



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ITALY

December 2011

This Phase 3 Report on Italy by the OECD Working Group on Bribery evaluates and makes recommendations on Italy's implementation and application of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 16 December 2011.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
A. INTRODUCTION	5
1. The on-site visit	5
2. Outline and methodology of the report.....	5
3. Economic background	6
4. Cases involving the bribery of foreign public officials	7
a) Summary of completed cases.....	7
b) Cases under investigation and/or prosecution.....	8
B. IMPLEMENTATION AND APPLICATION BY ITALY OF THE CONVENTION AND THE 2009 RECOMMENDATIONS.....	8
1. Foreign bribery offence	8
a) Amendment to the offence introduced since Phase 2	9
b) Interpretation by the Supreme Court of Cassation with regard to the definition of foreign public official	9
c) Defence of concussione	10
d) Istigazione alla corruzione and attempt.....	12
2. Responsibility of legal persons.....	13
a) Standard of administrative liability.....	13
b) Level of requirement with regard to the natural person's liability.....	15
c) Number of cases.....	16
3. Sanctions.....	17
a) Sanctions for natural persons	18
b) Sanctions for legal persons.....	19
c) Additional sanctions for legal persons	20
4. Confiscation of the bribe and the proceeds of bribery.....	22
5. Investigation and prosecution of the foreign bribery offence.....	23
a) Principles of investigation and prosecution, resources and coordination	23
b) Investigation tools and challenges in the investigation of foreign bribery.....	26
c) Termination of prosecution: The use of patteggiamento since Phase 2	27
d) Statute of limitations	28
6. Money laundering.....	32
a) The money laundering offence.....	32
b) Due diligence and reporting	32
7. Accounting requirements, external audit, and company compliance and ethics programmes	33
a) Accounting requirements	33
b) External audit requirements	35
c) Company internal controls, ethics and compliance programmes or measures.....	37
8. Tax measures for combating bribery	38
a) Non-deductibility of bribes	38
b) Detection and reporting of suspicions of foreign bribery	38

c)	Tax amnesty programmes	39
d)	Bilateral and multilateral tax treaties and the sharing of information by tax authorities	40
9.	International cooperation	41
a)	Mutual legal assistance	41
b)	International cooperation and statute of limitations	41
10.	Public awareness and the reporting of foreign bribery	42
a)	Awareness of the Convention and of the foreign bribery offence	42
b)	Reporting suspected acts of foreign bribery.....	44
c)	Whistleblower protection	45
11.	Public advantages.....	46
a)	Officially supported export credits.....	46
b)	Public procurement	48
c)	Official development assistance.....	49
C.	RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP	50
1.	Recommendations of the Working Group	51
2.	Follow-up by the Working Group	53
ANNEX 1	PHASE 2 RECOMMENDATIONS TO ITALY AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY	55
ANNEX 2	LEGISLATIVE EXTRACTS.....	58
ANNEX 3	CONCLUDED ENFORCEMENT ACTIONS.....	63
ANNEX 4	LIST OF PARTICIPANTS IN THE ON-SITE VISIT	73
ANNEX 5	KEY DATA AND STATISTICS	78
ANNEX 6	LIST OF ABBREVIATIONS, TERMS AND ACRONYMS.....	79

EXECUTIVE SUMMARY

1. The Phase 3 report on Italy by the OECD Working Group on Bribery evaluates and makes recommendations on Italy's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business transactions and related instruments. It focuses on horizontal issues, which concern the Working Group as a whole, particularly enforcement, and also considers country-specific (vertical) issues arising from progress made since Italy's Phase 2 evaluation in November 2004, taking into account progress observed in Italy's written follow-up report in March 2007.

2. Italy's prosecutors and law enforcement officials are currently engaging in significant efforts to investigate and prosecute foreign bribery offences, which is particularly notable given the challenges presented by the Italian statute of limitations. Since Phase 2, Italy's efforts to enforce its foreign bribery offence, including against legal persons, have increased steadily. However, although 60 defendants have been prosecuted and 9 cases are under investigation, final sanctions were only imposed against 3 legal persons and 9 individuals, in all cases through *patteggiamento*. Cases against numerous other legal persons and individuals have been dismissed, in most cases as time-barred under Italy's statute of limitations, which has not increased since Phase 2 and is capped at 7.5 years for all stages of a trial (through appeals), including suspensions and interruptions. For this reason, the Working Group recommends that Italy urgently take the necessary steps to extend the length of the ultimate limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means.

3. Italy's significant efforts in enforcing its law are made possible by its comprehensive framework for prosecuting the foreign bribery offence, including the availability of the *patteggiamento* procedure, which is akin to plea bargaining, and varied means for sanctioning legal persons for foreign bribery and confiscating proceeds of bribery. Enforcement of the offence against legal persons has also created a strong incentive for Italian companies to put in place internal compliance programs. In addition, agencies administering public benefits, such as export credits and public contracts, have put in place policies and procedures to prevent and detect foreign bribery.

4. Nonetheless, in addition to the issues raised above, the Working Group recommends that Italy eliminate *concussione* as a possible defence in foreign bribery cases. The Working Group also expresses concerns about the effectiveness and deterrent effect of the sanctions available in Italy, particularly those available against legal persons, and recommends that Italy strengthen them. In addition, the Working Group will monitor the possibility to effectively confiscate both the bribe and the proceeds of foreign bribery. In addition, the Working Group encourages Italy to strengthen its efforts to emphasize the detection of foreign bribery through means such as accounting and auditing, tax inspections and whistleblower protection.

5. The report and its recommendations reflect findings of experts from Australia and Germany and were adopted by the OECD Working Group on Bribery. It is based on legislation and other materials provided by Italy, as well as information obtained by the evaluation team during its four-day on-site visit to Italy on 5-8 July 2011, during which the team met representatives of Italy's public administration, judiciary, private sector and civil society. Within one year of the Working Group's approval of the report, Italy will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

A. INTRODUCTION

1. The on-site visit

6. From 5 to 8 July 2011, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group, made up of the 38 State Parties to the OECD Anti-Bribery Convention) visited Milan and Rome as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention or Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by Italy of the Anti-Bribery Convention and the 2009 Recommendations.

7. The evaluation team was composed of lead examiners from Australia and Germany as well as members of the OECD Secretariat.¹ Prior to the visit, Italy responded to the Phase 3 general questionnaire and supplementary questions. Italy also provided translations of some relevant legislation, documents and case law. During the visit, the evaluation team met with representatives of the Italian public and private sectors and civil society.² The evaluation team was grateful for the efforts made by Italy to secure the participation of a wide range of individuals from both the public and private sectors, including a number of high ranking officials from the Ministry of Justice (MOJ), the Ministry of Foreign Affairs (MOFA) and the Ministry of Economy and Finance and several prosecutors and judges who had worked on key foreign bribery cases. The evaluation team expresses its appreciation of Italy's openness and high level of cooperation throughout the evaluation process. The evaluation team is also grateful to all the participants at the on-site visit for their open and frank discussions and express its appreciation for the time taken by Under Secretary of State for Justice to meet the examiners. The evaluation team notes that the Italian government was not present during the panel discussions with the private sector and civil society.

2. Outline and methodology of the report

8. This report is structured in two parts. This part (section A) summarises background information about the on-site visit, the Italian economy and foreign bribery cases that have been prosecuted or are ongoing in Italy. Section B examines Italy's efforts to implement and enforce the Anti-Bribery Convention and the 2009 Recommendations, having regard to Working Group-wide issues for evaluation in Phase 3. It

¹ Australia was represented by Mr. Timothy Goodrick, Director of the Financial Crime Section in the Attorney General's Department, and Mr. Chris McDevitt, Manager of Special References for the Australian Federal Police. Germany was represented by Mr. Alexander Dörrbecker, Attorney for the Federal Department of Justice, and Ms. Cornelia Gädigk, Prosecutor in the Hamburg Prosecutors Office. The OECD Secretariat was represented by Sandrine Hannedouche-Leric, Co-ordinator of the Phase 3 Evaluation of Italy and Senior Legal Expert in the Anti-Corruption Division; Ms. France Chain, Senior Legal Expert in the Anti-Corruption Division; and Melanie Reed, Legal Analyst in the Anti-Corruption Division.

² See Annex 4 for a list of participants.

pays particular attention to enforcement efforts and results, as well as country specific issues arising from progress made by Italy on areas for improvement identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Italy. Part C sets out the Working Group's recommendations and issues for follow-up.

9. A key part of the analysis is based on (i) case summaries included in Italy's replies to the Phase 3 questionnaires and additional information compiled by the Milan Public Prosecutor's Office (PPO) and supplemented by the Ministry of Justice; and (ii) excerpts of selected court decisions requested by the evaluation team and provided by Italy after the on-site visit. Most of the cases referred to by Italy arose out of the investigation into the United Nations Oil for Food Programme. The lead examiners note that a limited number of decisions on foreign bribery cases were provided by Italy within the agreed evaluation schedule, while others were provided with some delays. Another matter of concern for the evaluation team was the compilation of up-to-date statistical information on Italy's foreign bribery enforcement actions. A recommendation to improve such a compilation of statistical information is made below in this report.

3. Economic background

10. Italy's diversified industrial economy is the eleventh largest in the world.³ The country has a population of about 60 million and a high GDP per head of USD 34 161.⁴ There are important economic disparities between the highly-developed industrial north and the less-developed agricultural south. Small and medium-sized enterprises, including family companies, account for a large part of Italy's economy.

11. Italy's commodity exports accounted for 26.8% of the GDP in 2010.⁵ Italy's top exports are refined petroleum products, automobiles, pharmaceutical products, automotive parts and accessories and processed iron, steel and ferroalloys⁶; however, these industries comprise only 16% of the total value of Italy's exports abroad. Other major exporting sectors include footwear, outerwear, general purpose machinery, furniture and steel accessories (excluding cast steel products). Italy's primary export destinations are European countries, although it also exports to China and the United States. In addition, many small and medium companies (SMEs) in Italy have begun to outsource production to eastern European countries. Primarily, these include companies in the textiles, leather and engineering sectors. Italy imports goods from a number of European countries, as well as from China and the United States. Because Italy has no energy resources aside from water and wind, it must obtain the majority of its energy resources from abroad.

12. The overwhelming majority of Italy's foreign direct investment occurs in Europe.⁷ Several countries where foreign direct investment occurs (such as Austria, Luxembourg, the Netherlands, Switzerland, and the Bahamas) are popular countries for holding companies.

³ Central Intelligence Agency (n.d.), the World Factbook, Europe: Italy, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html>, accessed 18 August 2011 [hereinafter CIA World Factbook].

⁴ OECD Economic Survey of Italy (2011), Basic Statistics of Italy.

⁵ CIA World Factbook.

⁶ Istituto Nazionale di Statistica (Istat) (2011), www.coewebt.istat.it (based on provisional data).

⁷ Data regarding FDI comes from the OECD International Direct Investment Database.

4. Cases involving the bribery of foreign public officials

a) Summary of completed cases

13. Italy's public prosecutors, law enforcement officials and judges have been active in prosecuting cases of foreign bribery since Section 322-bis of the Italian Criminal Code (CC) came into force in October 2000. Nonetheless, although Italy has concluded enforcement actions involving 60 defendants in 23 cases since that time, only 12 of them (9 individuals and 3 legal persons) have been sanctioned for foreign bribery. This is primarily due to the fact that the majority of the actions that otherwise would have proceeded on their substance (over 62% of the cases not dismissed for lack of grounds) were dismissed due to expiration of the applicable limitation period. During the on-site visit it became overwhelmingly clear that the issue of Italy's statute of limitations is the primary reason Italy's significant enforcement efforts have led to only limited results in terms of sanctions imposed on offenders.⁸

14. All of the cases where sanctions have been imposed concluded through a settlement procedure (*patteggiamento*). The settlements have all occurred since Phase 2, in 2008 (Oil for Food case 1, with one individual sanctioned), 2009 (Libyan Arms Traffickers case, with two individuals sanctioned), 2010 (Pirelli/Telecom case, with two legal persons and four individuals sanctioned) and 2011 (COGIM case, with one legal person sanctioned, and Oil Company case, with two individuals sanctioned). A table summarizing each of the completed cases to date (including sanctions imposed, amount of the bribe, and other essential available facts) is at Annex 3.

15. The longest term of imprisonment was imposed in the Pirelli/Telecom case (four years two months, not suspended). A number of prison sentences imposed on individuals for foreign bribery have been suspended, not enforced or dismissed on appeal due to expiration of the limitation period. The largest fine imposed on a legal person was EUR 400 000 imposed separately on each of the corporate defendants in the Pirelli/Telecom case. Confiscation has been imposed in 4 cases, the Libyan Arms Traffickers case (imposed on 2 individuals), the Pirelli/Telecom case (imposed on at least 4 individuals), the COGIM case (imposed on 1 legal person) and the Oil Company case (imposed on 2 individuals).

16. Three additional individual defendants (in Oil for Food case 12) were sanctioned for foreign bribery offences, but later had their sanctions dismissed because of the expiration of the limitation period during the appeals process. In September 2011, another individual was convicted of foreign bribery following a trial and sentenced to imprisonment (Oil Company case). The case is not final, pending conclusion of the appeals, and the limitation period on the case is set to expire in January 2012. Thus, this individual's sanctions may become subject to dismissal.

17. In the replies to the questionnaires and during the on-site visit, the lead examiners were informed that all past and current enforcement actions have been commenced based on information learned through outside sources, most notably information reported by the United Nations in its Report on the Manipulation of the Oil for Food Programme (15 of the 21 cases concluded since Phase 2),⁹ as well as formal and informal discussions with other Working Group members. Italian authorities seem to have opened few investigations based on the discovery of alleged foreign bribery by its law enforcement officials. One case provided to the evaluation team shows, however, that enforcement actions may also commence based on investigations of other offences (see the Libyan Arms Traffickers case).

⁸ All concluded enforcement actions are described in greater detail in Annex 3.

⁹ For more information, see: <http://www.iic-offp.org/story27oct05.htm>.

b) *Cases under investigation and/or prosecution*

18. Italian authorities are active in prosecuting foreign bribery cases. They have reported that they are in the process of prosecuting 9 additional cases at this time (involving 24 individuals and 4 legal persons). One of those cases has been publicly reported in the news and is currently at the trial stage (the Nigerian gas case). That case is proceeding against two legal persons as well as 5 individuals who were gas company managers. The case involves allegations of bribery in connection with the construction of a liquefied natural gas plant on Bonny Island, off the coast of Nigeria. Investigations relating to this project are also ongoing in France, Germany, Japan, Portugal, Switzerland, the United States and the United Kingdom. Another party to the Convention has issued sanctions in settlement of allegations of foreign bribery against other legal persons and has indicted a number of individuals.

19. Another case against a legal person and 3 individuals involves alleged bribery by a company in the oil and gas industry. That case is awaiting scheduling. A third case (involving 1 legal person and 1 individual) is related to an Oil for Food case that has already been dismissed on other foreign bribery counts. A fourth case involves 1 individual in the telecom industry; it has already been dismissed as to some of the illegal acts involved, but is ongoing with regard to others. The other 5 cases are proceeding against individuals only and are related to Oil for Food cases that have already concluded against the involved legal persons.

20. At least 5 of the 9 currently ongoing prosecutions are expected to be time-barred by the end of February 2012, and unless a final decision is reached (including at the highest level of appeal) in the meantime, a sixth case will be time-barred by the end of December 2012. Unless new cases arise by that time, only three cases of foreign bribery are expected to be still ongoing by the end of next year. This is especially notable, given that, at the time of this report, Italian authorities have not opened any investigations based on their own discovery of alleged foreign bribery (for example, based on information learned by Italian public officials through the performance of their duties or through reports by private persons). Considering that the large majority of concluded cases have related to the Oil for Food Programme, and many of those cases have already concluded or are set to expire, Italy potentially could see a drop in its ongoing enforcement actions over the next few years.

21. Finally, Italy has reported that it is currently investigating 15 additional foreign bribery cases. These cases involve at least 36 natural persons. Although the number of legal persons involved is not known at this stage, the cases involve activities of the defence and energy sector in areas such as Eastern Europe, the Middle East, and North Africa. One of these cases allegedly involves a large state-backed military equipment group and has been compared in the Italian press to a large scale investigation (known as “Clean Hands” investigation), which, in the 1990’s, involved dozens of companies and political figures.

B. IMPLEMENTATION AND APPLICATION BY ITALY OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. Foreign bribery offence

22. Italy’s implementing legislation, article 322-bis CC establishes the offence of active bribery of foreign public officials (paragraph 2).¹⁰ The article refers to (i) article 321 and (ii) paragraphs 1 and 2 of

¹⁰ Article 322-bis also establishes another basic offence: the passive bribery offence of officials of the European Communities (article 322-bis, paragraph 1). Article 322-bis, paragraph 2 is often referred to

article 322, which establish the offences of bribing a domestic public official.¹¹ Both the offence of foreign bribery and the offence of domestic bribery can be divided into two basic categories, based on whether the bribe was related to the officials performance of official duties or were in breach of his/her official duties. Different sanctions apply to each basic category.

a) *Amendment to the offence introduced since Phase 2*

23. At the time of Phase 2, article 322-bis CC provided that the offence must be “committed in order to procure an undue benefit for himself or others in international business transactions.” Since Phase 2, the scope of the offence has been extended with the addition of the words “or in order to obtain or maintain an economic or financial activity.”¹² The Italian authorities indicated that this change was made to align the text of the law with the United Nations Convention against Corruption (Article 16.1). The amendment does not appear to change the scope of the offence as initially drafted. Representatives of the legal professions met on site unanimously regarded this amendment as having no impact on the scope of the foreign bribery offence that was, according to them, already encompassing such situations.

b) *Interpretation by the Supreme Court of Cassation with regard to the definition of foreign public official*

24. In 2009, the Supreme Court of Cassation ruled that “the judge in a trial for foreign bribery shall ascertain ‘*ex officio*’ the rules of foreign law useful to determine whether the corrupt official was actually performing functions or activities equivalent to those of a public officials or of a representatives of public service.”¹³

25. The impact this interpretation may have on the autonomy of the definition of “foreign bribery official” (a requirement developed in Commentary 3 to the Convention) was the subject of discussion with a range of legal practitioners in the Phase 3 evaluation, particularly with prosecutors, defence lawyers and legal academics.

26. There was not a consistent view as to the impact of the Supreme Court’s decision. Academics indicated that this decision implies a dual test. First, whether a person exercises a public function in another State must be determined in accordance with the law of the State where this person exercises that function. Second, it is also necessary to verify whether this function is also considered to be a public function under the Italian legislation. A lawyer in the private sector further explained that both elements are indispensable in determining whether the acts performed (or omitted to perform) by the official in return for the bribe were related to his/her office or were in breach of his/her official duties (and, consequently, the sanctions that apply). Academics and prosecutors underlined that international law should prevail in cases of conflict (Article 10 of the Italian Constitution). With regard to applying the dual test, they stressed that verifying whether this function is also considered to be a public function under the Italian legislation should not be problematic, as Italian case law has developed criteria that are broad

simply as article 322-bis in this review when it is clear that the offence of bribing a foreign public official is being discussed (as opposed to passive bribery of officials of the European Union).

¹¹ In turn, articles 321 and paragraphs 1 and 2 of article 322 refer to passive bribery offences in relation to domestic officials for the determination of the relevant penalties (*i.e.* article 321 refers to paragraph 1 of article 318, article 319, article 319-bis, article 319-ter and article 320; paragraphs 1 and 2 of article 322 refer to articles 318 and 319, respectively).

¹² Law 116/2009 (article 3).

¹³ C. Cass., 5 November. 2009, n. 49532.

enough to encompass a large range of functions within the definition of “public function,” as notably reflected in the Enelpower/Siemens passive bribery case.¹⁴

27. The examiners were reassured by the explanations provided by the Italian authorities that this ascertainment does not go as far as requiring the “proof” of the law of the official’s country, but rather allows the judge to ascertain the concrete case “also” through proactive research of and reference to foreign law.¹⁵ In the concrete case brought to the attention of the Supreme Court, this legal principle was used to refute the reasoning of the Tribunal of Palermo based on a lack of information as to the role of the financial institution at stake and led to void the appealed decision of acquittal (and send the case back to the court of first instance in order to implement the above principle).

Commentary:

The lead examiners recommend that the Working Group follows up, once there has been sufficient practice in Italy, on whether the implementation of the principle of “ex officio” ascertainment by the judge of the law of the foreign public official’s country is compatible with the requirement of an autonomous offence.

c) *Defence of concussione*

(i) *Scope of the Defence*

28. Under Italian criminal law, an individual is not guilty of bribery if a public official abuses his/her functions or power to oblige or induce the individual to unduly give or promise money or other assets to the official or a third party. Instead, the official is guilty of *concussione* under article 317 CC, while the individual is considered a victim (see the full text in Annex 2 and paragraphs 121-140 of the Phase 2 report).¹⁶ Pursuant to article 25 of LD 231/2001, *concussione* also applies to legal persons.

29. This was a major issue for the Working Group in Phase 2, where the scope of the defence was considered nebulous. The Supreme Court of Cassation has ruled that *concussione* arises when a public official has psychologically coerced a private individual.¹⁷ The definition of *concussione* is further complicated by the concept of environmental *concussione* (*concussione ambientale*), which was developed by the jurisprudence in the 1990s and occurs when an individual is in an environment that leads him/her to believe that he/she must provide a public official with an advantage, either to avoid harm or to obtain

¹⁴ See decision of the Court of Milan, Criminal Division XI, 23 June 2003, where the Court stated that under Italian law Enelpower had the function of a public administration and that the foreign individual involved was thus a “public official” within the meaning of article 357 paragraph 2 CC.

¹⁵ The Supreme Court ruled that “Ascertainment of the possible nature of the bodies which employ the persons for whom the sum of money or the promise thereof was intended must be performed also with reference to the pertinent foreign law, which the Judge must ascertain *ex-officio*, also in accordance with the forms foreseen by Law no. 218 of 2005, Art. 14.” The knowledge of foreign law does not rely exclusively on the cooperation from the foreign state, as Law 218/2005, article 14 enounces that “the ascertainment of the foreign law is carried out also *ex-officio* by the Judge, possibly through the Ministry of Justice or experts or specialized institutions (paragraph 1) or with the assistance of the parties concerned (paragraph 2).”

¹⁶ Italian criminal law also provides for a separate offence of extortion. The main difference between *concussione* and extortion is that the former requires an abuse of an official’s functions or power.

