant to Decree No 231/2001 and based on precise and congruous facts, or breaches of the organisational model of the company, which they witnessed in the performance of their functions. Such channels must assure confidentiality over the identity of the whistle-blower when handling the disclosure;
- at least one alternative reporting channel suitable to assure, through IT, the confidentiality of the identity of the whistle-blower;
- prohibition against retaliation or discriminatory acts, whether direct or indirect, towards the whistle-blower for reasons, directly or indirectly, connected to the disclosure; and

- within the disciplinary system adopted, sanctions against those infringing the measures for the protection of the whistle-blower, as well as those making disclosures, maliciously or negligently, that turn out to be unfounded.

6.4 Incentives for Whistle-Blowers

No incentive is offered to whistle-blowers as a consequence of reporting bribery or corruption.

The only "incentive" – actually, a sort of "protection" for the whistle-blower – is the one provided by Article 3 of Law No 179/2017, which qualifies the complaint of the whistle-blower, if the "interest of the integrity of the public administration" is pursued by him or her, as a "justified cause" of disclosure of professional secrets. Therefore, Article 3 provides for an exonerating circumstance for the crimes of "disclosure and use of official secrets" (Article 326 ICC), "disclosure of professional secrets" (Article 622 ICC), "disclosure of scientific and industrial secrets" (Article 623 ICC) and "breach of the duty of loyalty" (Article 2105 of the Civil Code).

With reference to the new exonerating circumstance provided by Article 323-ter of the ICC in the event of self-incrimination and effective co-operation with the judicial authority, see **4.5 Safe Harbour or Amnesty Programme**.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

Provisions regarding whistle-blowers in the public sector are set out in Article 54-bis of Legislative Decree No 165/2001; provisions regarding the private sector are set out in Article 6 of Legislative Decree No 231/2001.

As mentioned in **6.3 Protection Afforded to Whistle-Blowers**, both decrees have been amended by Law No 179/2017 entitled "Provisions for the protection of whistle-blowers who report offences or irregularities which have come to their attention in the context of a public or private employment relationship".

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

See **7.3 Process of Application for Documentation**.

7.2 Enforcement Body

See **7.3 Process of Application for Documentation**.

7.3 Process of Application for Documentation

As mentioned previously, in the Italian jurisdiction, the main anti-bribery and anti-corruption provisions are included in the Criminal Code, which describes conduct which may trigger the relevant crimes and provides for the correlative sanctions.

At the same time, Legislative Decree No 231/2001 establishes an autonomous administrative liability for legal entities, in the event that one of the crimes listed in the Decree (including bribery and corruption offences) is perpetrated in the interest or to the advantage of a company.

All such provisions are enforced by the Criminal Court (following an initiative put in place by the prosecutor), which has a duty to assess individual and corporate liabilities and, as a consequence, deliver judgments of acquittal or conviction.

On the other hand, Law No 190/2012 established the National Anti-Corruption Authority (ANAC) which is an administrative authority aimed at preventing corruption in public administrations. ANAC has a broad range of powers (listed also under ANAC in Legislative Decree No 90/2014 and No 50/2016), which may be summarised as follows:

- analysis of the causes which facilitate corruption, identifying prevention initiatives (for this purpose the authority issues the annual National Anti-Corruption Plan which assesses the risk of corruption related to the office and points out the potential initiatives to be carried out to mitigate the risk);
- inspections by requesting information, acts and documents, and the execution of the initiatives required by the National Anti-Corruption Plan;
- supervision of public contracts and public tenders;
- reporting to the Public Prosecutor's Office in the event of crimes or to the Court of Auditors in the event of detriment to the Treasury;
- regulation by issuing guidelines (also having a binding value);
- management of the national database of public contracts, digital record of public contracts and national register of evaluation commission members;
- imposition of disqualifying and pecuniary sanctions in the event of failure, without justified reason, to provide the information requested by ANAC or contracting authorities, or in the event of providing false information or documents;
- incentive reporting through a whistle-blowing channel and imposition of pecuniary sanctions against:
  (a) those who take revengeful initiatives against the reporters; and
  (b) Corruption Prevention and Transparency Officials who fail to assess the reports received;

- in the event of prosecution of any of the crimes under Articles 317, 318, 319, 319-bis, 319-ter, 319-quater, 320, 322, 322-bis, 346-bis, 353 and 353-bis of the ICC or in the event of potential unlawful conduct referable to a successful tenderer, ANAC will inform the Prosecutor's Office and propose to the Prefect to:
  (a) order the replacement of the persons involved in the investigation in corporate bodies and, if the company fails to comply, impose extraordinary and temporary management of the company with specific reference to the execution of the public contract related to the potential unlawful conduct; or
  (b) impose extraordinary and temporary management of the company with specific reference to the execution of the public contract related to the potential unlawful conduct.