¹⁷ C. Cass., sez. VI, 13 November 1997.

something to which he/she is entitled. This concept demonstrates that *concussione* may be raised as a defence even where there is no solicitation or a threat by an official.¹⁸

30. In addition, the Phase 2 report notes that magistrates may be tempted to characterise a case as *concussione* rather than bribery, so that the private individual faces no proceedings and may thus be encouraged to offer testimony against the public official. Noting that this defence is inconsistent with Commentary 7 of the Convention, the Working Group recommended in Phase 2 (recommendation 7 (a)) that Italy “amend its legislation to exclude the defence of *concussione* from the offence of foreign bribery.”

31. In their Phase 3 replies, the Italian authorities emphasise that, to date, case law shows absolutely no cases of foreign bribery where *concussione* has been applied by a judge to relieve the defendants of liability. This was confirmed by prosecutors, judges and lawyers met during the on-site visit. Judges even pointed to Oil for Food case 12, involving an Italian oil company, where the Court of Milan rejected the defendant’s argument that *concussione* applied (even “environmental *concussione*” as discussed above) and held that facts supported a claim of foreign bribery under article 322-bis.¹⁹ While the lead examiners were reassured by these statements and the court decision, they do not find the argument fully convincing, particularly since only a limited number of cases are argued in court because of applicability of the statute of limitations (as further discussed under subsection 5 below). In fact, discussions with judges highlighted that *concussione* is systematically used by defence lawyers and contributes to lengthen investigations and prosecutions of foreign bribery cases.

(ii) *Legislative developments*

32. At the time of the Phase 2 written follow up report, in March 2007, the Working Group agreed that the recommendation to amend the law still stood and requested annual reports on progress. At the time of Italy’s oral follow-up in March 2008, Italy reported that in October 2007 the Italian government proposed a draft bill (AS 1594) that would repeal the offence of *concussione* from the CC.²⁰ However, by letter sent on 12 March 2009, Italy informed the Working Group that it would not be repealing the defence.

33. The replies to the Phase 3 questionnaire indicate that two other bills currently before Parliament include abrogating *concussione*. One aims at ratifying the 1999 Strasbourg “criminal” Convention on Corruption,²¹ while the other provides for a more general reform of the offences against the public administration.²² A translation of abstracts of these bills was provided to the evaluation team after the on-site visit. According to the Italian authorities, the first bill was proposed by Parliament and includes replacing the offence of *concussione* with a provision on self reporting that would be tantamount to a defence commonly known as “effective regret.”²³ In other countries’ evaluations, the Working Group has recommended repeal of the defence of effective regret. Consequently, introducing this new defence would not adequately address the Working Group’s prior recommendation, but might rather replace the issue raised by *concussione* with a new issue, as the defence of effective regret is even broader than *concussione*, since a perpetrator could report the offence to the authorities and be excused from liability in the case of

¹⁸ C. Cass., sez. VI, 13 July 1998.

¹⁹ C. Milan, Crim. Section, 10 March 2009, n. 1336/08 RG Trib. The case was against one individual and was later declared time-barred under Italy’s statute of limitations.

²⁰ DAF/INV/BR/M(2008)1/REV2.

²¹ This bill is memorialized in AC 3859.

²² See AS 2156, (now AC 4434).

²³ A defence of effective regret usually provides that a briber is not punishable where he/she confesses to the authorities that he/she has committed the offence of bribery.

concussione and any other situation. In addition, the abstracts of the same bill provided by the Italian authorities also include a provision reducing up to a half the amount of the penalty applying to the briber when he/she is induced to give or promise a bribe “to the only end of avoiding an unjust damage,” which remains broad in scope (much broader than coercion) and not clearly limited. The second bill emanated from the executive branch of government and was only passed by the Senate. During the on-site visit, the Italian authorities indicated that if Parliament were to reject the abolition of *concussione* contained in the first bill, the Minister of Justice would use the second bill to suppress the defence and replace it with a new offence of trading in influence. None of these bills had been approved at the time of drafting this report.²⁴

34. In Phase 2, Italy justified the application of *concussione* to foreign bribery on the basis of “equivalence” with domestic bribery. According to this argument, fairness dictates that a person accused of foreign bribery should be entitled to the same defences, including *concussione*, as a person accused of domestic bribery. Recent discussions in Parliament suggest that the solution to the issue of *concussione* may still be related to its application to domestic bribery, and Italian authorities indicated that discussions are still ongoing in relation to the usefulness of this defence in facilitating the detection and prosecution of domestic bribery offences (that is, through denunciation by the person who was allegedly forced by the official to pay a bribe). However, a number of individuals who participated in the Phase 3 on-site visit seem to have moved away from this approach. In particular, during the discussion with Parliamentarians, representatives of one major party expressed their conviction that the defence of *concussione* should be disconnected from discussions of domestic bribery, so that it can be successfully and quickly abolished with respect to foreign bribery.

d) *Istigazione alla corruzione and attempt*

35. In Phase 2, the Working Group decided to follow up, as case law develops, on “the application of the offence of *istigazione alla corruzione*²⁵ and attempt to the foreign bribery offence, in particular to verify whether it is committed irrespective of, *inter alia*, the value of the advantage and its results.” The written follow up to Phase 2 concluded that the Working Group should continue to monitor this issue due to continued concerns about the coverage of cases where the offer, promise or gift has not been accepted by the foreign public official. In their replies to the Phase 3 questionnaires, the Italian authorities indicated that no relevant case law is available that may contribute to the assessment of this issue as regards foreign bribery.

Commentary:

The lead examiners recommend that the Working Group reiterate its Phase 2 recommendation 7(a) that Italy “amend its legislation to exclude the defence of concussione from the offence of foreign bribery.” In this perspective, they believe that any amendment changing the application of concussione to foreign bribery should be assessed in line with Article 1 of the Convention and Annex I.A paragraph 1 of the 2009 Recommendation, as well as (i) independently of similar amendments dealing with the offence in relation to domestic bribery

²⁴ According to the Italian authorities, the text of the Anti-corruption Bill (AS 2156) was approved by the Senate on 15 June 2011 without the provisions repealing the defence of *concussione*. The examination of bill AC 4434 by the Chamber of Deputies started before the Joint Commission Justice and Constitutional Affairs on 7 July 2011 with a parliamentary amendment 9.20 repealing the defence of *concussione*. At the time of drafting this report, the bill was expected to be submitted to the Chamber Plenary.

²⁵ Under Italian law, acceptance of a bribe by an official is an essential element of the basic offence of bribery (including foreign bribery). To cover the bribes that are given, offered or promised but not accepted by an official, Italian law resorts to an additional offence of *istigazione alla corruzione*.

and (ii) with a view to eliminating concussion as a possible defence to foreign bribery without delay.

2. Responsibility of legal persons

a) Standard of administrative liability

36. Under Legislative Decree 231, 8 June 2001 (hereinafter LD 231/2001), administrative liability may be attributed to legal persons for certain criminal offences committed by a natural person, including foreign bribery and false accounting (see articles 4 and 25). The Italian authorities indicated in their replies to the Phase 3 questionnaire that the scope of LD 231/2001 has been progressively expanded in the last few years to encompass a number of new offences “predicate to the liability of legal persons,” including notably money laundering.

37. During the Phase 1 Review, the Working Group concluded that LD 231/2001 complies with the requirements of the Convention, but that its application should be monitored in view of its novelty. In Phase 2, the Working Group decided to follow up on whether Italy was able to effectively proceed against legal persons under this law in a number of listed cases (see issue for follow up (d)(i)). The cases since Phase 2 involving legal persons are discussed in the subsections below. The Working Group also decided to follow up on the application of the “defence of organisational models.”

(i) Liability of state-owned and state-controlled companies (SOEs)

38. One question for follow up that the Working Group highlighted in Phase 2 was whether LD 231/2001 effectively covers state-owned and state-controlled companies. According to the replies provided by Italy to the Phase 3 supplementary questionnaire, since Phase 2, the Supreme Court of Cassation has clarified that LD 231/2001 applies to such entities.²⁶ The Italian authorities have also referred to a more recent decision of the Supreme Court, where it stated that if a private company performs the activity of collection and recycling of garbage, pursuant to authority delegated to it by the Italian government, it is fully subject to the legislation on liability of legal persons.²⁷ Italy underlines that LD 231/2001 is meant to exclude from liability only public entities that are not also enterprises, that are performing non-profit activities and that are carrying out functions of constitutional importance.²⁸

(ii) Defence of organizational models

39. LD 231/2001 provides a defence²⁹ from liability for a legal person that has put in place an organisational model aimed at preventing an offence that has nevertheless occurred. During the on-site visit, the examiners tried to assess with panellists whether this defence complies with the standards on the liability of legal persons set up in the Good Practice Guidance on Implementing Specific Articles of the Convention (Annex I to the 2009 Recommendation). Pursuant to articles 6(1) and 7 of LD 231/2001, a

²⁶ The Supreme Court of Cassation specified that the exemption from liability under LD 231/2001 requires two elements: “the legal person must be public and must also not perform economic (profitable) activity” [*emphasis added*]. For example, an Italian court has held that a hospital with public and private capital can be accountable under LD 231/2001 (C. Cass., 9 July 2010, n. 28699).

²⁷ C. Cass., 10 January 2011, n. 234.

²⁸ Defined by the Supreme Court (in C. Cass., 9 January 2010, ref. supra.) as entities to which imposing measures and sanctions would have in fact the effect of suspending indefeasible functions provided for by the constitution.

²⁹ See subsection 3 (regarding organisational models as a mitigating factor).

body is not liable for an offence committed by a person holding a managing position (which encompasses a broader range of persons than persons with the highest level of managerial authority)³⁰ or persons who are under their direction or supervision³¹ if it proves that before the offence was committed (i) the body's management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred; (ii) the body had set up an autonomous organ to supervise, enforce and update the model; (iii) the autonomous organ had sufficiently supervised the operation of the model; and (iv) the natural perpetrator committed the offence by fraudulently evading the operation of the model. Article 6(2) outlines the essential elements of an acceptable organisational model. In Phase 2, the Working Group decided to follow up on the application of this defence.

40. During the Phase 3 on-site visit, participants explained that under LD 231/2001, a company is responsible for designing an organisational model tailored to its business and activities. A company may base its model upon a model code drafted by a business association and approved by the Ministry of Justice; however, if an issue arises, the court trying the case will ultimately decide whether the organisational model was adequate to prevent the offence that occurred. The court would make such a decision by examining both the substance of the organisational model and how it was implemented, for example, whether the independent supervisory body (*organismo di vigilanza*) adequately fulfilled its responsibilities.

41. In its replies to the Phase 3 questionnaires, Italy referred to a 2009 decision of the Court of Milan,³² where the court acquitted a company from the offence of stock manipulation committed by the President and CEO because the company had previously adopted an organisational model complying with LD 231/2001. Participants during the on-site visit stressed that this is the only court decision that has found a company's organisational model to be adequate. The court found that the company's organisational model was not only consistent with the general requirements of LD 231/2001, but also included specific measures aimed to reduce or eliminate the risk of the particular offence contested at trial. In addition, the model was in line with Confindustria's Guidelines. Furthermore, the internal procedures of the model specifically required the "approval" of two or more individuals to perform the activities with a high risk rate. The court explained that the illegal conduct that formed the basis for trial was not caused by an incorrect organisational model but by abnormal behaviours by high-level management that violated the internal rules of said model.

42. On the other hand, in one of the two only cases that led to the sanction of legal persons for foreign bribery in Italy, the Pirelli/Telecom case,³³ the Court of Milan held that, although the organisational model in place in each company was "adequate to prevent crimes like those that occurred," it was "not successfully implemented" and "properly watched over."³⁴ Representatives of the legal profession met on-site asserted that the mere fact that an offence occurred means that the model was not adequate and that the 2009 Court of Milan decision is an exception in a very specific case.

³⁰ LD 231/2001, article 5.1(a) provides that the liability of legal persons can be triggered by "persons carrying out activities of representation, administration or management of the body or of one of its organizational units, having financial and operating autonomy, as well as persons carrying out, even *de facto*, activities of management and supervision of the said body."

³¹ LD 231/2001, article 7.1 and 2.

³² C. Milan, Office of the Judge for Preliminary Investigations, 17 November 2009, Beta S.p.A.

³³ C. Milan, Div. of Investigating Judge and Judge of Precourt Hearings, 28 March 2010, n. 25194/08 RGNR, n. 6330/09 RGGIP.

³⁴ The Court even considered that the model "was not prepared to be observed ... because what materially occurred just corresponded to corporate logic." The Court concluded that, "as a consequence, the facts ... [were] considerably grievous."

Commentary:

The lead examiners welcome the clarification brought by the Supreme Court that LD 231/2001 effectively covers state-owned and state-controlled companies.

The lead examiners are satisfied with the standards required under the only Italian court decision available at the time of drafting this report on the application of the defence of organisational model. As tightly framed within these standards, the defence does not appear to depart from the requirements set forth in Annex I to the 2009 Recommendation. Nonetheless, they recommend that the Working Group continue to follow up on the application of the defence as practice develops in Italy.

b) Level of requirement with regard to the natural person's liability

(i) Principal offenders likely to trigger the liability of legal persons

43. LD 231/2001 imposes liability on legal persons for offences committed by two categories of principal offenders: natural persons in senior positions and natural persons subject to their management or supervision. Individuals in senior positions are further described under article 5(1) of LD 231/2001.

44. LD 231/2001 appears to implement the approach recommended by Section B b) of the Good Practice Guidance on Implementing Specific Articles of the Convention (Annex I to the 2009 Recommendation). Even though the liability of legal persons in Italy is in principle triggered by an act of an individual holding a managing position (which is relatively broad as defined under Italian law), LD 231/2001 also covers cases where such an individual fails to supervise a lower level person or fails to implement adequate internal controls, ethics and compliance programs.³⁵ The Pirelli/Telecom case sets forth a practical example. Similarly, in the ongoing Nigerian gas case, the Court of Milan is prosecuting two companies for not having adequately supervised the conduct of two employees who were allegedly involved in an international bribery scheme.³⁶

(ii) Bribery in the interest or at the advantage of the legal person

45. Liability under LD 231/2001 also depends on whether the offence was committed in the interest and to the advantage of the legal person. Pursuant to article 5, a legal person is not liable if the principal offender acted in the interest of him/herself or a third party (“at their exclusive advantage or at the advantage of a third party”). In Phase 2, the Working Group found it unclear whether LD 231/2001 would impose liability on a legal person if the principal offender were to pay a bribe that advantaged a subsidiary (or *vice versa*) or if the advantage resulting from the bribe were indirect (*e.g.* an improved competitive situation). Neither of the two cases where a legal person was sanctioned for foreign bribery available at the time of drafting this report has clarified this issue. During the on-site visit, prosecutors expressed confidence that LD 231/2001 would be broad enough to encompass these situations, but it remains to be seen as case law develops.

(iii) Independence from proceedings in relation to principal offender

46. Since liability of a legal person depends on whether a natural person has committed a crime, LD 231/2001 contemplates that the legal person and the natural person will generally be tried together (article

³⁵ LD 231/2001, article 5.1. (b) provides that the liability of legal persons can also be triggered by persons who are under the direction or the supervision of one of the subjects referred to in (a).

³⁶ The employees worked for one of the two companies, which was controlled by the other company.

38). However, according to Italian officials, a conviction against the natural person who is the principal offender is not necessary in order to convict the legal person, since article 8(1)(a) stipulates that a legal person may be held liable even if the principal has not been identified or is not indictable (*e.g.* because the principal has fled or died). This interpretation of the law was confirmed by the two instances where Italian companies were sanctioned in foreign bribery cases; each of the three companies involved in those two cases settled with prosecutors through *patteggiamento*, even though no individuals were convicted (as their cases were declared time-barred). This derives from the fact that the statute of limitations applicable to legal persons is different from the one applicable to natural persons, as further discussed under subsection 5(f).

47. Combined provisions in LD 231/2001 and the Code of Criminal Procedure (CCP) provide that the procedure for initiating proceedings against a legal person as well as the procedural provisions that would apply to a principal offender also apply to proceedings against legal persons brought under LD 231/2001, to the extent that they are compatible (articles 34 and 35). The Supreme Court of Cassation confirmed this in the Nigerian gas case.³⁷

48. In addition, if the investigation identifies only a legal, but not a natural, person as a suspect, the proceedings may continue against the legal person.³⁸ However, although article 8 of LD 231/2001 provides for “autonomous prosecutions” of legal persons, other provisions in LD 231/2001 appear to presuppose that legal persons may be prosecuted only if a natural person has been identified and charged. In Phase 2, the Working Group decided to further monitor this issue (issue for follow up (d)(i)(1)).

49. In reply to a question raised during the on-site visit regarding whether legal difficulties arise when prosecuting a legal person without also prosecuting the individual perpetrator, Italian authorities indicated that if proceedings against natural and legal persons are often joint (in order to facilitate the often complex gathering of evidence), this is not necessarily the case, for instance when the offender is not identified. They referred to the explanatory report of LD 231/2001 to emphasize that, in both cases, the offence remains even if the offender is not punishable and that the non-identification of the perpetrator is a very typical feature of the Italian regime of corporate liability. The judges and prosecutors met during the on-site visit agreed to this explanation in principle but could not provide the example of a case where this possibility had occurred. A prosecutor was sceptical about such possibility because of the legal requirement to establish that the principal offender acted in the interest and at the advantage of the body, which requires understanding the motives of the individual. The Italian authorities later confirmed that no such case has yet arisen. This should still be monitored as case law develops.

c) *Number of cases*

50. The data provided by Italy for use in the Working Group Annual Report indicates that 18 legal persons have been sanctioned for foreign bribery in Italy, including 17 through plea agreements (*patteggiamento*) since the entry into force of LD 231/2001 to December 2010. In their replies to the Phase 3 questionnaire, the Italian authorities provided comparable (although not identical) figures. However, following a closer scrutiny of these figures by the evaluation team, it emerged that these figures included cases of passive bribery and that, based on case law available at the time of drafting this report, only 3 legal persons have received sanctions in 2 foreign bribery cases.³⁹ These 2 cases do not fully reflect enforcement action against legal persons in Italy, however. Twenty of the 60 defendants in concluded enforcement actions undertaken by the Italian law enforcement authorities were legal persons. Among

³⁷ C. Cass., Criminal Section, 30 September 2010, n. 42701.

³⁸ See article 38(2)(c) of LD 231/2001 and article 415 of CCP.

³⁹ See Pirelli/Telecom and COGIM cases, referenced *supra* and in Annex 3.

these 20 legal persons, aside from the 3 legal persons who were sanctioned, cases against 15 legal persons were dismissed as time barred and cases against 2 other legal persons were dismissed for lack of grounds (see Annex 3). In addition, at the time of drafting this report, actions against 3 legal persons were still ongoing. Data provided by Italy after the on-site visit shows that, from 2001 to mid-June 2011, combining all offences (not just foreign bribery), 207 legal persons have been sentenced for violations covered by LD 231/2001.

51. As with natural persons, the figures also show a discrepancy among the regions and related Public Prosecutors' Offices (PPOs) in terms of the number of enforcement actions against legal persons for foreign bribery. The only two cases that gave rise to sanctions against legal persons were concluded in the same region by the same PPO, *i.e.* the Milan PPO. The majority of the other cases that were dismissed as time barred or for other reasons also were prosecuted by this PPO, although a number of cases have been prosecuted by other PPOs (such as those in Como, Genoa, Monza, Perugia, Piacenza, Rome, Trento and Turin). The Italian authorities emphasize that the gap that exists with regard to the different Italian regions may to some extent be justified by the sustained economic activity in the Milan region.

Commentary:

The lead examiners are satisfied with the large range of possibilities that appear to be available under Italian law for administrative liability of legal persons. This reflects a pragmatic and flexible approach that should allow for the coverage of the wide variety of decision making systems in legal persons. The lead examiners therefore commend Italy for this approach, which appears to be in line with the Good Practice Guidance in Annex 1 to the 2009 Recommendation. They nonetheless recommend that the Working Group follow up on whether LD 231/2001 imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery.

However, while the lead examiners recognise that a considerable number of actions have been launched against legal persons in application of the principle of mandatory prosecution, and that the regime of corporate liability has enabled the sentence of a significant number of legal persons for offences other than foreign bribery, they are seriously concerned by the high number of cases of foreign bribery that have become time-barred for legal persons and the consequently very low number of cases that have been concluded to date (2 cases involving 3 legal persons). In the view of the examiners, this is not compliant with Article 6 of the Convention. They therefore recommend that Italy take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among the prosecuting authorities throughout the country to ensure that the large range of possibilities available under the law for holding legal persons liable for foreign bribery is understood and applied consistently and diligently, with a view to avoiding the dismissal of these cases based on statute of limitations grounds.

3. Sanctions

52. In Phase 2, the Working Group decided to follow up, as case law develops, on the topic of sanctions, with a view to determining whether the sanctions regime in Italy is effective, proportionate and dissuasive, as required under Article 3 of the Convention. Earlier, in Phase 1, the Working Group had raised concerns regarding the unavailability of financials sanctions for natural persons (see subsection (a) below for further details).

53. It should be noted that the full range of sanctions and confiscation measures detailed below are available to prosecutors when relying on the *patteggiamento* procedure to settle cases.

a) Sanctions for natural persons

54. Sanctions for natural persons are unchanged since Phase 2. The foreign bribery offence mirrors the domestic offence. Penalties range from six months to three years imprisonment for a bribe offered, promised or given to a public official to obtain the performance of acts related to the public official's office and from two to five years imprisonment where the bribe is offered, promised or given to a public official to obtain an omission or delay of an act relating to the official's office or the performance of an act in breach of official duties (articles 318–319, 321–322 CC). Even higher sentences apply where the offence is committed in favour of or against a party to a civil, criminal or administrative proceeding or where the offence results in another being wrongfully sentenced (article 319-ter). Financial sanctions cannot be imposed on natural persons, an issue that the Working Group had identified in its conclusions during the Phase 1 review of Italy, suggesting that “the introduction of financial sanctions may constitute a useful additional deterrent.”

55. Italian courts have imposed imprisonment sanctions on natural persons in almost no foreign bribery cases because, in the large majority of cases, charges against the individuals involved became time-barred, either before trial or after a decision was handed down in the first or second instance (see below on the statute of limitations). In each case where sanctions were imposed, they occurred in connection with a *patteggiamento* procedure.

56. First, Oil for Food case 1 involved EUR 132 000 in bribes in connection with a compressor company's sales to Iraq. The individual involved was sentenced to a suspended sentence of one year imprisonment.⁴⁰

57. Second, Oil for Food case 12 involved four counts of bribery, ranging from USD 60 000 to USD 37.6 million, in connection with an oil company's business in Iraq. The three individuals who were sentenced in that case included the company's commercial manager, one of the company's attorneys and a partner responsible for the company's relations with an Iraqi state agency. They were each sentenced to two years imprisonment, were barred from entering into public contracts for two years, and had over EUR 1 million in assets confiscated.⁴¹ However, their sentences were also overturned on appeal after the offences were declared time-barred.

58. Third, the Libyan Arms Traffickers case involved approximately USD 3 million in bribes in connection with the sale of military equipment to Libyan government officials. The two individuals involved were sentenced to four years imprisonment, had goods and documents seized before trial confiscated and were barred from holding public office for five years.⁴² However, this case involved counts for arms trafficking in addition to the count for foreign bribery; thus, it is difficult to ascertain what portion of the sanctions stemmed from foreign bribery.

59. Fourth, the Pirelli/Telecom case involved approximately EUR 200 000 in bribes in connection with the bribery of a French public official to obtain business authorisations. The sentences received by the four individuals sanctioned range from 2 years and 4 months and 4 years and 2 months (these sentences have not been suspended). Finally, two individuals were sanctioned in connection with the Oil Company

⁴⁰ See C. Milan, 3 April 2008.

⁴¹ See C. Milan, 10 March 2009.

⁴² See C. Perugia, 8 July 2007, n. 374/09.

case. The first was sentenced to a suspended sentence of 10 months 20 days imprisonment. The second (who was charged with offences in addition to foreign bribery) was sentenced to 1 year 8 months imprisonment; however, the sentence was not enforced based on *condono*, a type of amnesty.⁴³

60. Article 163 of the CCP provides that a prison sentence of two years or less may be suspended under certain circumstances. The conditional suspension of a prison sentence may be requested as a condition in a *patteggiamento* procedure (article 444(3) CCP). Out of the 9 natural persons who have received prison sentences to date, 2 have been suspended and 1 was not enforced due to *condono*.

b) Sanctions for legal persons

61. For legal persons, the amount of a fine that may be imposed for foreign bribery depends on the nature and seriousness of the offence and is determined by a certain number of “quotas.”⁴⁴ Bribery for officials acts (article 318 CC) is punishable by a fine of up to EUR 309 800. Bribery for acts against official duties (article 319 CC) and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings (article 319-ter CC) are punishable by a fine of EUR 51 600 to 929 400. Where there are aggravating circumstances or where aggravated bribery results in a wrongful conviction or involves the award of public offices, salaries, pensions or contracts with the government, a fine of EUR 77 400 to 1 239 200 applies.

62. Certain mitigating factors may reduce the fine imposed in a given case. For example, the fine is reduced by one-half and in any event cannot exceed EUR 100 000 if the perpetrator committed the offence mainly in the interest of him/herself or a third party, or if the pecuniary damage caused is “small” (article 12.1 of LD 231/2001). A fine is reduced by between one-third and one-half if, before a trial against a legal person commences, the legal person (i) compensates any victims, takes effective steps to eliminate the consequences of the offence, or does its utmost to this effect; or (ii) implements an appropriate organisational model to prevent similar offences in the future (article 12.2). If both conditions in the preceding sentence are met, the fine is reduced by between one-half and two-thirds (article 12.3). Regardless of the above-mentioned mitigating factors, however, a fine cannot be reduced to less than EUR 10 000 (article 12.4).

63. The sanctions set out in LD 231/2001 appear relatively low. Prosecutors interviewed during the on-site visit were of the view that, while they could be dissuasive for SMEs, they would be fairly insignificant for large companies. The private sector participants also noted that the interdictive sanctions are the most dissuasive. Of greater concern, the mitigating circumstances could further reduce these sanctions, depending how broadly they are interpreted and applied. For instance, would a foreign bribery offence committed in the interest of a third party parent or sister company amount to a mitigating circumstance under article 12.1? And under this same provision, what would be considered a “small” damage in a foreign bribery case where, potentially, no damage was suffered in Italy? It is also unclear what would amount to reparation of damages under article 12.2, and to whom such damages should be paid

⁴³ Law n. 241 of 31 July 2006 granted a non-discretionary pardon for crimes committed until 2 May 2006 and which were subject to a sentence of up to 3 years or a fine of up to EUR 10 000. A number of offences (relating to terrorism, organized crime, pornography and sexual abuses) were excluded from the pardon, but not international bribery.

A third individual in the Oil Company Case was convicted in September 2011 following a trial on the merits. He was sentenced to 3 years 6 months imprisonment. Notably, however, this sentence will not go into effect unless he completes his appeals prior to the expiration of the limitation period in January 2012.

⁴⁴ Article 25.4 of LD 231/2001. Under articles 10 and 11 of LD 231/2001, the amount of a “quota” is based on the economic and pecuniary conditions of the legal person concerned and varies from EUR 258 to 1 549.

in a foreign bribery case. The opportunity for a company to reduce its sentence by at least one-third by putting in place an adequate organisational model before the trial commences also appears to facilitate possibilities for legal persons to escape serious financial sanctions. By way of example, in the Pirelli/Telecom case, the Court (i) agreed to reduce the amount of the fine by one-half to take into account the full compensation of the damage and the adoption of an organisational model, but it then (ii) decided to double the remaining amount for continued crime following which it (iii) reduced this sum by a third for the use of the *patteggiamento* procedure (as further discussed below).⁴⁵

64. The effective, dissuasive and proportionate character of financial sanctions imposed on legal persons in Italy is of even greater concern when examining sanctions handed down in practice by the courts. Because the immense majority of foreign bribery cases become time-barred before a final court decision, very few financial sanctions are pronounced against legal persons. For instance, in the Milan district, out of 16 proceedings commenced against legal persons for foreign bribery offences, 13 resulted in acquittals due to the expiry of the statute of limitations.

65. Only two cases have resulted in fines against legal persons. First, the COGIM case (Oil for Food case 15) involved the alleged payment of USD 721 000 in bribes to Iraqi public officials in connection with contracts to supply medical equipment to the Iraqi Ministry of Health; the company was fined EUR 90 000. Second, the Pirelli/Telecom case involved the alleged payment of approximately EUR 200 000 in bribes to a French public official in order to obtain business authorizations; the two companies involved were fined EUR 400 000 each, taking into account the seriousness of the bribes, their number and recurrence and thus the failure in practice of the organisational model (the aggravating circumstances).

66. In both cases, the fines were imposed under a *patteggiamento* procedure (see below). Articles 444 to 448 of the CCP on *patteggiamento* notably provide that when the defendant and the prosecutors ask the court to apply a substitute fine in a *patteggiamento* procedure, the fine is “reduced by up to a third.” Abstracts provided by Italy of the court decision in the Pirelli/Telecom case illustrate the use that courts make of this possibility. In this case, the amount of the fine calculated to take into account the circumstances of the case was “EUR 600 000 reduced to EUR 400 000 for the summary trial” (the *patteggiamento*). The decision in the COGIM case was provided to the evaluation team after the on-site visit, but the amount of the fine imposed on the company was even further from the maximum available in the law. While the extremely limited number of decisions does not allow a precise determination of the impact in practice of the *patteggiamento* procedure on the level of sanctions actually imposed, the fact remains that no case has been concluded for legal persons without using this procedure. This in itself implies a reduction of the level of the fine, which further reinforces the concerns expressed above about the possibilities for legal persons to escape serious financial sanctions

c) Additional sanctions for legal persons

67. Italian authorities, as well as prosecutors and defence counsels interviewed during the on-site visit, expressed their view that the interdictive sanctions set forth in LD 231/2001 are the most dissuasive part of the sanctions regime for foreign bribery. Under LD 231/2001, a legal person may be subject (for at least one year) to (i) suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence; (ii) prohibition on contracting with the public administration, except to obtain the performance of a public service; (iii) denial of facilitations, funding, contributions and subsidies (including those already granted); and (iv) prohibition on advertising (article 25.5 of LD 231/2001). If a court considers none of these sanctions to be adequate, it may flatly prohibit the offender from conducting business activities (articles 9 and 14).

⁴⁵ See C. Milan, Div. of Investigating Judge and Judge of Precourt Hearings, 28 May 2010, n. 25194/08 RGNR and n. 6330/09 RGGIP.

68. A court also can impose these interdictive sanctions as preventive or “precautionary” measures, that is, before a final court decision is handed down. In such a case, the prosecutor would solicit application of this precautionary measure from the Judge for Preliminary Investigations. The precautionary measure then could be converted into a final interdictive penalty at the trial stage.

69. Interdictive sanctions are compulsory if (i) a legal person obtained “considerable profit” from the offence and the offence was committed by an individual in a managerial position or (ii) the legal person has committed repeated violations (article 13.1). However, interdictive sanctions do not apply if, before the trial at first instance, the legal person completely compensates the damage, eliminates the organisational problem by putting in place an organisational model, or gives up the profit gained from the offence for the purpose of confiscation (article 17).

70. A question arose during Phase 2 regarding whether the interdictive sanctions would apply in a foreign bribery case, given the wording of LD 231/2001. Specifically, article 13 of LD 231/2001 states that interdictive sanctions apply “in connection with the offences for which they are explicitly provided” [*emphasis added*]. Article 25.5 of LD 231/2001 provides that interdictive sanctions apply to the domestic bribery offences, but does not refer to the foreign bribery offence contained in 322-bis of the CC. In connection with the Nigerian gas case, in 2009 the Court of Milan interpreted these statutes to conclude that the two companies involved could not be disqualified from contracting with the Nigerian National Petroleum Corporation (NPCC). However, in 2010, the Supreme Court of Cassation overturned the Court of Milan’s ruling and held that interdictive sanctions apply to offences arising under 322-bis; thus, the companies could be subject to disqualification from contracting.⁴⁶

71. Aside from the Nigerian gas case, interdictive sanctions were imposed in only one other foreign bribery case, the COGIM case. In that case, the court prohibited the company from contracting with the public administration for a six-month period (in addition to imposing financial sanctions and confiscation, as discussed above and below). In other foreign bribery cases, the passing of the statute of limitations meant that there was no possibility to impose interdictive sanctions on the companies involved.

Commentary:

With regard to natural persons, the lead examiners are concerned that monetary penalties cannot be applied for foreign bribery. This may affect the effective, proportionate and dissuasive character of sanctions in Italy for the foreign bribery offence. Given that monetary sanctions are a fundamental deterrent for economic offences such as foreign bribery, the lead examiners encourage the Italian authorities to consider making available to judges both the imposition of imprisonment and fines in cases against natural persons.

With regard to legal persons, the lead examiners welcome confirmation of the availability of interdictive sanctions for the foreign bribery offence, which can significantly deter companies from engaging in bribery, in spite of the multiple ways companies can evade such interdictive sanctions. However, they have concerns that the low level of financial sanctions for legal persons and the great number of mitigating circumstances available to reduce fines on legal persons may keep sanctions against legal persons from being effective, proportionate and dissuasive. They note that in the very rare cases where a fine was imposed on a legal person in a foreign bribery case, the level of the fine was far from the maximum available under the law (EUR 900 000 or EUR 300 000). This is of particular concern, since comparable statutory

⁴⁶ See C. Cass., 30 September 2010, n. 42701. Ultimately, however, the companies offered EUR 24.5 million to be seized as proceeds of bribery, so the public prosecutor dropped the request for the interdictive sanction of disqualification from public contracting.

maximum fines were deemed too low by the Working Group in other G8 countries. The lead examiners therefore recommend that Italy increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through patteggiamento procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies.

4. Confiscation of the bribe and the proceeds of bribery

72. Under the Italian legal system, only conviction-based confiscation is available. Italian authorities have generally expressed the view, confirmed in a 1994 decision by the Constitutional Court, that a non-conviction based confiscation system would not be in line with the presumption of innocence enshrined in the Italian Constitution.

73. As concerns natural persons, article 322-ter (2) of the CC provides for obligatory confiscation of “the price or the proceeds” where active bribery of a foreign public official occurs. Furthermore, article 240 of the CC provides for the discretion to confiscate the amount of the bribe payment. In Oil for Food case 12, the Judge for Preliminary Investigations ordered the pre-trial seizure of goods in the amount of EUR 63.1 million (corresponding to the value of the contracts illicitly obtained) and nearly EUR 900 000 (corresponding to the amount of the bribe payments). The Court of Milan reduced the amount of the pre-trial seizure to EUR 1.3 million after determining that the benefit deriving from the offence should be calculated as the difference between the real value of the contracts and the costs connected to the exercise of the illegal business.⁴⁷ Ultimately, however, the confiscation was revoked in its entirety by the Court of Appeals, as all the offences had become time-barred. In the Oil Company case, two of the defendants were subject to confiscation, one in the amount of EUR 100 000 and the other in the amount of EUR 1.2 million. Italy did not provide information regarding how these amounts were determined. The defendant subject to the greater amount of confiscation was charged with multiple offences, so it is possible that the confiscation amount reflected more than the amount of a bribe. In spite of the mandatory nature of confiscation, this measure was ordered against only eight of the nine individuals sanctioned for foreign bribery.

74. As concerns legal persons, under article 19.1 of LD 231/2001, “the confiscation of the price or the proceeds of the offence, apart from the portion which may be given back to the damaged person, shall always be ordered against the body” [*emphasis added*]. Thus, imposition of confiscation measures for foreign bribery offences is generally mandatory against legal persons. However, of the three legal persons that have been sanctioned in Italy, only one was subject to confiscation: confiscation of EUR 753 000 was imposed on the company in the COGIM case as part of a *patteggiamento* procedure.

75. Article 19.2 provides that confiscation of “sums of money” or property of equivalent value (“goods or other advantages”) is possible where the bribe or proceeds themselves may no longer be available. However, unlike in the case of financial or interdictive sanctions, profits can be confiscated even when the defence of organisational models applies (article 6.5). In a decision of 27 March 2008, the Supreme Court of Cassation clarified how to calculate the proceeds of crime in a corruption case. The court held that the criminal profit equals the contract value minus both (i) costs and (ii) the “effective utility” that the contract allowed the “damaged party” (*i.e.* the bribe recipient) to obtain. Prosecutors interviewed during the on-site visit indicated that such a calculation would be rather complex and would require complicated forensic analysis. Thus, they explained that prosecutors may simply assume that the criminal profit amounts to at least the value of the bribe and request confiscation of that amount. However, during the on-site visit and on the basis of articles 322-ter and 240 of the CC and article 19.1 of LD 231/2001, the lead examiners understood that the prosecutors and courts have the choice in each case to

⁴⁷ C. Cass., 27 September 2007, n. 37556 (affirming Court of Milan’s decision regarding confiscation).

determine whether to seize and confiscate the bribe or the proceeds of the bribery, but they may not confiscate both.

76. Following the on-site visit, Italy indicated that confiscation of both the bribe and the proceeds of the bribery is possible and provided the lead examiners with a case where a decision was made at the trial level to confiscate both the bribe and the proceeds of the bribe (Oil for Food case 12). Because this is only a trial level case, and confiscation of both the bribe and the proceeds of the bribe does not appear to have been ordered in other instances, the lead examiners believe that this issue remains ambiguous.

Commentary

As consistently noted by the Working Group in former evaluations, confiscation is an important element of an effective sanctions regime for foreign bribery. Given the small number of concluded foreign bribery cases that have resulted in confiscation, however, the lead examiners are uncertain (i) whether articles 322-ter and 240 of the CC and article 19.1 of LD 231/2001 allow for the confiscation of the bribe and the proceeds of the bribe and (ii) about the nature and scope of potential exceptions. The lead examiners therefore recommend that the Working Group follow up on whether, in compliance with Article 3.3 of the Convention, both the bribe and the proceeds of the bribery of a foreign public official are subject to seizure and confiscation in Italy.

Furthermore, the effective, proportionate and dissuasive character of sanctions based on conviction, such as confiscation measures, becomes largely theoretical when a large proportion of cases never reach the conviction stage, due to the expiry of the statute of limitations.

5. Investigation and prosecution of the foreign bribery offence

a) Principles of investigation and prosecution, resources and coordination

(i) Specialisation, training and resources of the police and prosecutors

- Police forces

77. Italy has a number of police forces, each with different and overlapping responsibilities. For the offence of foreign bribery, the most important forces are the *Guardia di Finanza*, the *Arma dei Carabinieri* and the *Polizia di Stato* (State Police).

78. The *Guardia di Finanza* is a highly trained police service specialising in financial based crime. Members of the *Guardia* are also specifically trained as tax auditors. The *Guardia* staffs and maintains an international network of *Guardia* law enforcement liaison officers who are, in the view of the lead examiners, well placed to coordinate foreign law enforcement intelligence support with respect to foreign bribery investigations. In their replies to the Phase 3 standard questionnaire, the Italian authorities stressed that the *Guardia di Finanza* has always been a privileged stakeholder with reference to economic crimes. The *Carabinieri* and the State Police are national police forces responsible for the maintenance of general public order, and they have jurisdiction to investigate all types of crimes including economic ones.

79. None of these forces have units specialising in foreign bribery (although the *Guardia* and the *Carabinieri* have each special units dealing with bribery generally). The Phase 2 report notes that the Judicial Police has long established specialised divisions where highly skilled police forces (*Polizia di Stato*, *Carabinieri*, *Guardia di Finanza*) have been drafted to exclusively deal with specific forms of crime. Such is, for instance, the case for organised (mafia type) crimes. No such specialised divisions have been

established to deal with foreign bribery. Hence, as discussed during the on-site visit, each prosecutor has the possibility of assigning foreign bribery matters to any police service as he/she see fit, thus drawing on the strengths of the available law enforcement agencies. In practice, he/she assigns the case to the police force that received the complaint. However, if it turns out that this is not the most qualified for performing a specific act (or acts) or conducting a given operation (or operations), he/she has the ability to assign such act(s) or operation(s) to other forces in the broader context of an investigation that remains as a whole led by the prosecutor.

- Prosecutors

80. The Phase 2 report noted that all PPOs are subdivided into working groups that specialise in particular crimes. In their replies to Phase 3 questionnaires, the Italian authorities indicated that 74 PPOs, out of 144 that answered a survey, have put in place (i) specialised units consisting of prosecutors specialised in investigating offences of corruption and against the public administration and (ii) a coordinating mechanism to optimize investigation tools and relevant protocols.⁴⁸ However, during the on-site visit Italian authorities and prosecutors explained that no working group or even individual prosecutor specialises in foreign bribery, not even in the Milan PPO (despite its involvement in the largest number of Oil for Food and other foreign bribery cases in Italy). Rather, a single prosecutor is involved in a range of economic and other crimes, sometimes involving high political figures (and thus particularly time consuming files) without specialisation or prioritisation.

81. A serious lack of resources within PPOs and tribunals was emphasised by all prosecutors and judges met during the on-site visit. One prosecutor depicted resources as “scant and scarce.”

- Training

82. With regard to Phase 2 recommendation 1(a) to “provide additional training to police, prosecutors and magistrates on the foreign bribery offence ...” (partially implemented at the time of the written follow up), Italy provided detailed information in the replies to the supplementary questionnaire. In particular, Italy explained that the *Consiglio Superiore della Magistratura* (Superior Council of the Judiciary) provided specific training on the foreign bribery offence to judges and prosecutors and that training on bribery in international business transactions (both passive and active) has been periodically provided to members of the *Guardia di Finanza* who, during the on-site visit, demonstrated a good level of awareness of the offence. More generally, the programs of all *Carabinieri* training institutes include analysis and discussion of “international corruption” as a criminal offence contained in the Criminal Code.

(ii) *Principles of investigations and prosecution*

83. The Italian authorities have emphasised that all corruption offences, including international bribery, are prosecuted *ex officio* by public prosecutors, under the general principle of mandatory prosecution (article 112 of the Constitution). This principle also applies to legal persons.

84. Prosecutions in Italy are conducted by the PPOs. Once assigned to a case, a public prosecutor has total autonomy from the government and acts independently of other prosecutors despite a hierarchical structure within the PPO (each regional office is headed by a general public prosecutor). Under Italian law, a public prosecutor is in charge of criminal investigations and has the power to direct the law enforcement to conduct investigations. Each prosecutor can also prioritise his/her case load, although only to a limited extent according to prosecutors met on-site. No such prioritisation exists at the PPO or country level,

⁴⁸ Italy further indicate that this data include the 19 “large size” Italian Courts (*i.e.* with a staff of prosecutors over 19) and a large majority of the “medium size” Courts (*i.e.* from 5 up to 19).

which, in the lead examiners' view, implies a risk of inconsistent approaches to foreign bribery prosecutions.

(iii) *Sources of allegations*

85. Italy's replies to the Phase 3 standard questionnaire include a summary of selected relevant cases since Phase 2 and discusses the "main source of information" for each case. The sources listed include: (i) a report of the Independent Inquiry Committee into the United Nations Oil for Food Program, (ii) documents provided by the US Department of Justice and (iii) information obtained in the course of OECD Working Group meetings. Prosecutors met during the on-site visit indicated that there is no example of a foreign bribery case that started on the basis of a report by the *Guardia di Finanza*, by staff in foreign embassies or by the media. This is all the more surprising, since it is a mandatory requirement in Italy to report all corruption matters to the prosecutor's office for investigation (as further discussed under subsection 10 below). One case provided to the evaluation team shows, however, that enforcement actions may also commence based on investigations of other offences (see the Libyan Arms Traffickers case).

(iv) *Coordination, conflicts of competence and availability of data*

86. Under Italian law, the competence of a public prosecutor to investigate and prosecute a crime is based on territoriality. In Phase 2, the Working Group decided to follow up on whether conflicts of competence in Italy lead to delay and waste of resources, thereby decreasing the effectiveness of foreign bribery investigations (issue for follow up (c)(i)).

87. The issue of coordination was repeatedly raised with the different law enforcement panellists who participated in the Phase 3 on-site visit. They unanimously confirmed that there is no central coordination, either at prosecution or police level, for foreign bribery or even bribery offences in general. Conversely, central coordination exists only for mafia type offences. As underlined by one prosecutor, coordination thus fully relies on an individual prosecutor's efforts to involve other prosecutors in a given case.