7.4 Discretion for Mitigation

With reference to mitigation powers, it is important to highlight that they concern two different fields: administrative law and criminal law.

From the administrative perspective, it is worth mentioning ANAC Resolution No 949/2017, which introduced the possibility to extinguish the administrative pecuniary sanctions issued by ANAC, in the event that no disqualifying sanctions are applicable, by means of the payment of a reduced fine.

Payment of the fine is due within 60 days from the notification of the violation, at a rate of EUR500 in the case of failure to provide the information requested and EUR1,000 in the case of providing false information.

On the other hand, regarding potential mitigation powers in the criminal field, the Criminal Code and the Criminal Procedure Code provide for three different mitigation measures which may be applied by the Criminal Courts to reduce the sanctions described in **5.1 Penalties on Conviction**.

Plea Bargain Proceedings

According to Articles 444 and following of the Criminal Procedure Code, individuals may settle the charge through a plea bargain agreement with the prosecutor setting out the pecuniary sanctions (fines) and the duration of imprisonment.

The main positive outcomes of plea bargain proceedings are as follows:

- the sanctions agreed with the prosecutor are reduced by a maximum of one third;
- if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the judgment itself does not entail the cost of the proceedings or the application of ancillary penalties and security measures, except for confiscation in cases set forth by Article 240 of the ICC;
- if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the offence shall be extinguished if, within five years (if the judgment concerns a crime) or two years (if the judgment concerns a misdemeanour), the accused does not commit a crime or misdemeanour of the same kind.

Note that, as set forth by Article 444 paragraph 1-ter of the Criminal Procedure Code, in the event of prosecution of any of the crimes set forth in Articles 314, 317, 318, 319, 319-ter, 319-quarter and 322-bis of the ICC, the request for plea bargain proceedings is subject to the full restitution of the price or the profit arising from the offence.

The court assesses whether the latter condition is met and, in general terms, whether the plea bargain agreement complies with the law. If the evaluation is positive, the court delivers the plea bargain sentence.

Furthermore, Law No 3/2019 added paragraph No 3-bis to Article 444 of the Criminal Procedure Code, which states that, in the event of prosecution for any of the crimes provided for by Articles 314 paragraphs 1, 317, 318, 319, 319-ter, 319-quarter, paragraphs 1, 320, 321, 322, 322-bis and 346-bis of the ICC, the plea bargain request may be subject to the exclusion or suspension of the accessory penalties provided for by Article 317-bis of the ICC. Should the court deem it mandatory to apply these accessory penalties, it shall reject the plea bargain request.

Finally, it is important to highlight that, pursuant to Article 63 of Legislative Decree No 231/2001, administrative liability may also be settled through a plea bargain agreement. Indeed, the company is entitled to settle its potential administrative liability with an agreement on pecuniary sanctions and on the duration of disqualifying measures (if applicable).

Two Special Mitigating Circumstances Set Forth by Article 323-bis ICC

The special mitigating circumstance under the first paragraph is met when the offences under Articles 314, 316, 316-bis, 316-ter, 317, 318, 319, 319-quarter, 320, 322, 322-bis and 323 of the ICC are particularly slight. In such event the sanction is reduced by up to one third.

In greater detail, such mitigating circumstance occurs when the whole offence is barely offensive and, therefore, not very serious, with reference to the conduct carried out, the amount of economic damage or profit attained, the subjective attitude

of the perpetrator and the event (see latest Court of Cassation, Section VI, 23 May 2019, No 30178). Therefore, the application of such mitigating circumstance cannot be determined by the mere slightness of the advantage gained by the perpetrator.

The second mitigating circumstance has been introduced by Law No 69/2015 and occurs if the perpetrator made effective efforts to:

- prevent any further consequences of the criminal activity;
- provide evidence of criminal offences and identify other perpetrators; or
- allow the seizure of the profits.

In accordance with Article 25, paragraph 5-bis Legislative Decree No 231/2001, the same mitigating measure is applicable to the benefit of the legal entity which meets all the above-mentioned conditions and adopts an organisational model suitable to prevent crimes of the same type.

Such circumstance (which is applicable only with reference to the offences under Articles 318, 319, 319-ter, 319-quarter, 320, 322, 322-bis and 323 of the ICC) is a kind of active repentance post delictum and determines a reduction of from one to two thirds of the penalties.

It is important to point out that, in accordance with the case law referred to, similar legal provisions (see Court of Cassation, Section IV, 14 April 2016, No 32520) state that such mitigating circumstance cannot be granted in the case of reticence, even if only partial, on the part of the perpetrator, as collaboration is required to be full and effective.