88. Prosecutors and members of the police forces recognise the need for and importance of a national database that can effectively manage intelligence and information relating to foreign bribery. A number of panel members provided the examiners with diverse views on the existence of such a database and its capabilities. It appears that while a database exists and is used by the police, it only includes those cases for which a complaint was initially lodged by a private person. As no investigations on foreign bribery offences have commenced on the basis of a complaint from an aggrieved party in Italy to date, it is unlikely that this database could be of much use in this context. The prosecutors met on-site admitted that they have no general sense or means of easily obtaining information about other possible concurrent investigations.

89. The difficulty faced by the evaluation team when seeking data on both concluded and ongoing cases also illustrated this lack of centralised database that would have allowed easily accessible and reliable information on enforcement action at national level.

90. An additional matter of concern for the evaluation team was the significant discrepancy between the information provided by Italy on its enforcement action in the context of this Phase 3 evaluation and information provided as part of the statistical data set forth in the Working Group's 2010 Annual Report. On the basis of the information provided at the time by Italy, the Working Group noted in its annual report that 21 individuals and 18 legal persons had been sanctioned for foreign bribery, whereas the current Phase 3 report finds that only 5 individuals and 3 legal persons have been actually sanctioned for foreign bribery in Italy. After further review in the context of the Phase 3 evaluation, Italy explained that data provided

before the Phase 3 evaluation was also inclusive of some cases of bribery of national officials (*i.e.* charged through art. 319 and 321 CC), though committed in connection with international business transactions.

Commentary:

The lead examiners commend Italy for the high level of awareness of the foreign bribery offence demonstrated during the on-site visit by most prosecutors and representatives of the Guardia di Finanza, as well as for the steady progress made since Phase 2 in delivering foreign bribery training modules to prosecutors and judges. However, they recommend that the Italian authorities further develop and deliver a consistent foreign bribery training module to police services that may become involved in investigating foreign bribery cases, in particular to the Guardia di Finanza, and continue to deliver a foreign bribery training module to all prosecutors and judges likely to be involved in foreign bribery cases throughout the country [re-stating Phase 2 recommendation 1(a)].

The lead examiners also recommend that Italy use proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations, in addition to having Italian embassies and consular offices report suspicions of crime and acquire information about related legal proceedings in the foreign jurisdictions. In addition, they recommend that Italy consider taking the following steps to ensure effective investigations and prosecution: (a) establishing specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; (b) establishing working groups specialised in the foreign bribery offence within the PPOs that are the most likely to be involved in foreign bribery; (c) raising awareness at national level about the need to prioritise the investigation of foreign bribery offence; and (d) reinforcing the resources available in PPOs and tribunals to deal with this particularly time consuming offence.

The lead examiners recommend that Italy consider the establishment of a national database for all on-going cases, in line with private data protection legislation, with a view to ensure coordination of foreign bribery investigations nationally and to avoid intelligence gaps.

The examiners also encourage Italy to strengthen its efforts to compile at the national level for future assessment information on investigations (including the names of the accused, the nature of the charge and the location of the offence) and sanctions for the foreign bribery offence for both natural and legal persons, in order to allow Italy to effectively review its laws implementing the Convention and its approach to enforcement, as recommended under Recommendation V of the 2009 Recommendation. It should compile this statistical information in a manner that differentiates between (i) sanctions imposed on natural and legal persons for the offence of foreign bribery and (ii) the procedures applied (court decision with a full hearing, patteggiamento or other procedural step).

b) Investigation tools and challenges in the investigation of foreign bribery

91. The Phase 2 report listed the large range of investigative techniques that are available in foreign bribery cases. The summary of selected relevant cases, in Italy's replies to the Phase 3 questionnaires, provides information as to the investigative techniques used in the cases described. This includes for instance, wire, oral and electronic telecommunication interceptions; shadowing; international rogatory commissions; local search and seizure; obtaining information from witnesses; and interrogating directly individuals involved. Even if the use of intelligence services like undercover operations was not mentioned and it was unclear during the on-site visit whether undercover operations have been used when foreign

bribery is involved, the Italian authorities later emphasised that it is an investigative tool that is commonly used for bribery, including international bribery.

92. The public prosecutor and the judicial police may use all investigative tools allowed in relation to the crime in proceedings against legal persons as well as individuals. The summary of selected relevant cases provided by Italy in their replies to the standard questionnaire presented detailed information as to the investigative techniques used in the various cases described. Such investigative techniques have been used with regard to legal persons in the ongoing Nigerian gas case as well as in several of the Oil for Food cases. In the Oil for Food cases, an examination and analysis of papers and documents related to each supply contract allowed law enforcement authorities to identify the illicit payments made and promised, to assign to the corporate structure's top managers criminal responsibility and to prosecute the legal persons under LD 231/2001.

c) Termination of prosecution: The use of *patteggiamento* since Phase 2

(i) The *patteggiamento* procedure

93. Under the *patteggiamento* procedure, which is akin to plea-bargaining, the prosecution and defence can jointly ask the judge for the imposition of a substitute penalty or a fine on which they both agree (*patteggiamento applicazione di pena su richiesta*), as long as the envisaged sentence for the offence tried does not exceed five years of imprisonment (articles 444 to 448 CCP). The procedure applies equally to individuals and legal persons. The judge exercises control over these decisions not to prosecute. He or she retains the discretion to accept or reject the *patteggiamento* and, if accepted, the judge orders its application by judgement. If the public prosecutor does not agree with the judge's resolution of the request for *patteggiamento*, the prosecutor may lodge an appeal. If the prosecutor does not appeal the judge's decision, the judgement cannot be challenged. This procedure obviously presents the advantage of shortening the length of the process, particularly given that in Italy individuals systematically appeal all court decisions up to the Supreme Court of Cassation level.

94. Benefits of the procedure for the defendant include the possible reduction of one third of the maximum penalty allowed by statute, the possibility of requesting and receiving a conditional suspension of the sentence, the extinction of the offence if the defendant commits no other offences of the same kind during the five years following sentencing, the absence of additional sanctions imposed on the defendant for that offence, and the exoneration from payment of court costs and other legal expenses associated with going to trial.⁴⁹ In practice, prosecutors and members of the legal profession who participated in the on-site visit admitted that, in the vast majority of cases, the possibility to reduce penalties does not have much weight in comparison to the total impunity a defendant can expect from the lapse of the limitation period (as further discussed below).

(ii) Reasons for entering into a *patteggiamento*

95. Since Phase 2, the *patteggiamento* procedure has proven to be instrumental to the settlement and sanction of foreign bribery cases: all 12 persons (9 individuals and 3 legal persons) sanctioned to date in relation to bribing foreign public officials reached settlement with prosecutors through *patteggiamento*.⁵⁰

96. From the standpoint of prosecutors who participated in the on-site visit, efforts to resolve prosecutions through *patteggiamento* are driven by two main factors: (1) avoiding the dismissal of cases

⁴⁹ The impact of *patteggiamento* on sanctions is also discussed in subsection 3 above.

⁵⁰ Another individual was convicted following a trial; however, because his appeal is still pending, he has not yet been sanctioned (see Individual 5 in the Pirelli/Telecom case).

because of the statute of limitations and (2) choosing the most economically viable solution against a background of complex investigations and scarce resources. The *patteggiamento* procedure appears to have played (even if to a limited extent) the role of a safety net in a system where most cases would otherwise be time barred.

97. During the on-site visit, prosecutors and defence lawyers explained that companies are more likely to ask to enter into a *patteggiamento* than individuals because, while individuals' defence strategy is to lengthen the process until their case becomes time barred and thus to avoid any sanction, companies are keener (i) to shorten the process and limit its potential impact on the image of the company and (ii) to avoid the sanction of debarment from public contracts. This difference may explain why only 5 individuals (in just 3 cases) have entered into *patteggiamento* with prosecutors.

(iii) *Availability of information on patteggiamento in the public domain*

98. During the on-site visit, contradictory information was presented regarding the level of confidentiality given to this type of settlement. *Patteggiamento* being the sole and only procedure applied to date to sanction foreign bribery, the ability of the public to understand the agreements reached and sanctions imposed in this context is essential to enhance the deterrent effect of enforcement actions concluded in this way. The prosecutors indicated that the hearing where the judge for preliminary investigations pronounces on a proposed *patteggiamento* is held in public. They also stated that the court decision is available on request. However, it appears that only those persons who can justify an "interest" in receiving communication of a decision would have access to it, and the criteria for determining when a person has such an "interest" is unclear. A journalist said that he would never be allowed to attend such a hearing and that he has never received information from prosecutors on these arrangements. Conversely, some prosecutors affirmed that they communicate with the press on the outcome of *patteggiamento*, in particular, in cases of bribery. However, the decision to communicate appears to be based exclusively on each prosecutor's individual approach and judgement.

Commentary:

The lead examiners recognise the value and flexibility provided by the availability of the patteggiamento procedure that has enabled Italy to sanction a few individuals and legal persons in foreign bribery cases in spite of the short limitation period.

In order to enhance the deterrent effect of such settlements and sanctions, they recommend that Italy make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through patteggiamento, such as the reasons why patteggiamento was deemed appropriate in a specific case and the terms of the arrangement (in particular, the amount agreed to be paid), as this would add accountability, raise awareness, and enhance public confidence in the enforcement of the anti-corruption legislation in Italy.

d) *Statute of limitations*

99. The statute of limitations in Italy was the subject of much discussion with prosecutors, defence lawyers, judges and academics during the Phase 3 examination. In Phase 2, the Working Group recommended that Italy, "With respect to the prosecution and sanctioning of foreign bribery, ... [t]ake the necessary steps to extend the length of the 'ultimate' limitation period (*i.e.* the period of completion of prosecutions including all appeals) for the offence of foreign bribery" (recommendation 7(b)). In 2005, in the context of its Phase 2 oral follow-up report, Italy reported on the adoption of a law modifying the rules

on the statute of limitations.⁵¹ Italy further reported to the Working Group on efforts made to implement the above recommendation during the Phase 2 written follow up, in additional progress reports required by the Working Group (in March and June 2010), and also in response to two letters from the Chair (in November 2009 and January 2010), which expressed the Working Group's concerns about a proposed bill 1880 ("Measures for the protection of citizens against the indeterminate duration of trials") that could have weakened Italy's implementation of its foreign bribery law by forcing the criminal justice system to terminate foreign bribery cases once they have exceeded a certain length of time before the court. On each of these several occasions, Italy discussed draft bills that had been submitted to parliament, but reported that the draft bills had not been passed into law.

(i) *Statute of limitations in force before 2005*

100. Before the 2005 reform, the ultimate statute of limitations was seven and a half years. However, prosecutors involved in the Phase 3 on-site visit explained that in certain cases involving suspensions and/or interruptions of the proceedings (*i.e.* where the defendant acted in breach of duty or where he acted according to its duties but multiple aggravating circumstances were present), it was possible to increase the period of limitations to up to 15 years.

(ii) *Statute of limitations in force since 2005*

101. In their replies to the standard Phase 3 questionnaire, the Italian authorities indicated that the period of limitations that has now been in force since 2005 has introduced new rules for extending the length of the limitation period by providing for differentiation based on the criminal record of the accused person (Law n. 251, 5 December 2005). The base limitation "is equivalent to the maximum term of imprisonment provided for the offence" and cannot be less than 6 years, which is the limitation period that applies to the foreign bribery offence. In case of first time offenders (*incensurato*) and recidivism (*recidiva semplice*),⁵² this period can be suspended and interrupted up to a "ultimate" limitation period of 7 and a half years (6 years plus one fourth).⁵³ Prosecutors who participated in the on-site visit emphasised that, contrary to the situation before 2005, as a practical matter, this term can no longer be increased in the case of aggravating circumstances. The lead examiners note with concern that this goes in the opposite direction than recommended at the time of Phase 2.

(iii) *Bill under discussion*

102. On 30–31 March 2011, Parliament was seized with a new proposal designed to shorten the statute of limitations (*prescrizione breve*) for a number of offences if the defendant has no prior convictions. Italy's reply to Phase 3 questionnaires stressed that this would only apply to "first time offenders" and would reduce the extension of the limitation period after interruption from one fourth to one sixth of the general limitation period, *i.e.*, in cases of foreign bribery, from 7 and a half to 7 years.⁵⁴ This is of particular concern as foreign bribery is, by nature, mainly a first time offender offence. If the proposed

⁵¹ Law (ex-Cirielli) n°251, of 5 December 2005.

⁵² Recidivism is when an individual commits an offence after the judgement of conviction in respect of another prior offence becomes final

⁵³ In case of aggravated recidivism (*recidiva aggravata*) the period is increased by one half (9 years); in case of reiterated recidivism (*recidiva reiterata*) by two thirds; in case of habitual offender (*delinquenti abituali*) the period is doubled.

⁵⁴ While in case of recidivism (*recidiva semplice*) it stays at one fourth. In cases of aggravated recidivism (*recidiva aggravate*), the time limit stays "at one half"; in case of reiterated recidivism (*recidiva reiterata*) it stays "at two thirds" and in case of habitual offender (*delinquenti abituali*) it is doubled.

law were to be adopted, it could have an important impact, including on ongoing corruption trials (both domestic and transnational). In its reply to the Phase 3 supplementary questionnaire, Italy indicated that the bill was first approved by the Senate, in first reading, on 20 January 2011, following which it was approved by the Chamber, with modifications, on 13 April. The bill is now in the Senate for further discussion. Developments will need to be closely followed up by the Working Group.

(iv) *Impact of current statute of limitations on Italy's enforcement activity*

103. The prosecutors and judges who participated in the on-site visit were not so much concerned with this bill as they were with the impact of the current statute of limitations. They unanimously and repeatedly alerted the lead examiners on the seriousness of the impact of the limitation period on both the judiciary and police morale.

104. The information on enforcement activity provided by Italy once consolidated by the evaluation team shows that out of 47 defendants in cases of foreign bribery concluded at the time of this report (60 total defendants minus 12 defendants whose cases were dismissed for lack of evidence or on other grounds), cases against 30 defendants were dismissed as time barred (over 62%). Among these 30 defendants, 3 were natural persons who initially received sanctions and/or had property confiscated, but who later obtained dismissals because their cases later became time barred during the appeals process.⁵⁵ The small number of these cases that gave rise to a court decision before becoming time barred further emphasises that the current statute of limitations is much too short to allow for the prosecution and sanction of foreign bribery (also see above regarding other features of the Italian system of investigation and prosecution that impacts the length of proceedings). With respect to the ongoing prosecutions (9 cases involving approximately 28 persons⁵⁶), 5 cases are expected to be time barred by the end of February 2012 and an additional case is expected to be time barred by the end of December 2012.⁵⁷

105. During the on-site visit, the lead examiners noted the high level of enforcement activity and involvement demonstrated by the judges, prosecutors and members of the police forces. This is all the more remarkable in a context where in the majority of cases, in spite of their efforts, confiscation and precautionary measures are cancelled and defendants are not sanctioned because of the expiration of the limitation period.

(v) *Statute of limitations for legal persons*

106. Regarding legal persons, a prosecutor must conduct an investigation within a limitation period that is different from the one that applies to proceedings against a natural person. Pursuant to article 22 of LD 231/2001, cases are time barred after 5 years, starting the day the offence was committed. However, the period of limitation is interrupted by a request for the application of precautionary measures or the notification of the administrative violation related to the offence (article 59). While the limitation period applying to individuals is capped within a ultimate period of 7 and a half years, no such ultimate period applies to legal persons, as was confirmed by a number of representatives of the legal professions during the on-site visit. However, during the on-site visit, prosecutors stressed that, too often, the notification of the administrative violation necessary to interrupt the period of limitations is not sent in time and the

⁵⁵ One individual had been sentenced to 4 years imprisonment in Oil for Food case 3 (agricultural company) case; the three others had been sentenced to 2 years and had approximately EUR 1 million in assets confiscated in Oil for Food case 12 (oil company).

⁵⁶ 23 natural persons and 4 legal persons.

⁵⁷ No information was given on the remaining 2 cases. In addition, one individual in the Oil Company case was convicted after trial in September 2011, but the limitation period on his case will expire in January 2012, well before the appeal process is likely to conclude.

prosecution of legal persons thus becomes time barred after five years. Court decisions provided by Italy in the Oil for food cases 1 and 12⁵⁸ provide examples of such a situation (although in each case, the court however stressed the considerable profit made by the legal person as a result of its failure to prevent the offence). One prosecutor explained that establishing evidences against a legal person is usually logically linked to progress made in the investigation of offences committed by individuals. Thus, in a number of instances, the five year period may be too short. As further discussed under subsection 2 on the liability of legal persons, this is a serious problem that has led to the termination of proceedings against the vast majority (15 out of 20) of defendants who were legal persons.

(vi) *Draft bill on trial reform*

107. After the on-site visit, a bill⁵⁹ introducing a reform of the admissibility of proof in trial (and thus modifying a number of articles in the CCP) was approved by the Italian Senate (on 29 July 2011). This reform would introduce two main changes. First, the *ex-ante* examination of the admissibility of proofs would be replaced by a general principle of admissibility pursuant to which the parties would have the right to present all evidence they wish and the judge would have to accept these without delay through an order, with the exception of those prohibited by law or “manifestly non pertinent” This, in practice, may lengthen the process to the point where it becomes time barred. Second, while final decisions reached in a trial could still be used as evidence in another trial, parties would have the right to re-hear witnesses. At the time of drafting this report, the bill had been transmitted to the Chamber of Deputies and was under discussion

Commentary:

The lead examiners are seriously concerned by the striking amount of foreign bribery cases that have been dismissed as time barred or are likely to be time barred within the next year. They emphasise that Article 6 of the Convention requires “an adequate period of time for the investigation and prosecution” of the foreign bribery offence. They note that practice since Phase 2 has confirmed that the limitation period in force in Italy does not comply with this standard. This seriously jeopardises Italy’s implementation of the Convention as a whole. This very serious concern would be even reinforced would the bill currently pending be approved. The lead examiners hence recommend that the Working Group follow up on the status of this bill.

They recommend that Italy urgently implement Phase 2 recommendation 7(b) to take the necessary steps to extend the length of the “ultimate” limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means. They emphasise that any extension to the limitations period should be significant, including for “first time offenders.” They also encourage Italy to re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals (as extended according to the above recommendation). The lead examiners recommend that Italy report to the Working Group every six months on progress made with regard to the implementation of the above recommendation.

The lead examiners are concerned with the impact that the proposed trial reform would have on the adequacy of the period of time for the investigation and prosecution of the foreign

⁵⁸ See Annex 3 for more details on these cases.

⁵⁹ The title of the bill AC 668-B (AS2567) is “*Modifiche agli articoli 190, 238-bis, 438, 442 e 495 del codice di procedura penale e all’articolo 58-quater della legge 26 luglio 1975, n. 354.*”

bribery offence, should the current bill pass into law. They recommend that Italy seriously re-consider the value of applying such a reform to the offence of foreign bribery.

6. Money laundering

a) The money laundering offence

108. During Phase 2, the Working Group recommended that Italy (i) “expeditious[ly]” pass a legislative amendment that would have criminalised money laundering by the person committing the predicate offence (that is, “self-laundering”) and (ii) establish liability of legal persons for money laundering (recommendation 5). (In addition, the Financial Action Task Force has also recommended that Italy criminalise self laundering.⁶⁰) However, during the Phase 2 Follow-up, the Working Group concluded that this recommendation went “beyond the scope of the Convention,” which only requires that a Party that “has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.”

(i) Money laundering sanctions for a person who commits the predicate offence

109. A person cannot be sanctioned for self-laundering because the legislative amendment pending during Phase 2 was not passed (articles 648, 648-bis and 648-ter CC). During the on-site visit, representatives of the Italian Financial Intelligence Unit (FIU) explained that new legislation has been proposed that would criminalise self-laundering.⁶¹

(ii) Liability of legal persons for money laundering

110. Italy has addressed liability of legal persons for money laundering. In 2005, Italy revamped its money laundering legislative scheme to implement the 3rd EU AML/CFT Directive, 26 October 2005. The new legislation provides that a legal person can be liable for money laundering under LD 231/2001 (see subsection 2.a.ii above for a discussion of this provision).⁶² Liability can apply even if an offence is committed abroad or the perpetrator of the underlying violation has not been identified or is no longer subject to prosecution (for example, because of expiration of the limitation period).

b) Due diligence and reporting

111. LD 231/2007 strengthened Italy’s AML regime by re-defining customer due diligence obligations using a risk-based approach, requiring covered entities to take certain steps to guard against money laundering related to politically exposed persons (PEPs), strengthening limitations and prohibitions on certain types of transactions (such as cash payments) and extending AML/CFT reporting requirements to certain service providers (such as trust companies) that were not covered under the prior law. LD 231/2007 also created the *Unità d’Informazione Finanziaria*, an independent and autonomous unit at the Bank of Italy, as a new FIU to replace the prior FIU, which was the *Ufficio Italiano dei Cambi*. Finally, for the purpose of filing suspicious transaction reports (STRs), LD 231/2007 broadened the definition of money laundering to include a person who commits self-laundering (article 2(1)).

⁶⁰ See page 30 of the [Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism](#), 28 February 2006.

⁶¹ See bills A.S. 733-bis, A.C. 3986 and A.S. 1454.

⁶² See article 63(3) of Legislative Decree no. 231, 14 December 2007. LD 231/2007 has been updated by Legislative Decree no. 151, 25 September 2009, and Decree no. 78, 31 May 2010 (converted to Law no. 122, 30 July 2010).

112. Nonetheless, it does not appear that any of these legislative changes have led to increased detection of foreign bribery. Although Italy explained that the FIU regularly exchanges information with investigative bodies, such as the Special Foreign Exchange Unit of the *Guardia di Finanza* (NSPV), no suspicions of foreign bribery cases have been initiated as a result of this exchange of information. Although the total number of STRs referred by the FIU to law enforcement authorities has steadily increased since 2004, Italian authorities have not been able to provide numbers regarding how many of these STRs have resulted in convictions for money laundering or how many may have related to a predicate offence of foreign bribery.

Commentary:

The lead examiners note that Italy’s Criminal Code precludes the simultaneous conviction of an individual for money laundering (i.e. “self-laundering”) and foreign bribery. This limitation, which risks weakening the effective application of foreign bribery legislation, does not seem justified by fundamental principles of law. The lead examiners recognise, however, that legislation on self-laundering is being considered by the legislature. They consider that prosecuting self-laundering may provide an alternative option for taking action in cases of foreign bribery, particularly considering the issues related to the statute of limitations. The lead examiners suggest that the Working Group should follow up on the status of this bill.

The lead examiners commend Italy for extending liability for money laundering to legal persons and strengthening its money laundering reporting scheme, including by extending reporting requirements to cover persons who engage in self-laundering. Nonetheless, they note that Italy was not able to provide information regarding the number of convictions resulting from its AML measures or how many STRs may have related to foreign bribery offences. They recommend that Italy maintain statistics on (i) sanctions in money laundering cases; (ii) the predicate offence for money laundering, with a view to identifying cases where foreign bribery is a predicate offence; and (iii) STRs that result in or support bribery investigations, prosecutions and convictions.

7. Accounting requirements, external audit, and company compliance and ethics programmes

a) Accounting requirements

(i) Accounting standards generally

113. In Italy, listed companies and companies whose financial instruments are widely distributed are required to follow International Financial Reporting Standards (IFRS), as adopted by the EU, in both consolidated and individual (separate) financial statements. Non-listed subsidiaries of both listed and non-listed companies are permitted, but not required, to follow IFRS. In addition, as discussed in the Phase 2 Report, Italy’s false accounting offence requires Italian companies to publish accurate and complete accounting records.

(ii) Enforcement of the false accounting offence

114. During Phase 2, the Working Group noted a number of hurdles to effectively sanctioning companies under the false accounting offence: (i) a person could only be liable if the person intended to deceive shareholders and the public (a requirement that rarely would be fulfilled for non-listed, closely-held companies); (ii) monetary sanctions and imprisonment were not available if the false accounting did not “appreciably distort” the company’s balance sheet or financial situation or reach certain monetary thresholds; and (iii) even where available, monetary sanctions provided by the statute were relatively low. The Working Group recommended that Italy “ensure that its legislation provides effective, proportionate

and dissuasive sanctions for all cases of false accounting regardless of (a) monetary thresholds, (b) whether the offence is committed in relation to listed or non-listed companies, and (c) whether the offence causes damage to shareholders or creditors” (recommendation 3).

115. During the Phase 2 Follow-up, Italy reported two legislative changes. First, relating to issue (ii) above, the law was amended in 2005 to provide administrative remedies against natural persons even where monetary thresholds were not met (articles 2621 and 2622 of the Civil Code). The administrative remedies only apply to natural persons and include a bar on such employees holding a leadership position for between 6 months and 3 years and (if associated with a listed company) sanctions of 10 to 100 shares of the company’s stock.⁶³ Second, relating to issue (iii), the 2005 amendments increased the sanctions for false accounting (where the monetary thresholds are met).⁶⁴ Thus, the Working Group concluded that the Phase 2 recommendation was partially implemented.

116. In spite of these changes, prosecutors participating in the Phase 3 on-site visit expressed the view that the 2005 amendments actually left them “worse off” when it comes to bringing cases. For example, under the law in force prior to 2005, a non-listed company could not be prosecuted for false accounting causing damage to shareholders or creditors unless a private person were to bring charges. The 2005 amendments made this requirement more stringent by requiring a “shareholder” (not just a private person) to bring a complaint. Prosecutors referred to this new requirement as “absurd,” since most non-listed companies are private, family-run businesses and the requirement would generally require an offender to bring a complaint against itself. In addition, the current law continues to require intent to deceive shareholders and the public. Furthermore, with regard to claims against natural persons, the newly created administrative sanctions are rather low and the scope of natural persons who can face imprisonment continues to be limited.

Commentary:

The lead examiners commend Italy for increasing sanctions under the false accounting provisions and providing administrative sanctions for certain natural persons who commit the false accounting offence when the false accounting does not reach monetary thresholds.

However, the lead examiners are concerned that the false accounting offence is still not structured as an adequate tool to prohibit illicit practices, particularly given the hurdles to prosecution discussed above. For these reasons, the lead examiners reiterate the Working Group’s recommendation in Phase 2 that Italy should “ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (a) monetary thresholds, (b) whether the offence is committed in relation to listed or non-listed companies, and (c) whether the offence causes damage to shareholders or creditors.”

⁶³ The natural persons who can face sanctions under the new rules are administrators (directors), liquidators, general managers, managers in charge of drawing up accounting documents and other officers having power to represent the company.

⁶⁴ During the Phase 2 follow-up in 2007, Italy indicated that penalties against natural persons were changed to the following: (i) for false accounting not causing damage to shareholders or creditors, up to 2 years imprisonment; (ii) for false accounting involving non-listed companies causing damage to shareholders or creditors, 6 months to 3 years imprisonment; and (iii) for false accounting involving listed companies causing damage to shareholders or creditors, 1 to 4 years imprisonment. Penalties against legal persons were changed as follows: (i) for false accounting not causing damage to shareholders or creditors, a fine of EUR 51 600 to 464 700; (ii) for false accounting involving non-listed companies causing damage to shareholders or creditors, a fine of EUR 77 400 to 1 022 340; and (iii) for false accounting involving listed companies causing damage to shareholders or creditors, a fine of EUR 103 200 to 1 239 2001. See article 25-ter of LD 231/2001, amended by article 39(5) of Law n. 262, 28 December 2005.

b) External audit requirements

(i) In general

117. Under the 2009 Recommendations, Parties are requested to maintain adequate standards to ensure the independence of external auditors and to require reporting of suspected acts of bribery discovered in the course of an external audit.

118. During Phase 2, the Working Group reported that non-listed companies in Italy were not required to submit to an independent external audit. Therefore, the Working Group recommended that Italy “consider broadening the categories of companies subject to independent external audits to include certain non-listed companies with a high turnover” (recommendation 4).

119. Italian authorities have explained that on 27 January 2010, Legislative Decree no. 39/2010 came into force, implementing Directive 2006/43/EC on statutory auditing of annual accounts and consolidated accounts (the EU Auditing Directive). This legislation introduced important changes with regard to statutory auditing of companies’ annual accounts. In particular, the law replaced article 2409-bis of the Italian Civil Code relating to joint stock companies (*società per azioni*) with a new provision, under which, the accounts of joint stock companies must be audited externally. However, if a company is not required to draw up consolidated accounts, auditing may be carried out by the board of internal auditors (which must consist of registered auditors).⁶⁵ In the case of companies that use a monistic or dualistic corporate governance system, audits must always be carried out externally.

120. In a summary paper provided during the on-site visit, the *Commissione Nazionale per le Società e la Borsa* (CONSOB)⁶⁶ explained that LD 39/2010 also expanded the category of companies subject to mandatory external audits to include (i) non-listed companies required to draw up consolidated accounts; (ii) “public interest entities,” a term that includes listed companies as well as non-listed companies whose securities are widely distributed to the public, credit institutions, insurance undertakings, investment and asset management companies and other financial intermediaries; and (iii) all entities controlling, controlled by or affiliated with a public interest entity. Therefore, a number of non-listed companies are subject to external audit (including many large, family-owned companies that are required to draw up consolidated accounts). Other non-listed companies, including some family-owned companies, are still not subject to external audit.

121. According to Italian authorities, LD 39/2010 also sets forth sanctions for certain types of corruption by those involved in external audits. For example, an external auditor who, in order to gain personal enrichment and with intent to deceive, provides false information when communicating about or reporting on an audit can be punished with imprisonment of up to five years. The same punishment applies to an external auditor or who violates audit obligations because of the receipt of a bribe (the length of the prison term depends on the nature of damages, the type of entity and the position held by the offender) (articles 27–28 of LD 39/2010). Sanctions are also available if an external auditor receives illegal rewards or has an illicit financial relationship with an audited company (articles 30–31). According to Italian authorities, these offences are prosecuted *ex officio* and there is no minimum threshold for prosecution (*e.g.* appreciable distortion of financial accounts).

⁶⁵ According to Italian authorities, the duty to draw up consolidated accounts follows EU Directive no. 83/349/EEC (as amended) and applies to companies controlling an undertaking, whether listed or non-listed.

⁶⁶ CONSOB is Italy’s securities regulator; it also supervises all external auditors.

(ii) *Reports by auditors*

122. In its summary paper, CONSOB explained that if external auditors suspect any violation of the law, including foreign bribery, during the course of an audit, they are required to inform the internal audit board of the company, pursuant to article 2409-septies of the Civil Code. The internal audit board is required to call a shareholders' meeting, after reporting to the chair of the board of directors if it becomes "aware of censurable facts of considerable gravity" and there is a need to act promptly (article 2406 of the Civil Code). These requirements apply to both listed and non-listed companies. Italian authorities have explained that the requirement applies to any potential violation of criminal law and facts suggesting a potential foreign bribery offence would qualify as "censurable fact[s] of considerable gravity."

123. Article 155(2) of Legislative Decree 58, 24 February 1998, requires external auditors of listed companies and companies whose securities are widely distributed to report to CONSOB any facts "deemed to be censurable," which are discovered in the course of an audit. During Phase 2, the Working Group recommended that Italy "ensure that 'facts deemed to be censurable' ... include foreign bribery" (recommendation 4). Nonetheless, Italy has not taken specific actions in this respect after the recommendation was made. In their response to the Phase 3 questionnaire and during the on-site visit, Italian authorities explained that the reason why no action has been taken is that a 1993 CONSOB circular specified that that "facts deemed censurable" must be intended as "any irregular or illicit facts committed by persons or boards of the company arising from violations of any laws and regulations or rules established in the company's by-laws which may have a material effect on the accounting."⁶⁷ According to Italian authorities, the 1993 circular is "well known by auditors."

124. However, the circular, which notably pre-dates Italy's legislation implementing the Anti-Bribery Convention, appears to have had little effect on helping the accounting and auditing profession understand their obligation to report suspected foreign bribery. The three members of the accounting and auditing profession who participated in the on-site visit were not aware of the foreign bribery offence, the false accounting offence or the Convention. They also could not express any views about how the 2005 amendments to the false accounting offence may have changed accounting practices. This raises a concern that the accounting and auditing profession may not be sufficiently educated about its obligations with respect to the foreign bribery offence, much less its obligation to report suspicions of foreign bribery.

125. The members of the accounting and auditing profession who participated in the on-site visit expressed disagreement and uncertainty regarding the appropriate channel for reporting instances of false accounting or suspected illegal conduct to criminal law enforcement authorities. It appears that under article 333 of the CCP private persons may (but are not required to) report potential wrongdoing discovered in the course of an audit to law enforcement authorities, but those who participated in the on-site visit expressed some uncertainty regarding who (auditors or board of directors) would have the responsibility to make such a report. During the on-site visit, the panellists were unable to indicate whether they enjoy legal protection if they report suspicions of wrongful conduct discovered in the course of an audit.

Commentary:

The lead examiners commend Italy for extending its external audit requirements to cover a number of non-listed companies. They recognize that this will greatly increase transparency in non-listed companies and contribute to a compliance-focused business environment. The lead examiners suggest that the Working Group should follow up on the implementation of these new requirements.

⁶⁷ See SOC/RM/93002422, 31 March 1993.

The lead examiners also commend Italy for its efforts to hold auditors to international accounting standards and to create criminal penalties for external auditors who provide false information or engage in corrupt activities in the course of an audit. The lead examiners recommend that Italy engage in awareness-raising activities with auditors, including the provision of training regarding (i) the detection of indications of suspected acts of foreign bribery; (ii) the obligation applicable to auditors under LD 58/1998 to report such acts to company management and criminal law enforcement authorities; and (iii) the legal protections that may be available to auditors who report suspicions of wrongful conduct.

c) *Company internal controls, ethics and compliance programmes or measures*

126. Based on discussions with judges, prosecutors, representatives of large companies, and representatives of business associations during the Phase 3 on-site visit, it appears that LD 231/2001 has become an entrenched part of corporate social responsibility in Italy. In addition, the representatives of large companies and business associations who participated in the on-site visit were knowledgeable about the foreign bribery offence. However, although it appears that many large companies in Italy have LD 231/2001 organisational models in place, it does not appear that all large companies include policies specifically dealing with foreign bribery. Based on discussions during the on-site visit and review of a sample of publicly available company compliance programs,⁶⁸ it appears that large companies in Italy generally include policy provisions that prohibit bribery and require accurate accounting, but that only companies with significant international operations include provisions specifically dealing with foreign bribery. This leads one to question the impact LD 231/2001 has actually had on the development of compliance measures targeting foreign bribery, since such companies would likely have such compliance measures in place even absent LD 231/2001.

127. No SMEs were present at the on-site visit, so the lead examiners did not have an opportunity to assess the types of internal controls and compliance programs implemented in SMEs. Representatives of the business associations indicated that design and implementation of a full-fledged compliance programme is a significant challenge for SMEs because of limited resources. This is a horizontal issue that also affects SMEs in countries other than Italy.

Commentary:

With regard to company internal controls, ethics and compliance programmes, the lead examiners commend Italy for its work and note the high awareness of Italian companies in this regard. They suggest that Italy continue to pursue these efforts, notably by encouraging companies, particularly SMEs, (i) to adopt or further develop adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery, taking into account the Good Practice Guidance, in Annex II of the 2009 Recommendation; and (ii) to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures for preventing and detecting bribery.

⁶⁸ Organisational models, along with related codes of ethics or codes of conduct, were reviewed for seven large companies based in Italy that do business in sectors considered to be particularly high risk for corruption, such as the energy sector and the construction sector.

8. Tax measures for combating bribery

a) *Non-deductibility of bribes*

128. The legislation in force during Phase 2 provided, “In determining the income, ... costs or expenses connected to facts, acts or activities which may be qualified as crimes shall not be deductible.”⁶⁹ A payment is not deductible as a business expense as soon as a suspicion of a bribe is detected. If tax authorities detect a suspicion, they must immediately report it to the PPO. Revenues from unlawful activities are taxed even when it is not certain that the persons involved actually received the revenues.⁷⁰

b) *Detection and reporting of suspicions of foreign bribery*

(i) *Tax audits*

129. During the on-site visit, representatives of the Italian Revenue Agency (*Agenzia delle Entrate*) explained that the agency audits a few thousand taxpayers (both individuals and legal entities) each year as a matter of course. The audit plan is based on a risk analysis derived from factors such as the countries in which a person operates or the size of a person’s business. If there is a time lag between tax audits, this creates a risk that tax examiners will not be in a position to detect foreign bribery within an adequate timeframe for prosecuting an offence. The risk is particularly keen given the difficulties presented by Italy’s statute of limitations (see subsection 5 above).

130. Following the on-site visit, Italian authorities explained that in January 2009 a new strategy towards the auditing of large business taxpayers (LBTs) was introduced, called Risk Management Monitoring. This strategy sets forth a system for permanently monitoring the activity and behaviours of all LBTs and includes the following steps: collection and analysis of information submitted by LBTs, reviewing and updating the risk profile of each LBT to assessing the potential tax risks presented by the LBT’s activities and, when necessary, selecting enforcement measures tailored to the taxpayer. However, Italian authorities were not able to provide information regarding how often a multinational company might expect to be subject to an audit.

(ii) *Exchange of information with law enforcement*

131. If during the course of an audit, facts are discovered that would suggest a crime, the Italian Revenue Agency reports these facts to the appropriate PPO. In addition, the *Guardia di Finanza* may work with the Italian Revenue Agency to conduct a tax audit when a suspicion of foreign bribery exists. The tax administration and *Guardia di Finanza* have formed several technical permanent working groups for the exchange of information on tax crime schemes, the persons involved and methods of investigation. In addition, following the on-site visit, Italian authorities explained that on 31 March 2011, the Central Assessment Directorate of the Revenue Agency issued new guidelines aimed at further promoting coordination between the PPOs and the Revenue Agency.

132. In its response to the Phase 3 questionnaire, Italy explained that the Italian Revenue Agency, the Judicial Administration, the FIU and the police forces all have access to an IT tool that enables the exchange of available information about tax issues in joint criminal investigations, including the

⁶⁹ Article 14(4-bis) of Law 537/1993, as amended by article 2(8) of Law 289/2002. Legislation passed in 2006 clarified that proceeds of illicit activities are taxable income, unless they have already been confiscated. See article 36(34-bis) of Law Decree no. 223, 4 July 2006; see also C. Cass., 18 January 2008, n. 1058, and 14 May 2008, n. 12041.

⁷⁰ See C. Cass., 14 May 2008, n. 12041.

relationships maintained by financial institutions and trust companies in Italy and transactions completed without the use of a bank account.

(iii) *Training and awareness raising*

133. Relevant personnel of the Italian Revenue Agency and the *Guardia di Finanza* have received an Italian version of The OECD Bribery Awareness Handbook for Tax Examiners. Tax officials in Italy are subject to the same general obligation as other public officials to report offences they discover in the course of their duties (see discussion in subsection 10.b below). In addition, Italian authorities have explained that the tax administration regularly organizes training courses for tax auditors on detecting corruption, including foreign bribery. These trainings cover topics such as the collection of evidence and the format for reporting suspicions of foreign bribery to law enforcement authorities, communication with the FIU and techniques to detect and transmit information regarding cash transactions exceeding a EUR 2 500 threshold.

134. In spite of the significant efforts outlined above, thus far, no instances of foreign bribery have been detected in the first instance through tax audits conducted by the Italian Revenue Agency or the *Guardia di Finanza*.

c) *Tax amnesty programmes*

135. During Phase 2 in 2004, the Working Group recommended that “Italy pay particular attention to information arising as a result of tax amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of bribes” (recommendation 6). During the Phase 2 Follow-up in 2007, Italian authorities indicated that the tax amnesty programme that was in place during Phase 2 had been discontinued and that “the government in office [had] adopted policies which mark clear signs of discontinuity with it.” Based on this information, the Working Group concluded that this recommendation was “no longer relevant.”

136. Nonetheless, in October 2009, Italy’s legislature implemented a new tax amnesty programme that applied to assets held abroad on 31 December 2008 by natural persons, non-commercial entities and similar associations (not commercial entities), and which had been undisclosed in violation of the fiscal monitoring provisions, if those assets were repatriated or regularised from 15 September to 30 April 2010.⁷¹ During the on-site visit, Italian authorities explained that it functioned identically to the “Tax Shield” in place during Phase 2.

137. Under the “Tax Shield” programmes, persons repatriating or regularising assets could not be prosecuted for certain tax-related offences.⁷² Italian authorities have explained that the law has not precluded AML investigations and prosecutions and, importantly, does not affect the sanctions available for violations of AML laws, which must still be prosecuted autonomously. The statute also set forth an administrative sanction for misuses of the tax shield program.⁷³

⁷¹ See articles 12 and 13-bis of Law Decree n. 78, July 2009, converted by Law n. 102, 3 August 2009, as amended by article 1 of Law Decree n. 103, 3 August 2009, converted by Law n. 141, 3 October 2009.

⁷² See article 14(1) of Law Decree n. 350, 25 September 2001, amended and converted into Law n. 409, 23 November 2001 (incorporated into LD 78/2009). For example, the programme provides relief from false and/or inaccurate declarations and concealing or destroying documents. It also provides relief from some forgery offences when related to tax offences (*i.e.* false documents, concealing or destroying accounting documents, and false corporate communications).

⁷³ See article 17(2-bis) *ibid.*

138. Italian authorities have explained that, due to the entry into force of the legislation setting forth the Tax Shield programme, Italy's AML authorities enhanced their monitoring activities. In addition, they provided guidance to all AML/CFT reporting entities (on 12 October 2009) as well as specific guidance to intermediaries (on 16 February 2010), in order to reiterate that the requirements of Italy's AML reporting regime applied during the duration of the program.

d) *Bilateral and multilateral tax treaties and the sharing of information by tax authorities*

139. Italian authorities stated that they are in the process of negotiating the inclusion of the optional language in Paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in their bilateral tax treaties. This language allows the sharing of tax information by the tax authorities in the contracting state with its law enforcement and judicial authorities on certain high priority matters, including corruption, money laundering and terrorism, when certain conditions are met. Currently, Italy's bilateral tax treaties only allow information to be used for the purpose for which it is requested. Nonetheless, Italy has signed the updated version of the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, which provides that "information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use."⁷⁴ According to participants in the on-site visit, tax secrecy is not an impediment to an exchange of information with law enforcement authorities.

Commentary:

The lead examiners are pleased that Italy has clarified that bribes are not tax deductible. Italy also has set up a framework for auditing taxpayers and exchanging information that could foster the exchange of information about potential cases of foreign bribery. The lead examiners commend Italy for the efforts made to improve the exchange of information with law enforcement authorities and for the various mechanisms put in place to that effect. They believe that the impact of these measures on the detection of foreign bribery cases should be followed up once there have been sufficient practice. Moreover, in the current absence of detection of any potential foreign bribery cases through the tax audit process, in Italy, the lead examiners suggest following up on whether the methodology for conducting tax audits is adequate in terms of (i) the basis of risks considered when deciding which companies to audit and (ii) the time-lag between audits.

The lead examiners have significant concerns about Italy's tax amnesty, or "Tax Shield," programmes. During the Phase 2 Follow-up, the Working Group concluded that these programmes were not an issue based on Italy's assertion that it had adopted policies to discontinue such programmes. Despite the Working Group's expressed concerns, Italy adopted a new tax amnesty programme. The full range of criminal penalties for money laundering and foreign bribery offences do not appear to be available in the context of these programmes. The lead examiners recommend that the WGB follow up on whether special tax programs, such as tax amnesty programmes, prevent tax officials from detecting suspicions of foreign bribery.

Finally, the lead examiners commend Italy for signing the updated version of the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, which allows information received for tax purposes to be used for other purposes under certain conditions. They encourage Italy to promptly ratify it.

⁷⁴

See article 22.4 at <http://www.oecd.org/dataoecd/11/29/2499078.pdf>.

9. International cooperation

140. During Phase 2, the Working Group recommended following up on Italy's ability to provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons. The report further noted some concern regarding the applicability of *concussione* to foreign bribery and whether a person sought for extradition could raise *concussione* to prevent such extradition. Since Phase 2, Italy has not modified its legislative framework for providing mutual legal assistance (MLA) or extradition requests, save for certain provisions concerning asset recovery (see below for further details). The Ministry of Justice acts as the central authority for incoming and outgoing MLA requests.

a) Mutual legal assistance

(i) Incoming requests

141. Italy places few conditions on granting MLA, as provided under article 724 of the CCP and confirmed by prosecutors during the on-site visit. The sole precondition to MLA is whether the activity under investigation is criminal. Thus, Italian authorities asserted that MLA could be provided concerning legal persons, regardless of whether the requesting country would impose criminal or administrative liability. They indicated that in the past they have transmitted investigative and procedural documentation concerning proceedings against a legal person to a requesting country.