Non-punishable Clause Set Forth by Article 323-ter ICC

Law No 3/2019 introduced a special non-punishable clause in the event of self-incrimination and effective co-operation with the judicial authority.

In greater detail, such clause requires that:

- one of the offences pursuant to Articles 318, 319, 319-ter, 319-quarter, 320, 321, 322-bis, 353, 353-bis and 356 of the ICC is perpetrated;
- the author voluntarily reports the crime to the authority, provides evidence of the crime and helps to identify the other perpetrators; and
- the perpetrator discloses the crime before being informed that they are under investigation and within four months of the offence being perpetrated.

Furthermore, the perpetrator is required to make available the benefit received or, where this is not possible, make available a sum of money of equivalent value, or provide useful information to identify the beneficial owner of the advantage. Such initiative must also be carried out within four months of perpetration of the crime.

The non-punishable clause is not applicable if the self-incrimination is aimed at perpetrating the crime reported or at uncovering the agent who has acted in breach of the law.

Exonerating Circumstance for Legal Entities

Article 17 Legislative Decree No 231/2001 states that disqualifying sanctions are not applicable if, after the unlawful behaviour but before the beginning of the trial, the company is able to meet three requirements:

- full compensation for damage and the removal of any detrimental or dangerous consequence of the crime;
- removal of the organisational inefficiencies that determined the crime through the adoption and implementation of an organisational model pursuant to Legislative Decree No 231/2001; and
- making available the "profit" arising from the crime for it to be confiscated.

7.5 Jurisdictional Reach of the Body/Bodies

See **7.4 Discretion for Mitigation**.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

In recent Italian judicial news, there are many cases of corruption which could be considered as landmarks in case law.

Among them, it is important to highlight a recent proceeding launched by the Prosecutor's Officein Milan with reference to potential offences of corruption, disturbing the fairness of tenders, embezzlement and abuse in office. The case involves more than 30 individuals andeight companies (charged with administrative liability under Legislative Decree No 231/2001), which were part of an illicit system aimed at altering the fair course of tenders for the innovation and maintenance of Milan's subway railways.

It is also worth mentioning that the Criminal Court of Cassation had the opportunity to examine some issues related to whistle-blowing.

In greater detail, two different principles are regularly affirmed by the case law:

- in the event that an employee carries out investigative activity aimed at filing a whistle-blowing complaint and this activity – breaching thelaw –could trigger a crime, this con-

duct cannot be justified by the rules protecting thewhistle-blower (30November 2017 Law No 179); and
- confidentiality over the identity of the whistle-blower is for disciplinary purposes only, but in the criminal field it cannot be guaranteed in a case where the report becomes an accusatory statement and the identification of the whistle-blower is absolutely essential for the defendant's defence.

7.7 Level of Sanctions Imposed

See **7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption**.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

In addition to the reports provided by the Court of Cassation concerning the general approach followed by criminal case law related – inter alia – to crimes against the public administration, it is important to point out that ANAC issues an annual report on the progress of its activities.

Such documents provide evidence of the results achieved and, simultaneously, highlight possible future initiatives aimed at preventing corruption.

In greater detail, the latest version of the report (released on 2 July 2020) describes positive outcomes arising from prevention activity, which have also been confirmed in the report released by anti-corruption organisation Transparency International with reference to 2019.

The report highlights that corruption in Italy is rather "pulverised and multifarious" and involves almost all the territorial areas of the country. Furthermore, the value of the bribe is frequently very low and is often not represented by a sum of money, but by a different utility (eg, hiring friends and relatives in breach of the law which regulates recruiting in public administrations, building renovations, vacations, etc).

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

With reference to potential changes to the applicable legislation or the enforcement body, it is important to point out that, on 13 February 2020, the Council of Ministries approved the draft of reform of the criminal trial.

The main proposed modifications concern:

- notifications to the defendant;
- time limit of the preliminary investigations;
- rule of judgment of the preliminary hearing;
- limit within which it is possible to enter into a plea bargain agreement (increased up to eight years); and
- rules relating to the prosecution upon complaint of the injured party.

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Pistochini Avvocati Studio Legale was founded in 2020 and has a team of ten legal professionals based in Milan, Italy. The firm provides corporate criminal law assistance to leading Italian and international clients and law firms. The firm's lawyers have postgraduate specialisations in criminal law and advise companies and individuals on preventative steps and, in the judicial phase, on criminal business law issues. In light of this specialisation, Pistochini Avvocati has been involved in many relevant cases concerning crimes in the areas of public administration, tax, finance, the environment and the criminal liability of legal entities under Legislative Decree No 231/2001.

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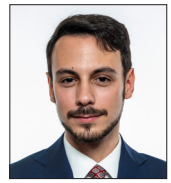

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