142. Furthermore, when the United Nations Convention against Corruption was ratified in 2009, Italy inserted a new provision into the CCP (article 740bis). This provision allows Italian authorities to seize and return assets to a foreign country where a foreign verdict provides for the seizure of such assets, so long as (i) a request is made to the Italian authorities and (ii) the foreign court decision is recognised by the Italian authorities.

143. As concerns foreign bribery cases specifically, Italy indicated in its response to the Phase 3 questionnaire that it has only received one request for MLA concerning foreign bribery; the request was received from Brazil in September 2009. This figure seems very low, especially since Italy has provided assistance to foreign jurisdictions in prominent cases, including in the Siemens case and in the ongoing Nigerian gas investigation. Italy indicated to the lead examiners that it usually takes six months to a year to respond to incoming requests.

(ii) Outgoing requests

144. As concerns outgoing requests for MLA, Italy has reported making 22 outgoing MLA requests, of which 15 were made to other Parties to the Anti-Bribery Convention. Prosecutors interviewed during the on-site visit indicated that international cooperation has generally improved over the past few years. However, they underscored that, depending on the jurisdiction whose assistance is required, requesting MLA may be a large hurdle in an investigation. Prompt responses to outgoing requests are especially crucial for Italian law enforcement authorities, given problems arising from the statute of limitations.

b) International cooperation and statute of limitations

145. Because of the concerns raised by the statute of limitations with regard to investigations, prosecutions, and sanctions, the topic was also explored during the on-site visit in relation to possible impacts on international cooperation issues. According to Italian prosecutors, the expiration of the statute of limitations in Italy would not prevent Italian authorities from responding positively to requests from other countries with longer statutes of limitations. This is because article 724 of the CCP only provides for a limited number of reasons for refusing MLA (typically, where there are reasons to believe a person is being prosecuted based on considerations of race, religion, sex, nationality, or similar issues), and the

expiration of the statute of limitations is not included in this short list. Similarly, the expiration of the statute of limitations would not prevent Italy from returning stolen assets.

146. Prosecutors were less certain, on the other hand, that extradition would be possible if the statute of limitations for an offence had already expired in Italy. Article 10.3 of the Anti-Bribery Convention requires that a Party must either be able to extradite its nationals for foreign bribery or, if it declines to extradite because of the individual's nationality, the Party must prosecute the case itself. It is not certain at this stage whether Italy would be able to satisfy this requirement.

147. Finally, MLA requests do not suspend the running of the statute of limitations. Thus prosecutors at the on-site indicated that they have, on occasion, been obliged to cut short an investigation and bring defendants to trial without receiving answers to MLA requests. This creates the potential for not having sufficient evidence to provide to the court.

Commentary:

The lead examiners are unable to assess in detail Italy's practice of providing MLA in foreign bribery cases, due to (i) the limited number of requests made to Italy and (ii), more generally, the lack of a mechanism by which lead examiners could obtain information from other Parties to the Convention on their experiences in cooperation by Italy in response to MLA requests. The lead examiners consider that the question of how to assess the practice of Parties in responding to MLA requests is a cross-cutting issue that should be examined by the Working Group.

*Furthermore, as concerns extradition, the lead examiners recommend that the Working Group follow up on Italy's ability to extradite an individual (i) where that person raises *concessione* as a possible defence to prevent extradition and (ii) where the statute of limitations for the foreign bribery offence has expired in Italy.*

10. Public awareness and the reporting of foreign bribery

a) Awareness of the Convention and of the foreign bribery offence

(i) Public sector awareness

148. During Phase 2, the Working Group recommended that Italy provide additional training on the foreign bribery offence to government agencies, particularly those dealing with Italian companies operating abroad (recommendation 1(a)). Following the on-site visit, Italy explained that the Ministry of Foreign Affairs (MOFA) provides training on foreign bribery to its officials (both incoming and current) as part of a triennial plan (2011-2013) for transparency and integrity. However, other than this example and those discussed above in relation to law enforcement, prosecutors and judges, Italy has taken no significant steps to provide training on foreign bribery since Phase 2. Aside from those enforcing the law, public officials met on-site did not appear to have a level of awareness of the offence that would allow them to identify suspicions of foreign bribery.

(ii) Private sector awareness

149. In Phase 2, the Working Group reported that Italian embassies were working with the Italian Institute for Foreign Trade and the Italian Chambers of Commerce abroad to disseminate information about the foreign bribery offence to members of the private sector operating abroad. The Working Group recommended that Italy sustain these efforts and continue to pursue other initiatives to raise awareness, particularly among SMEs (recommendation 1(c)).

150. Since Phase 2, Italy's efforts to raise awareness in the private sector have been mixed. During the onsite visit, agencies providing public advantages told lead examiners that they provide information on foreign bribery to private sector stakeholders (see subsection 11 below). In addition, the MOFA Internet website contains a page discussing foreign bribery that includes links to several key OECD documents, pieces of national legislation and a PowerPoint presentation called "Advice on preventing bribery for companies operating abroad."⁷⁵ However, during the on-site visit, MOFA representatives did not report about any specific steps embassies have taken to inform Italian companies abroad of the foreign bribery offence, other than providing copies of OECD documents at embassy locations. Other government agencies have not engaged in efforts to educate the public about the foreign bribery offence.

151. The Convention is published on the websites of MOFA, the Italian Permanent Delegation to the OECD and the Italian National Contact Point (NPC), a structure organized within the Ministry of Economic Development to further the effectiveness of the OECD Guidelines for Multinational Enterprises.⁷⁶ Italy has also established an Anti-Corruption and Transparency Service (SAET), but this agency has no particular competence in the area of foreign bribery.⁷⁷

152. Representatives of large multinational companies who participated in the on-site visit had a good level of awareness of the foreign bribery offence, largely due to recent foreign bribery cases and the publicity surrounding LD 231/2001 (see subsections 2(b) and 7(c) above). Business associations reported that they have developed training modules dealing with corruption issues; however, since lead examiners have not received copies of these modules, it is unclear to what extent they deal with foreign bribery, as opposed to domestic bribery. As already noted above in subsection 7(c), participants in the on-site visit opined that the level of awareness is much lower among SMEs.

Commentary:

The lead examiners note that Italy has taken limited steps since Phase 2 to raise awareness of the foreign bribery offence among Italian public officials (other than among the judiciary, the prosecution, law enforcement and diplomats) or individuals and companies doing business abroad. Although investigations under LD 231/2001 have increased awareness of the potential for legal person liability, additional steps could be taken to enhance awareness specifically with regard to the foreign bribery offence.

With regard to the public sector, the lead examiners recommend that Italy further improve training programmes that address foreign bribery, including among foreign embassies abroad, with a view to assist public officials to be alert to instances of foreign bribery. With regard to the private sector, the lead examiners recommend that Italian authorities continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence. Given SAET's unique position as the country's anti-corruption authority, Italy could consider utilising SAET in these efforts.

⁷⁵ See Ministero degli Affari Esteri (28 October 2010), "OCSE – j La corruzione nelle transazioni internazionali," http://www.esteri.it/MAE/IT/Politica_Estera/Economia/Cooperaz_Econom/OCSE.htm.

⁷⁶ See <http://www.pcnitalia.it/documents/oecd-polidy-a7framework-for-investment/convention-on-combating-bribery-on-foreign-public-officials-in-international-business-transactions/>.

⁷⁷ In 2008, the former High Commissioner against Corruption was replaced by SAET. Neither the former High Commissioner against Corruption nor SAET engage in any activities to promote awareness of the foreign bribery offence.

b) Reporting suspected acts of foreign bribery

(i) By public officials

153. In Phase 2, the Working Group recommended that Italy “Remind all public officials of their obligation under article 331 of the CCP to report suspicions of foreign bribery offences detected in the course of performing their duties to the law enforcement authorities and of the sanctions for a failure to report” (recommendation 1(b)).⁷⁸ Italy has only recently taken steps to remind Italian public officials of this legal obligation.

154. Italy has explained that a legislative decree adopted in February 2011 (n. 71) reminds embassy and consular personnel about their reporting obligation and unequivocally clarifies the duty to report suspicions of crimes reported abroad to the law enforcement authorities. Nevertheless, during the on-site visit, participants from the Ministry of Foreign Affairs (MOFA) were unable to explain exactly how an embassy staff member would go about reporting a suspicion of foreign bribery and noted that no written guidance has been provided to embassy personnel. They also explained that diplomatic officials are not required to and in practice do not convey allegations of foreign bribery that they discover through local news reports abroad. Notably, no cases have been detected in the first instance by foreign missions.

155. With a view to clarify the situation, immediately following the on-site visit in early July 2011, MOFA took steps to remind diplomatic officials of their reporting duties. First, in July 2011, MOFA circulated written guidance to all diplomatic personnel regarding the means of reporting suspicions of criminal activity (circular n. 4 of 14 July 2011). Shortly thereafter, on 25 July 2011, MOFA also circulated two cables to all the foreign missions abroad specifically reminding them of their duty to report suspicions of foreign bribery.

(ii) By private persons

156. There is some confusion concerning the establishment of a systematic and centralized reporting mechanism for private individuals to report suspected foreign bribery. In their reply to the Phase 3 questionnaire, Italy indicated that SAET can receive a report of wrongful conduct, conduct a preliminary investigation and pass the report to public prosecutors. However, the fact that SAET has no competence to deal with allegations of foreign bribery may create confusion. A private person, thinking SAET by virtue of its name can deal with foreign bribery issues, might try to report to this agency; however, since personnel at the agency are not trained on the foreign bribery offence, they might not adequately assess an allegation. Generally, one would expect SAET staff would report all suspicions of crimes, including foreign bribery, to the adequate institution (at least to law enforcement). However, to fulfil this obligation, SAET personnel need to understand the offence.

157. Given the lack of mechanisms for reporting foreign bribery, it is no surprise that no foreign bribery investigations have commenced based on information reported by individuals, whether public or private. Considering the fact that many cases (notably several Oil for Food cases) have been or will soon be time barred (see subsection 5 above), enforcement activity in Italy will face an alarming decrease if Italy does not take steps to enhance and support detection and reporting of foreign bribery cases by both the public and private sectors, notably through putting in place necessary mechanisms to detect foreign bribery.

⁷⁸ Article 331 provides that a public servant who discovers a crime in the course of his or her service must notify the public prosecutor or a judicial police officer “without delay,” even if the perpetrator has not been identified.

Commentary:

The lead examiners commend Italy for the measures taken by MOFA following the on-site visit to remind diplomatic personnel of their duty to report suspicions of foreign bribery. Nevertheless, they observe that, although there is a legal requirement for public officials to report instances of foreign bribery, the mechanism for doing so was unclear to the panellists met on-site. The lead examiners recommend that Italy continue to remind all public officials of their obligation under article 331 CCP to report suspicions of foreign bribery detected in the course of performing their duties to law enforcement and of the sanctions for a failure to report (Phase 2 recommendation 1(b)). The lead examiners also recommend that Italy create and publicize a clear means by which private individuals can report suspicions of foreign bribery.

c) Whistleblower protection

158. During Phase 2 the Working Group recommended that Italy “Consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution” (recommendation 2). No changes have been made in Italian law, which provides no whistleblower protection to either public or private employees who report suspected illegal activities. The issue of whistleblower protection has been identified as a horizontal issue by the Working Group.

159. If passed, a bill currently pending in parliament would protect public sector employees who report illicit conduct discovered while performing their duties of employment from direct and indirect discrimination. It also would protect the identity of such employees during the preliminary stages of an investigation into the reported facts.⁷⁹ However, no measures to protect private sector employees have been introduced.

160. During the on-site visit, a number of individuals expressed their belief that a court probably would not find that an organisational model under LD 231/2001 was adequate if it did not contain provisions protecting whistleblowers. However, unless legislation backs such provisions in an organisational model, they have limited usefulness, since an employee would still have limited legal recourse against an employer. During the on-site visit, representatives of multinational companies explained that nearly all reports of wrongdoing come to them in the form of anonymous handwritten notes or anonymous emails, suggesting that employees are reluctant to disclose their identities absent whistleblower protection.

Commentary:

The lead examiners are concerned that Italian law provides no protection for whistleblowers in either the public or private sector, as recommended by 2009 Recommendation IX(iii) and in line with Annex II.A.11(ii) to the 2009 Recommendation. They note that draft legislation before parliament could provide some protections for public officials; however, the draft legislation does not provide protection for whistleblowers in the private sector, where information regarding bribery in connection with commercial transactions is most likely to be discovered.

The lead examiners note that LD 231/2001 provides a strong incentive for companies to have internal whistleblower protections in place, although such internal protections serve limited

⁷⁹ Article 4 of bill AC 4434 (bill AS 2156 after approval of the Senate on 15 June 2011).

use absent legislative backing. Thus, the lead examiners recommend that Italy (i) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and (ii) take steps to raise awareness of these mechanisms.

11. Public advantages

a) Officially supported export credits

161. Italy's export credit agency, *Servizi Assicurativi del Commercio Estero S.p.A.* (SACE), is a member of the OECD Working Party on Export Credit and Credit Guarantees. Representatives from SACE who participated in the on-site visit demonstrated strong knowledge and awareness of the Anti-Bribery Convention, as well as of Italy's implementing legislation.

(i) Anti-bribery procedures

162. SACE informed the lead examiners that it has created an anti-bribery procedure to address the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (2006 Recommendation). Under the procedure, an applicant for SACE support must declare that (i) it will have no involvement in bribery in the context of the facts of the transaction; (ii) it is not aware of any judgements or pending proceedings involving foreign bribery against it or any of its directors, board members, employees or other agents; and (iii) it has never been included on the debarment list of an international financial institution. The company also must guarantee that it will refund SACE for any indemnities SACE pays as a result of the company's wrongful conduct.

163. According to SACE, an applicant also must disclose the identity of and commissions paid to third parties acting on its behalf. In information provided by SACE to the OECD's Export Credit Division in November 2010, SACE reported that applicants are not required to disclose the purpose of such payments, unless the amount paid "is clearly exceeding business practices" or enhanced due diligence is required. After the on-site visit, Italian authorities explained that SACE "always" requires that applicants describe the amount and purposes of all fees and commissions paid on connection with a transaction. In either case, since information regarding the purpose of such payments is made available when needed, Italy appears to comply with the 2006 Recommendation.

164. SACE does not verify any information provided in an applicant's declarations (for example, by independently checking international debarment lists). Following the on-site visit, Italian authorities reported that SACE "is currently in the process of availing itself of specific reputational databases that will allow it to independently check, among others, international debarment lists." SACE also does not require additional declarations or certifications in the course of a relationship with an exporter, unless suspicions of an offence arise between the time of the original application and the time the exporter files a claim. Following the on-site visit, Italian authorities explained that SACE may become aware of such suspicions through its day-to-day monitoring of public sources of information.

165. SACE engages in enhanced due diligence of an applicant if the applicant reports that it is on an international financial institution's debarment list, a conviction or proceeding for foreign bribery is present, or the applicant is reluctant to provide certain declarations. Among other things, the enhanced due diligence procedure evaluates the effectiveness of any corrective and preventive measures the applicant has adopted to fight bribery.

(ii) *Ethical codes applicable to exporters*

166. SACE has explained that its Code of Ethics and its organisational model under LD 231/2001 are designed to prevent the foreign bribery offence. The Code of Ethics prohibits those subject to it from directly or indirectly offering, soliciting or receiving “gifts, benefits or other advantages,” unless the gift, benefit or other advantage is a “modest value good” provided as a common courtesy and not to influence corporate decisions or create an obligation on the part of a third party. A person who receives such a request or offer, except for one of modest value, must report it to his or her “departmental superior.”⁸⁰

167. According to SACE, an exporter must agree to comply with SACE’s Code of Ethics before it may receive SACE benefits. In information provided to applicants, SACE informs exporters that a breach of the principles in the Code of Ethics will constitute a breach of contract. Nonetheless, SACE has not provided training to exporters that would clarify their obligations under the Code with regard to the foreign bribery offence.

(iii) *SACE reporting obligations*

168. During the on-site visit, SACE explained that its personnel are not considered public officials and therefore are not under the obligation to report suspicions of foreign bribery to law enforcement (see subsection 10.b above). Nonetheless, SACE personnel are expected to internally report suspicions of wrongdoing, and SACE’s *organismo di vigilanza* decides whether to report the potential issue to law enforcement, which appears to be generally in line with the 2006 Recommendation, although formalisation or codification of these internal procedures would contribute to clarifying the issue.

(iv) *SIMEST due diligence activities*

169. *Società Italiana per le Imprese all’ Estero S.p.A.* (SIMEST) is a separate agency that provides interest rate support for transactions underwritten by SACE. Following the on-site visit, SIMEST explained that under Legislative Decree 143/1998, it supports export credits granted by Italian or foreign banks in order to allow Italian firms to offer foreign buyers medium and long-term deferred payments, agreed on terms that are in line with the OECD rules. SACE’s support is not necessarily required to obtain SIMEST’s intervention, even though most of the transactions supported by SIMEST benefit from SACE’s coverage.

170. After the on-site visit, Italy reported that SIMEST has been implementing anti-bribery measures since 2001, following the principles in the undertakings set forth in the 2000 Action Statement on Bribery and Officially Supported Export Credits. In addition, Italy explained that SIMEST has adopted measures in response to the 2006 Recommendation “by means of specific requirements in a number of documents (application forms, applicable circulars, agreements between SIMEST and the banks)”⁸¹

⁸⁰ Article 3.2 of The SACE Group Code of Ethics (undated).

⁸¹ For example, in connection with an application for SIMEST support, an applicant (a bank or Italian exporter) must submit a declaration that (i) neither it nor anyone acting on its behalf has engaged in bribery of foreign public officials under article 322-bis CC; (ii) it has taken and will maintain in force “all measures as requested by the law in order to deter bribery in international transactions”; (iii) neither it nor anyone acting on its behalf has been convicted of “bribery in international transactions”; (iv) it has never been listed on a publicly available debarment list of the World Bank Group, African Development Bank, Asian Development Bank, EBRD or the Inter-American Development Bank; and (v) it is “aware that the existence of serious circumstantial evidence ... concerning the acts of bribery in international transactions, may cause the suspension of the approval procedure or the refusal of the subsidy intervention.” An exporter is also required to inform SIMEST if any facts arise that would make these declarations untrue and must

b) Public procurement

(i) Relevant authorities

171. The *Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture* (AVCP, the Authority for the Supervision of Public Contracts for Works, Services and Supplies) is an independent Italian authority in charge of public procurement.⁸² AVCP supervises the entire public procurement system at the national and local levels in order to ensure that public procurement complies with the principles of accuracy and transparency set forth by law.

172. *Concessionaria Servizi Informativi Pubblici S.p.A.* (CONSIP) is a public stock company owned by the Ministry of Economy and Finance and acts as Italy's central purchasing body. CONSIP acts under the supervision of AVCP. Among other things, it operates on behalf of the state to vet potential public contractors in relation to corruption.

(ii) Due diligence of potential contractors

173. All purchasing bodies (CONSIP included) are required to verify that a company seeking a public contract has not been convicted of corruption, as defined by the EU Acts.⁸³ However, the EU Acts restrict the definition of "corruption" to (i) bribery of "any Community or national official, including any national official of another Member State" (*i.e.* bribery only of officials from EU countries) and (ii) private to private bribery.⁸⁴ This means a conviction for bribery of a non-EU public official would not trigger an exclusion from public tenders. This is contrary to Section XI(i) of the 2009 Recommendation, which recommends that member countries permit authorities to deny the privilege of entering into public procurement contracts to enterprises that have engaged in bribery of *any* public officials, not just those in the EU.

174. AVCP has explained that it maintains a National Database of Public Contracts (National Database) that contains tenders, contract notices, information about declarations filed by companies, and a company database that contains information about each company's quality certifications. AVCP also has been appointed as a national contact point for issues related to the exclusion database set forth in European Commission Regulation n. 1302/2008 (which includes information about candidates for public contracts that have been convicted of corruption). Based on the information provided by Italian authorities, it appears that the National Database may, therefore, contain information about convictions for corruption, as defined by the EU Acts. However, the National Database does not appear to contain information on whether a company (i) has been convicted for foreign bribery of non-EU officials or (ii) is on international financial institution (IFI) debarment lists.

175. During the on-site visit, CONSIP explained that it does not consult a central database or registry for checking prior convictions or IFI debarment lists. Rather, it relies on the candidate's self-declaration that it has not been convicted of corruption (as defined by the EU Acts). CONSIP also explained that it does not require potential public contractors to declare that they are not on the debarment list of any IFI.

disclose, upon demand, the identity of persons acting on its behalf, as well as the amount and purpose of brokerage or agency fees.

⁸² See www.avcp.it.

⁸³ See article 38 of Legislative Decree no. 163, 12 April 2006.

⁸⁴ See articles 1 and 3 of Act of the Council of the European Union of 26 May 1997; article 3 of Joint Action of 22 December 1998 adopted by the Council of the European Union.

However, according to Italian authorities, purchasing bodies should consult the National Database as well as the Central Criminal Registry in order to check prior convictions.

(iii) *Guidance provided to public contractors*

176. It is unclear what, if any, guidance CONSIP provides to potential or current public contractors regarding corruption, including the foreign bribery offence. In a background paper provided to the lead examiners, CONSIP reported that it publishes “Anticorruption Guidelines” on its Internet website. However, the lead examiners were unable to locate any such guidelines on the web.

(iv) *Reporting obligations*

177. AVCP personnel are subject to the reporting requirements applicable to all public officials (see subsection 10.b above). CONSIP personnel, like SACE personnel, are not considered public officials and therefore are not under an obligation to report suspicions of foreign bribery to law enforcement, although they are expected to report internally “knowledge of possible Code [of Ethics] violations.”⁸⁵

c) *Official development assistance*

178. The Ministry of Foreign Affairs is Italy’s agency for official development assistance (ODA) through the Italian Development Cooperation Programme (Cooperation Programme). According to participants in the on-site visit, any public procurement carried out with the financial resources of the Cooperation Programme is subject to Italy’s general procurement laws, including Decree 163/2006. To ensure that funds are used for their intended purpose, the Cooperation Programme has produced additional guidelines on preventing and combating corruption in projects funded by it (CP Guidelines).

179. Under the CP Guidelines, the Cooperation Programme “reserves the right to suspend or cancel Project financing if corrupt practices of any kind are discovered at any stage of the award process and if the contracting authority fails to take all appropriate measures to remedy the situation.” Corrupt practices covered by this provision include “the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the contracting authority.”⁸⁶ In addition, “all tender dossiers and contracts for works, supplies and services must include a clause stipulating that tenders will be rejected or contracts terminated if it emerges that the award or execution of a contract has given rise to unusual commercial expenses,” such as commissions not paid in return for an actual and legitimate service, commissions paid in tax haven countries, commissions paid to recipients that are not clearly identified or commissions paid to a company that appears to be a front company (clause 4.12). If a contractor has paid such an unusual commercial expense, the contract may be terminated and the contractor may be permanently excluded from receiving Cooperation Programme funds (clause 4.14). The contractor also may be excluded from other Cooperation Programme contracts or required to pay penalties (clause 4.15). The Cooperation Programme requirements also apply to subcontractors and local agents. In addition, the conduct of local agents acting in the name of contractors or subcontractors of the Cooperation Programme (or in the name of local governments who receive budget support under Italian ODA programmes) is imputable to the subjects they represent.

180. Unlike officials of SACE and CONSIP, officials of the Cooperation Programme are public officials. Thus, they are subject to the general reporting requirements discussed in subsection 10.b above.

⁸⁵ Article 11 of Consip Company Code of Ethics (11 April 2005), <http://www.consip.it/online/Home/CompanyOverview/CodeofEthics.html>.

⁸⁶ Clause 4.11 of Eligibility Criteria, Ethical Clauses, Contract General Principles, 1 June 2009.

Commentary:

The lead examiners commend Italy for the measures taken thus far by SACE to implement the 2006 Recommendation. They also recognize the measures Italy has put in place to ensure that companies obtaining public contracts and other public advantages operate in ethical ways. However, the lead examiners recommend that Italy establish mechanisms for verifying, when necessary, the accuracy of information submitted by prospective public contractors, including declarations regarding whether they have been previously convicted for foreign bribery and whether they are listed on IFI debarment lists.

The lead examiners are encouraged by the measures to prohibit bribery taken in regard to ODA-funded contracts. However, they are concerned that CONSIP only considers bribery of EU officials when deciding whether to award a contract. The lead examiners recommend that AVCP and other agencies administering public contracts extend the grounds for debarment from public tenders to cover all offences falling within the scope of Article 1 of the Anti-Bribery Convention.

Finally, because personnel at SACE and CONSIP do not appear to view themselves as public officials, the lead examiners recommend that these agencies formalise procedures to be followed by employees for reporting credible evidence of the bribery of a foreign official to law enforcement.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

The Working Group on Bribery commends Italy for its significant enforcement efforts, which have increased steadily since Phase 2. These efforts have been enabled by Italy's comprehensive framework for prosecuting the foreign bribery offence, including varied means for sanctioning legal persons for foreign bribery and confiscating proceeds of bribery. The Working Group remains, however, concerned that the vast majority of the cases prosecuted are dismissed as time barred and that the level of sanctions applied to both legal and natural persons may not always be fully effective, proportionate and dissuasive.

The Phase 2 evaluation report on Italy adopted in November 2004 included recommendations and issues for follow-up (as set out in Annex 1 to this report). Of the recommendations considered to have been only partially implemented or not implemented, at the time of Italy's written follow-up report, in December 2005, the Working Group concludes that: recommendation 4 has been implemented, recommendation 1(b) has been partially implemented, recommendations 1(a) and 3 remain partially implemented, recommendation 7(b) that was deemed partially implemented is not implemented, and recommendations 2 and 7(a) remain not implemented.

In conclusion, based on the findings in this report, regarding implementation by Italy of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of the Convention in Part I; and (2) will follow-up the issues identified in Part II. The Working Group invites Italy to report in writing on the implementation of recommendation 4(f) within six months of this report (*i.e.* in June 2012) and every six months thereafter, if needed. As well, the Working Group invites Italy to report orally on the implementation of recommendations 1(a) and (b), 3(a) and (b) within one year of this report (*i.e.* in December 2012). It

further invites Italy to submit a written follow-up report on all recommendations and follow-up issues within two years (*i.e.* in December 2013).

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

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

(a) Amend its legislation without delay to exclude the application of concessione as a possible defence to foreign bribery; and

(b) Assess any amendment changing the application of concessione as a possible defence to foreign bribery independently of similar amendments dealing with the offence in relation to domestic bribery [Convention, Article 1; 2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 7(a)].

2. Regarding the responsibility of legal persons, the Working Group recommends that Italy take steps to increase the effectiveness of the liability of legal persons in foreign bribery cases, including through raising awareness among the prosecuting authorities throughout the country, to ensure that the large range of possibilities available in the law to trigger the liability of legal persons for foreign bribery offences is understood and applied consistently and diligently, with a view to avoiding the dismissal of these cases based on statute of limitations grounds [Convention, Article 2, Phase 2 Evaluation, recommendation 7(b)].

3. Regarding sanctions, the Working Group recommends that Italy:

(a) Consider making available to judges both the imposition of imprisonment and fines in cases of offences of foreign bribery perpetrated by natural persons as a useful additional deterrent [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];

(b) Increase the maximum level of administrative fines for legal persons and ensure that the mitigating factors and the reduction of the fine imposed through patteggiamento procedures lead to the imposition of sanctions that are effective, proportionate and dissuasive, including for large companies [Convention, Articles 2 and 3; 2009 Recommendation V, Phase 2 evaluation, follow-up issue 8(e)];

(c) Strengthen its efforts to compile at the national level, for future assessment, information and statistics on cases concluded and sanctions imposed for the foreign bribery offence in a manner that differentiates between (i) sanctions imposed on natural and legal persons for the offence of foreign bribery and (ii) the procedures applied (court decision with a full hearing, patteggiamento or other procedural step), in order to allow Italy to effectively review its laws implementing the Convention and its approach to enforcement [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V, Phase 2 evaluation, follow-up issue 8(e)];

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Italy:

(a) Further develop and deliver a consistent foreign bribery training module to police services that may become involved in investigating foreign bribery cases, in particular to the Guardia di Finanza, and continue to deliver a foreign bribery training module to all prosecutors and judges likely to be involved in foreign bribery cases throughout the country [2009 Recommendation III(ii) and V, Phase 2 evaluation, recommendation 1(a)];

(b) Use proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations, in addition to having Italian embassies and consular offices report suspicions of crime and acquire information about related legal proceedings in the foreign jurisdictions;

(c) Considering taking the following steps to ensure effective investigations and prosecution: (i) establishing specialised divisions where highly skilled police forces would work together and specialise in foreign bribery as was done for other crimes in Italy; (ii) establishing working groups specialised in the foreign bribery offence within the Public Prosecutor's Offices that are the most likely to be involved in foreign bribery; (iii) raising awareness at national level about the need to prioritise the investigation of foreign bribery offence; and (iv) reinforcing the resources available in PPOs and tribunals to deal with foreign bribery; and [2009 Recommendation III(ii) and V];

(d) Consider the establishment of a national database for all on-going cases, in line with private data protection legislation, with a view to ensure coordination of foreign bribery investigations nationally and to avoid intelligence gaps [Convention, Article 3 and 12; 2009 Recommendation III(ii) and V];

(e) Make public, where appropriate and in line with its data protection rules and the provisions of its Constitution, through any appropriate means, certain elements of the arrangements reached through patteggiamento, such as the reasons why patteggiamento was deemed appropriate in a specific case and the terms of the arrangement, in particular, the amount agreed to be paid [Convention, Article 3, Phase 2 evaluation, follow-up issue 8(e)]; and

(f) Urgently (i) take the necessary steps to significantly extend, including for "first time offenders," the length of the "ultimate" limitation period with respect to the prosecution and sanctioning of foreign bribery, through any appropriate means; and (ii) re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals (as extended according to (i) above) [Convention, Article 6, Phase 2 recommendation 7(b)].

Recommendations for ensuring effective prevention and detection of foreign bribery

5. Regarding raising awareness of the foreign bribery offence, the Working Group recommends that Italy (a) in relation to the public sector, further improve training programmes that address foreign bribery, including among foreign embassies abroad, with a view to assist public officials to be alert to instances of foreign bribery; and (b) in relation to the private sector, continue its efforts to raise awareness among companies, especially SMEs, about the foreign bribery offence [2009 Recommendation III(i), IX and X.C.].

6. Regarding reporting suspicions of foreign bribery, the Working Group recommends that Italy (a) continue to remind public officials of their obligation under article 331 CCP to report suspicions of foreign bribery detected in the course of performing their duties to law enforcement; and (b) create and publicize a clear means by which private individuals can report suspicions of foreign bribery [2009 Recommendation IX(ii); Phase 2 evaluation, recommendation 1(b)].

7. Regarding whistleblower protection, the Working Group recommends that Italy (a) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action both public and private employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and (b) take steps to raise awareness of these mechanisms [2009 Recommendation IX(iii), Phase 2 evaluation, recommendation 2].

8. Regarding money laundering, the Working Group recommends that Italy maintain statistics on (a) sanctions in money laundering cases; (b) the predicate offence for money laundering, with a view to identifying cases where foreign bribery is a predicate offence; and (c) STRs that result in or support bribery investigations, prosecutions and convictions [Convention, Article 7].

9. Regarding accounting and auditing requirements, the Working Group recommends that Italy:

(a) Ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (i) monetary thresholds, (ii) whether the offence is committed in relation to listed or non-listed companies, and (iii) whether the offence causes damage to shareholders or creditors [2009 Recommendation X.A(iii); Phase 2 recommendation 3]; and

(b) Engage in awareness-raising activities with auditors, including through providing training regarding (i) the detection of indications of suspected acts of foreign bribery; (ii) the obligation under LD 58/1998 to report such acts to company management and criminal law enforcement authorities; and (iii) the legal protections that may be available to auditors who report suspicions of wrongful conduct [2009 Recommendation X.B];

10. Regarding corporate compliance, internal controls and ethics programs, the Working Group recommends that Italy encourage companies, particularly SMEs, (a) to adopt or further develop adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery; and (b) to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures for preventing and detecting bribery [2009 Recommendation X.C, Annex II].

11. Regarding public procurement, the Working Group recommends that Italy (a) establish mechanisms for verifying, when necessary, information submitted by prospective public contractors, including declarations regarding whether they have been previously convicted for foreign bribery and whether they are listed on IFI debarment lists; and (b) extend the grounds for debarment from public tenders administered by AVCP and other agencies to cover all offences falling within the scope of Article 1 of the Convention, not just those involving EU officials [2009 Recommendation XI(ii)].

12. Regarding export credit, the Working Group recommends that Italy require SACE and CONSIP to formalise procedures to be followed by employees for reporting credible evidence of the bribery of a foreign official to law enforcement [2009 Recommendation IX].

2. Follow-up by the Working Group

13. The Working Group will follow up on the issues below as case law and practice develop:

(a) The interpretation by the Italian Supreme Court of Cassation with regard to the definition of foreign public official and the implementation of the principle of “ex officio” ascertainment by the judge of the law of the foreign public official’s country to ensure that is compatible with the requirement of an autonomous definition [Convention, Article 1];

(b) The application of the defence of organisational model available to legal persons under LD 231/2001, articles 6(1) and 7 [Convention, Article 2, 2009 Recommendation IV, Annex I, B];

(c) Whether LD 231/2001 imposes liability on a legal person when a principal offender bribes to the advantage of a subsidiary (or vice versa) or when an indirect advantage, such as an improved competitive situation, results from bribery [Convention, Article 2, 2009 Recommendation IV, Annex I, B];

(d) Whether both the bribe and the proceeds of the bribery of a foreign public official are subject to seizure and confiscation in Italy [Convention, Article 3.3];

(e) The status of bills A.S. 733-bis, A.C. 3986 and A.S. 1454, which would criminalise self-laundering [Convention, Article 7];

(f) Whether the methodology for conducting tax audits is adequate in terms of (i) the basis of risks considered when deciding which companies to audit and (ii) the time-lag between audits [2009 Recommendation I(ii)];

(g) The impact of special tax programs, such as tax amnesty programmes, on tax officials' ability to detect suspicions of foreign bribery [2009 Recommendation III(ii); 2009 Tax Recommendation II; Phase 2 evaluation, recommendation 6];

(h) Implementation of the extension of Italy's external audit requirements to cover certain non-listed companies [2009 Recommendation X.B];

(i) Italy's ability to extradite an individual (i) where that person raises the *concussione* as a defence to prevent extradition and (ii) where the statute of limitations for the foreign bribery offence has expired in Italy [Convention, Article 10].

**ANNEX 1 PHASE 2 RECOMMENDATIONS TO ITALY AND
ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY**

Recommendations in Phase 2		<i>Written follow-up*</i>
<i>Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery</i>		
With respect to promoting awareness of the Convention and the offence of bribing a foreign public official under article 322-bis of the Italian Criminal Code, the Working Group recommends that Italy:		
1a.	Provide additional training to police, prosecutors and magistrates on the foreign bribery offence and increase efforts to promote awareness of the foreign bribery offence and the Convention in all the government agencies involved in the implementation of the offence, notably those dealing with Italian companies operating abroad (Revised Recommendation, Paragraph I).	<i>Partially implemented</i>
1b.	Remind all public official of their obligation under article 331 of the Code of Criminal Procedure to report suspicions of foreign bribery offences detected in the course of performing their duties to the law enforcement authorities and of the sanctions for a failure to report (Revised Recommendation, Paragraph I).	<i>Not implemented</i>
1c.	Sustain the current proactive awareness-raising activities by institutions such as the Ministry of Foreign Affairs through its diplomatic missions abroad, and pursue its initiatives to raise awareness in the private sector, notably where SMEs are concerned (Revised Recommendation, Paragraph I).	<i>Satisfactorily implemented</i>
With respect to whistleblowing protection, the Working Group recommends that Italy:		
2.	Consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation, Paragraph I).	<i>Not implemented</i>
With respect to the prevention and detection of foreign bribery through accounting requirements, the Working Group urges:		
3.	The expeditious amendment of the provisions on false accounting in the Civil Code to ensure full conformity with article 8 of the Convention. In particular, Italy is recommended to ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (a) monetary thresholds, (b) whether the offence is committed in relation to listed or non-listed companies, and (c) whether the offence causes damage to shareholders or creditors (Convention, Article 8).	<i>Partially implemented</i>

With respect to the role of an independent external audit in the detection of foreign bribery, the Working Group recommends that Italy:		
4.	Consider broadening the categories of companies subject to independent external audits to include certain non-listed companies with a high turnover, and ensure that “facts deemed to be censurable” in article 155 (2) of Decree 58/1998, which are required to be reported by external auditors to CONSOB (the regulator of the Italian securities market) and the board of directors of a company, include foreign bribery (Revised Recommendation, Paragraph V.B. (i), (iii) and (iv)).	<i>Partially implemented</i>
With respect to the prevention and detection of foreign bribery through anti-money laundering measures, the Working Group urges:		
5.	The expeditious adoption of the bill criminalising money laundering by a person who commits the predicate offence, and establishing the liability of legal persons for money laundering (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III).	<i>Goes beyond the scope of the Convention</i>
With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Italy:		
6.	Pay particular attention to information arising as a result of tax amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of bribes (Revised Recommendation, Paragraph IV).	<i>No longer relevant</i>
<i>Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences</i>		
With respect to the prosecution and sanctioning of foreign bribery, the Working Group recommends that Italy:		
7a.	Amend its legislation to exclude the defence of <i>concussione</i> from the offence of foreign bribery (Convention, Article 1 and Commentary 1).	<i>Not implemented</i>
7b.	Take the necessary steps to extend the length of the “ultimate” limitation period (<i>i.e.</i> the period of completion of prosecutions including all appeals) for the offence of foreign bribery (Convention, Article 6). ⁸⁷	<i>Partially implemented</i>
7c.	Encourage its officials at the Ministry of Justice who specialise in mutual legal assistance to work more closely with law enforcement in the preparation of outgoing requests for assistance, and organise meetings to facilitate an exchange of experiences and concerns amongst officials who are involved in mutual legal assistance (Revised Recommendation, Paragraphs II.vii and VII).	<i>Satisfactorily implemented</i>

* The right-hand column sets out the findings of the Working Group on Bribery on Italy's written follow-up report to Phase 2, considered by the Working Group in March 2007.

⁸⁷

The Working Group notes that this is a general issue for many Parties.

Follow-up by the Working Group

The Working Group shall follow-up on the following issues once there has been sufficient practice in Italy:

- (a) The effectiveness of the code of conduct of SACE (Italy's export credit agency) in preventing foreign bribery (Revised Recommendation, Paragraph I);
- (b) The application of the offence of *istigazione alla corruzione* and attempts to the foreign bribery offence in particular to verify whether it is committed irrespective of, *inter alia*, the value of the advantage and its results (Convention, Article 1; Commentary 7);
- (c) With respect to the prosecution of foreign bribery:
 - (i) Whether conflicts of competence amongst Italian public prosecutors lead to delays and a waste of resources, thereby decreasing the effectiveness of foreign bribery investigations (Revised Recommendation, Paragraph I);
 - (ii) Italy's ability to provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Revised Recommendation, Paragraphs II.vii and VII);
 - (iii) The use of the powers of the Minister of Justice in deciding whether to assert nationality jurisdiction to prosecute a natural person (Convention, Articles 4 and 5).
- (d) With respect to the liability of legal persons:
 - (i) Whether Italy can effectively prosecute legal persons in the following cases: 1. in the absence of proceedings against natural persons; 2. where the legal person is a state-owned or state-controlled company; 3. where a foreign legal person bribes a non-Italian official in Italy; and 4. where an Italian legal person uses a non-Italian national to bribe a foreign public official while outside Italy⁸⁸ (Convention, Article 2);
 - (ii) The application of the "defence of organisational models" (*i.e.* the adoption of an organisational and management model, including internal control and compliance procedures, to prevent offences of the kind that occurred) (Convention, Article 2);
- (e) With respect to sanctions, the level of sanctions applied to natural and legal persons, including the level of fines, application of confiscation, prohibitive sanctions, suspended sentences and the use of *patteggiamento* based on information provided by Italy (Convention, Article 3);
- (f) With respect to the power of the *Corte dei Conti* (State Audit Court) to audit public bodies, the application of that power to public or publicly-managed entities (1) involved in international transactions, (2) involved in contracting opportunities with Italian companies through public procurement or development aid, and (3) that are not subject to an external audit requirement (Revised Recommendation, Paragraph V.B.(i)).

⁸⁸

The Working Group notes that this is a general issue for many Parties.

ANNEX 2 LEGISLATIVE EXTRACTS

CRIMINAL CODE

Article 317 – Concussione

Whoever, being a public officer or in charge of a public service, takes advantage of his/her functions or power to oblige or induce another to unduly give or promise money or other assets to himself or a third party, shall be liable to imprisonment for between four and twelve years.

Article 321 – Punishments for the briber

The punishments as per the first paragraph of article 318, per article 319, 319*bis*, 319*ter* and article 320, with respect to the said provisions of article 318 and 319, shall also apply to any person giving or promising money or other assets to a public officer or a person in charge of a public service.

Article 322 – Incitement to bribery

Whoever unduly offers or promises money or other assets to a public officer or a person in charge of a public service acting in the capacity of employee of a public authority, in order to induce the said officer or person to perform an act related to his/her office, shall be liable to the punishment as per the first paragraph of article 318, reduced by one-third, if the said offer or promise is not accepted.

If the said offer or promise was made in order to induce a public officer or a person in charge of a public service to omit or delay an act related to his office, or to act in breach of his official duties, the offender shall be liable to the punishment as per article 319, reduced by one-third, if the offer or promise is not accepted.

The punishment as per the first paragraph shall apply to any public officer or person in charge of a public service acting in the capacity of employee of a public authority who urges an individual to give or promise money or other assets for the purposes mentioned in article 318.

The punishment as per the first paragraph shall apply to any public officer or person in charge of a public service acting in the capacity of employee of a public authority who urges an individual to give or promise money or other assets for the purposes mentioned in article 319.

Article 322-bis – Embezzlement, extortion by colour of office, bribery and incitement to bribery of the members of European Communities' bodies and of the officials of the European Communities and of foreign States

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

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

2) to officials and contracted agents within the meaning of the Staff Regulations of officials of the European Communities or the conditions of employment of agents of the European Communities;

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

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

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

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

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

2) to persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organizations, when the offence was committed in order to procure an undue benefit for himself or others in international business transactions or to obtain or retain business.

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

Article 322-ter – Confiscation

In the cases of conviction, or imposition of punishments upon request of the parties pursuant to article 444 of the Code of Criminal Procedure, for any of the offences as per articles from 314 to 320, even if committed by the person who are referred to in article 322-bis, first paragraph, confiscation shall always be ordered of the goods representing the price or the proceeds thereof, unless they belong to a person who has not committed the offence; if said confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to such price.

In the cases of conviction or impositions of punishment pursuant to article 444 of the Code of Criminal Procedure, for the offence as per article 321, even if committed as per article 322-bis, second paragraph, confiscation shall always be ordered of the goods representing the proceeds thereof, unless they belong to a person who has not committed the offence; if said confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to said proceeds and, nonetheless, not inferior to that of money and of other advantages given or promised to a public official or to a person in charge of a public service or to other persons which are referred to in article 322-bis, second paragraph.

In the cases provided for in paragraphs 1 and 2, the judge, in the conviction shall also determine the sums of money or indicates the goods for confiscation as they represent the price or proceeds thereof or as they have a value corresponding to that of such proceeds or price of the offence.

CODE OF CRIMINAL PROCEDURE

Article 331 – Denunciation by public officials and persons charged with public service

1. Except as specified in Article 347, public officials and persons charged with a public service who, in the exercise or because of their functions or their service, have news of crime that can be prosecuted ex officio, must make written denunciation even if the perpetrator of the crime has not been identified.

2. The denunciation is presented or transmitted without delay to the public prosecutor or to a judicial police officer.

(omissis)

CIVIL CODE

Article 2621 – False information on a company

Save as otherwise provided in Article 2622, managers, general managers, directors responsible for preparing corporate accounting documents, auditors and receivers, which, with the intention of deceiving partners or the public and in order to achieve for their selves or for others an undue benefit, expose, in financial statements, reports or other communications required by law and directed to the shareholders or the public, material facts not responding to truth although subject of valuations, or omit information of which the disclosure is required by law concerning the assets, liabilities or financial position of the company or the group to which it belongs, in an appropriate way to mislead recipients about the aforementioned situation, are punished with imprisonment of up to two years.

Criminal liability shall extend to cases in which the information relates to property owned or managed by the company on behalf of third parties.

Criminal liability is excluded if the false statements or omissions do not alter significantly the representation concerning the economic position, assets, liabilities or financial position of the company or group to which it belongs. Criminal liability shall be however excluded where the false statements or omissions determine the distortion of the results of the financial exercise, before tax, by no more than 5% or the variation of the net assets by not more than 1%.

In any case, the fact is not punishable if the result of estimations which, taken individually, differ by no more than 10% from the correct one.

In the cases provided for in the third and fourth paragraphs, subjects as in the first paragraph shall be imposed the administrative sanction of between ten and one hundred shares and disqualification from the managing offices of legal persons and companies from six months to three years, from the office of director, auditor, liquidator, general manager and executive in charge of preparing corporate accounting documents, and any other office authorized to represent the legal person or enterprise.

Article 2622 – False information on a company detrimental to members or creditors

Managers, general managers, directors responsible for preparing corporate accounting documents, auditors and receivers, which, with the intention of deceiving partners or the public and in order to achieve for their selves or for others an undue benefit, expose, in financial statements, reports or other communications required by law and directed to the shareholders or the public, material facts not responding to truth although subject of valuations, or omit information of which the disclosure is required

by law concerning the economic position, assets, liabilities or financial position of the company or the group to which that company belongs, in an appropriate way to mislead recipients about the aforementioned situation and thereby causing a financial loss to the partners or creditors, shall, on complaint by the injured party, be punished with imprisonment for a term of between six months and three years.

Proceedings shall likewise be initiated on complaint where the act constitutes a separate, more serious offence detrimental to the assets of persons other than partners or creditors, unless it has been committed to the detriment of the State, other public institutions or the European Communities.

In the case of companies subject to the provisions of Part IV, Title III, Section II, of Legislative Decree No. 58 of 24 February 1998, the penalty for the acts provided for in the first paragraph shall be one to four years' imprisonment and a prosecution in respect of the offence may be brought ex officio.

The penalty is up from two years if, in the case foreseen by the third paragraph, the fact causes a serious harm to the investors.

The harm is considered serious if it has covered a number of investors more than 0.1 per thousand population in the latest ISTAT census or it consisted in the destruction or reduction of the value of titles in to a total extent above the 0.1 per thousand of the gross domestic product.

Criminal liability for the acts referred to in the first and third paragraphs of this article shall extend to cases where the information concerns assets held or administered by the company on behalf of third parties.

Criminal liability for the acts provided for in the first and third paragraphs shall be excluded where the false statements or omissions do not distort to an appreciable extent the representation of the economic position, assets, liabilities or financial position of the company or the group to which the company belongs. Criminal liability shall in any event be excluded where the false statements or omissions distort the pre-tax financial results for the year by no more than 5% or distort the net assets by no more than 1%.

Such acts shall not be punishable in any circumstances where they are the result of estimates which, viewed individually, do not differ from the true values by more than 10%.

In the cases provided for in the seventh and eighth paragraphs, subjects in the first paragraph shall be imposed administrative sanction of between ten and one hundred shares and disqualification from the offices of legal persons and companies from six months to three years, from the exercise of the office of director, auditor, liquidator, general manager and executive in charge of preparing corporate accounting documents, and any other office authorized to represent the legal person or the company.

LEGISLATIVE DECREE NO. 231 OF 8 JUNE 2001 – ADMINISTRATIVE LIABILITY OF LEGAL PERSONS

Article 5 – Liability of bodies

1. Bodies shall be liable for offences committed in their interest or at their advantage:
 - a) by persons carrying out activities of representation, administration or management of the body or of one of its organizational units having financial and operating autonomy, as well as by persons carrying out, even de facto, activities of management and supervision of the said body;
 - b) by persons who are under the direction or the supervision of one of the subjects referred to in a).
2. Bodies shall not be liable where persons indicated in the previous paragraph have committed the fact at their exclusive advantage or at the advantage of a third party.

Article 19 - Confiscation

1. When convicted, the price or the proceeds of the offence are always confiscated from the body, save for a portion which may be returned to an injured party. This is without prejudice to rights acquired by third parties in good faith.
2. When it is not possible to effect confiscation in accordance with paragraph 1, sums of money, assets or other valuable interests equivalent to the proceeds or the profits of the offence may be confiscated.

Article 22 – Period of limitation

1. As regards administrative sanctions, the period of limitation shall run ... five years from the day of carrying out of the offence:
2. The request of application of precautionary interdictive measures and the notification of the administrative violation as per art.59 shall interrupt the period of limitation.
3. Owing to this interruption, a new period of limitation shall begin.
4. If the interruption has occurred by notifying the administrative violation related to offences, the period of limitation shall run from the time when the judgement becomes final.

ANNEX 3 - CONCLUDED ENFORCEMENT ACTIONS

Key:
 Person sanctioned for foreign bribery offence
 Person sanctioned for foreign bribery offence, but conviction dismissed on statutes of limitations grounds

Note: Cases are listed in chronological order.

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
1. Serbian bribes	10/11/06	Trento	Individual 1	2004	Alleged bribery of non-defined Serbian authorities in order to facilitate Italian companies in obtaining public contracts in Serbia.	Not provided	CC 322-bis	Dismissed (no grounds to prosecute)	NA	
2.	10/11/06	Trento	Individual 2	2004			CC 322-bis	Dismissed (no grounds to prosecute)	NA	
3.	10/11/06	Trento	Individual 3	2004			CC 322-bis	Dismissed (no grounds to prosecute)	NA	
4.	10/11/06	Trento	Individual 4	2004			CC 322-bis	Dismissed (no grounds to prosecute)	NA	
5. Oil for Food case 1 (compressor company)	3/4/08	Milan	Legal Person 1	9/1/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	EUR 132 000	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
6.	3/4/08	Milan	Individual 1	29/1/02			322 bis	Patteggiamento	1 year imprison-	INDIVIDUAL SANCTIONED FOR

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
									ment (suspended sentence)	FOREIGN BRIBERY
7. International Gold Trading (Mali)	3/6/08	Trento	Individual 1	2005	Alleged bribery of Malian public officials in connection with the trade of gold.	USD 50 million	CC 322-bis	Dismissed (no grounds to prosecute)	NA	
8.	3/6/08	Trento	Individual 2	2005			CC 322-bis	Dismissed (no grounds to prosecute)	NA	
9. Oil for Food case 2 (chemical company)	9/10/08	Milan	Legal Person 1	31/12/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	EUR 48 283	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
10. Oil for Food case 3 (agricultural company)	28/11/08	Milan	Legal Person 1	21/12/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	EUR 74 921	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
11.	10/6/10	Milan	Individual 1	21/12/02			CC 322-bis	Dismissed (statute of limitations)	NA	
12. Oil for Food case 4 (diversified manufacturing company)	12/12/08	Milan	Legal Person 1	31/7/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	EUR 334 735	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
13. Oil for Food case 5 (construction company)	30/1/09	Milan	Legal Person 1	31/12/02 31/8/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	Count a) EUR 100 004 Count b) EUR 96 133	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
14. Oil for Food case 6 (manufacturing company)	30/1/09	Milan	Legal Person 1	28/2/03 31/8/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food	Count a) EUR 1.2 million Count b)	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
					Programme.	EUR 93 449				
15. Oil for Food case 7 (oil and gas equipment company)	30/1/09	Milan	Legal Person 1	14/11/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	EUR 59 091	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
16. Oil for Food case 8 (oil company)	3/2/09	Genoa	Legal Person 1	Until 16/5/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	USD 632 257	LD 231/2001 (reference CC 322-bis)	Acquittal	NA	
17.	3/2/09	Genoa	Individual 1	Until 16/5/02			CC 322-bis	Dismissed (statute of limitations)	NA	
18. Libyan Arms Traffickers case	8/7/09	Perugia	Individual 1	Until 12/2/07 (bribery)	Allegedly bribery of Libyan public officials, as well as selling military weapons to Libyan government officials without properly registering with the Italian Ministry of Defence and engaging in negotiations without filing proper notifications	Approximately EUR 65 million	<u>Count a1)</u> CC 110, 112, 81; Law 285/1990; Law 895/1967 <u>Count a2)</u> CC 416 <u>Count c)</u> CC 110, 322-bis	Patteggiamento	* 4 years imprisonment * Confiscation of goods and documents seized before trial * 5-year bar on holding public office	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
19.	8/7/09	Perugia	Individual 2	Until 12/2/07 (bribery)			Same as for Individual 1	Patteggiamento	Same as for Individual 1	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
20.	9/7/09	Perugia	Individual 3	Until 12/2/07 (bribery)			<u>Count c)</u> CC 110, 322-bis	Dismissed (no grounds to prosecute)	NA	

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues	
21.	9/7/09	Perugia	Individual 4	Until 12/2/07 (bribery)			<u>Count c</u> CC 110, 322-bis	Dismissed (no grounds to prosecute)	NA		
22.	9/7/09	Perugia	Individual 5	Until 12/2/07 (bribery)			<u>Count c</u> CC 110, 322-bis	Dismissed (no grounds to prosecute)	NA		
23.	Oil for Food case 9 (engineering and manufacturing company)	5/2/09	Milan	Legal Person 1	<u>Count e</u> Contract 1: 11/7/01 Contract 2: 22/6/02	Alleged bribery of Iraqi public officials in connection with the UN Oil for Food Programme.	<u>Count e</u> EUR 240 934 Contract 1: EUR 114 465 Contract 2: EUR 126 469	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
24.		5/2/09	Milan	Legal Person 2	<u>Count a</u> Contract 1: 21/7/02 Contract 2: 14/12/02 Contract 3: 14/11/01 Contract 4: 14/11/01 Contract 5: 1/8/03 <u>Count b</u> 30/11/02		<u>Count a</u> EUR 769 177 Contract 1: EUR 330 000 Contract 2: EUR 61 761 Contract 3: EUR 42 820 Contract 4: EUR 44 760 Contract 5: EUR 289 836 <u>Count b</u> EUR 315 510	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations) as to count a / contracts 1 through 4	NA	The case with regard to count a / contract 5 and count b is still ongoing in front of the Court of Como.
25.		Not provided	Milan	Individual 1	<u>Count a</u> Contract 1: 21/7/02 Contract 2: 14/12/02 Contract 3:		<u>Count a</u> EUR 769 177 Contract 1: EUR 330 000 Contract 2: EUR 61 761	CC 322-bis	Dismissed (grounds not provided) as to count a, contracts 1 through 4	NA	The case with regard to count a / contract 5 and count b is still ongoing in front of the Court of Como.

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
				14/11/01 Contract 4: 14/11/01 Contract 5: 1/8/03 <u>Count b)</u> 30/11/02 <u>Count c)</u> Contract 1: 11/7/01 Contract 2: 22/6/02		Contract 3: EUR 42 820 Contract 4: EUR 44 760 Contract 5: EUR 289 836 <u>Count b)</u> EUR 315 510 <u>Count e)</u> EUR 240 934 Contract 1: EUR 114 465 Contract 2: EUR 126 469				
26.	Oil for Food case 10 (pharmaceutical company)	21/7/09	Milan	Legal Person 1	31/10/02	EUR 144 660	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
27.		21/7/09	Milan	Individual 1	31/10/02		CC 322-bis	Dismissed (statute of limitations)	NA	
28.		21/7/09	Milan	Individual 2	31/10/02		CC 322-bis	Dismissed (statute of limitations)	NA	
29.	Oil for Food case 11 (medical equipment company)	6/10/09	Milan	Legal Person 1	31/7/02	EUR 165 428	LD 231/2001 (reference CC 322-bis)	Acquittal	NA	
30.		6/10/09	Milan	Individual 1	31/7/02		CC 322-bis	Acquittal	NA	
31.	Pirelli/ Telecom case	28/3/10	Milan	Legal Person 1 (Pirelli)	2001-2005	Approximately EUR 200 000	LD 231/2001 (reference CC 322-bis)	Patteggiamento	EUR 400 000 fine	LEGAL PERSON SANCTIONED FOR FOREIGN BRIBERY
32.		28/3/10	Milan	Legal Person 2 (Telecom Italia)	2001-2005		LD 231/2001 (reference CC 322-bis)	Patteggiamento	EUR 400 000 fine	LEGAL PERSON SANCTIONED FOR FOREIGN BRIBERY

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
33.	28/3/10	Milan	Individual 1	2001-2005			CC 322-bis	Patteggiamento for 20 of the 33 operations; dismissed as to the other operations (statute of limitations)	* 4 years 2 months imprisonment * EUR 70 000 confiscation	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
34.	28/3/10	Milan	Individual 2	2001-2005			CC 322-bis	Patteggiamento for 20 of the 33 operations; dismissed as to the other operations (statute of limitations)	* 2 years 4 months imprisonment * EUR 50 000 confiscation	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
35.	28/3/10	Milan	Individual 3	2001-2005			CC 322-bis	Patteggiamento	* 2 years 10 months imprisonment * EUR 100 000 confiscation ⁸⁹	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
36.	28/3/10	Milan	Individual 4	2001-2005			CC 322-bis	Patteggiamento	* 2 years 8 months imprisonment * EUR 20 000 confiscation ⁹⁰	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY

⁸⁹ The defendant was also ordered to pay EUR 50 000 as compensation for civil damages.

⁹⁰ The defendant was also ordered to pay EUR 10 000 as compensation for civil damages.

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues	
37.		28/3/10	Milan	Individual 5	2001-2005			CC 322-bis	Dismissed as to 13 of the 33 operations (statute of limitations)	NA	
38.	Somalian Bribes	30/4/10	Rome	Individual 1	Not provided	Alleged bribery of Somalian authorities in order to facilitate Italian businessmen in obtaining business in Somalia	Not provided	CC 322-bis	Dismissed (no grounds to prosecute)	NA	
39.	Oil for Food case 12 (oil company)	20/12/07	Milan	Legal Person 1	Until May 2002	Alleged bribery of Iraqi public officials to (i) obtain a contract for the supply of 584 312 oil drums for an amount of USD 15 594 702 (count a); (ii) to obtain a contract for the supply of approximately 1 million oil drums for an amount of USD 37 636 851 (count b); (iii) to obtain a contract for the supply of approximately 1 million oil drums for an amount of EUR 27 million (count c); and (iv) to obtain a contract for the supply of approximately 2 million oil drums for an amount of EUR 36 042 767 (count d).	USD 1.4 million	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
40.		15/4/10	Milan	Individual 1	Between 14/12/00 and 5/02		<u>Count a)</u> USD 60 000	CC 322-bis	Dismissed (statute of limitations)	LATER TIME-BARRED: * 2 years imprisonment * 2-year ban on entering public contracts * Confiscation of approx. EUR 1 million in assets (imposed jointly on all defendants)	INDIVIDUAL SANCTIONED, BUT LATER TIME-BARRED
41.		15/4/10	Milan	Individual 2	Between 14/12/00 and 5/02		<u>Count b)</u> USD 500 million	CC 322-bis	Dismissed (statute of limitations)		INDIVIDUAL SANCTIONED, BUT LATER TIME-BARRED
42.		15/4/10	Milan	Individual 3	Between 14/12/00 and 5/02		<u>Count c)</u> USD 250 580	CC 322-bis	Dismissed (statute of limitations)		INDIVIDUAL SANCTIONED, BUT LATER TIME-BARRED
						<u>Count d)</u> USD 632 257					
43.	Oil for Food case 13 (energy)	30/9/10	Monza	Legal Person 1	31/1/03	Alleged bribery of Iraqi public officials to obtain contracts to supply	EUR 793 519	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
44. company)	30/9/10	Monza	Individual 1	31/1/03	medical equipment to the Iraqi Ministry of Health.		CC 322-bis	Dismissed (statute of limitations)	NA	
45.	30/9/10	Monza	Individual 2	31/1/03						
46. Truck company case	2011	Turin	Legal Person 1	Not provided	Alleged bribery of Croatian public officials in 2004 in connection with the sale of 39 trucks to the Croatian administration.	Not provided	Not clear	Dismissed (no grounds to prosecute)	NA	
47. Oil for Food case 14 (water purification company)	28/11/08	Milan	Legal Person 1	31/7/01 and 31/1/03	Alleged bribery of Iraqi public officials to obtain contracts to supply medical equipment to the Iraqi Ministry of Health.	<u>Count a)</u> EUR 890 153 <u>Count b)</u> EUR 1 million	LD 231/2001 (reference CC 322-bis)	Dismissed (statute of limitations)	NA	
48.	26/5/11	Milan	Individual 1	31/7/01 and 31/1/03			CC 322-bis	Dismissed (statute of limitations)	NA	
49.	26/5/11	Milan	Individual 2	31/7/01 and 31/1/03			CC 322-bis	Dismissed (statute of limitations)	NA	
50.	26/5/11	Milan	Individual 3	31/7/01 and 31/1/03			CC 322-bis	Dismissed (statute of limitations)	NA	
51.	26/5/11	Milan	Individual 4	31/7/01 and 31/1/03			CC 322-bis	Dismissed (statute of limitations)	NA	
52. Aerospace company case	21/4/11	Turin	Legal Person 1	Not provided	Alleged bribery of Romanian public officials in 2006 in connection with a contract of 7 transport planes for the Romanian Air Force.	Not clear	Not clear	Dismissed (no grounds to prosecute)	NA	
53. COGIM case (Oil for Food case 15)	12/5/11	Piacenza	Legal Person 1 (COGIM S.p.A.)	5/11/03	Alleged bribery of Iraqi public officials to obtain contracts to supply medical equipment to the Iraqi Ministry of	USD 721 000	LD 231/2001 (reference CC 322-bis)	Patteggiamento	* EUR 90 000 (fine) * EUR 753 917	LEGAL PERSON SANCTIONED FOR FOREIGN BRIBERY

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
					Health.				(confiscation) * 6-month ban from public contracting	
54.	12/5/11	Piacenza	Individual 1	5/11/03			CC 322-bis	Dismissed (statute of limitations)	NA	
55.	12/5/11	Piacenza	Individual 2	5/11/03			CC 322-bis	Dismissed (statute of limitations)	NA	
56.	28/3/08	Milan	Individual 1	Until 9/7/04	Alleged bribery of Libyan public officials through an intermediary in order to obtain business in Libya.	EUR 14 million	CC 322-bis	Patteggiamento	* EUR 100 000 confiscation * 10 months 20 days imprisonment (suspended sentence)	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
57.	27/4/09	Milan	Individual 2	Until 9/7/04			CC 322-bis and other offences	Patteggiamento	* EUR 1.2 million confiscation * 1 year 8 months imprisonment (not enforced on amnesty grounds)	INDIVIDUAL SANCTIONED FOR FOREIGN BRIBERY
58.	<u>20/9/11</u>	<u>Milan</u>	<u>Individual 3</u>	<u>Until 9/7/04</u>			<u>CC 322-bis</u>	<u>Conviction</u>	<u>* 3 years 6 months imprisonment-</u>	<u>CONVICTION FOR FOREIGN BRIBERY, APPEAL ONGOING, LIMITATION PERIOD</u>

Case Name	Date of Court Decision / Other Action	Court	Briber / Defendant	Date Crime Committed	Alleged Facts	Total Bribes	Offence(s)	Judicial Decision / Other Action	Sanction(s)	Comments / Issues
									ment	<u>EXPIRES IN JANUARY 2012</u>
59.	20/9/11	Milan	Individual 4	Until 9/7/04			CC 322-bis	Acquittal	NA	
60.	20/9/11	Milan	Individual 5	Until 9/7/04			CC 322-bis	Acquittal	NA	

ANNEX 4 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Agencies

Ministries

- Ministry of Economic Development
 - AGRÓ, Maria Ludovica, Dott.ssa, National Contact Point for OECD Guidelines for Multinational Enterprises
 - BRANCHINI, Daniele, Dott., Policies for Promotion of industrial Sector of Made in Italy
- Ministry of Economy and Finance
 - ADINOLFI, Antonio, Dott., Head (Unit III), Department of the Treasury General, Directorate for Prevention of Financial Crimes
 - ALLEGRINI, Silvia, Dott.ssa, Head (Unit XIII), Department of Finance Tax Laws Directorate
 - COLLURA, Cristina, Dott.ssa, Head (Unit for International Relations), Department of the Treasury, General Directorate for Prevention of Financial Crimes
 - CORONA, Giovanna, Dott.ssa, Tax Officer (Unit II), Department of Finance, International Relations Directorate
 - SCAFATI, Ilario, Dott., Head (Unit II), Department of Finance, Tax Laws Directorate
 - MANGANO, Michele, Dott., Tax Officer (Unit XIII), Department of Finance, Tax Laws Directorate
 - PICARDI, Francesca, Dott.ssa, Officer (Unit for International Relations), Department of the Treasury, General Directorate for Prevention of Financial Crimes
- Ministry of Foreign Affairs
 - MARINO, Maria Rosaria, Cons., Legal Advisor
 - SOLIMAN, Stefano, Cons., Italian Development Cooperation Programme
- Ministry of Justice
 - CALIENDO, Giacomo, On., Undersecretary of State for Justice
 - DI TARANTO, Alessandro, Cons., Head of Office II, Mutual Legal Assistance
 - FRUNZIO, Luigi, Cons., General Director for Criminal Justice

- IANNINI, Augusta, Cons., Head of Legislative Office
- MALAGNINO, Mario Ermini, Cons.
- MARTELLO, Pietro, Pres., Acting Head, Justice Affairs Division
- MATONE, Simonetta, Cons.
- PAGOTTO, Anna, Cons.
- PASETTO, Carla, Dott.ssa
- RONDINA, Francesca, Dott.ssa
- SALAZAR, Lorenzo, Cons.

Government Agencies

- Agenzia delle Entrate (Italian Revenue Agency)
- Bank of Italy
- CONSIP (Italian Public Procurement Agency)
- CONSOB
- Corte dei Conti (State Auditors' Department)
- Fiscal Regional Commission for Lombardia
- National Anti-Corruption Authority
- Parlamento Italiano
- MARTINO, Antonio, Dott., Director of Unit (Fight against International Tax Crimes), Assessment Directorate
- PALAZZI, Pamela, Dott.ssa, Tax Officer (Exchange of Information Unit), Assessment Directorate
- BUCAIONI, Katia, Dott.ssa, Second Grade Officer, Regulatory and Institutional Cooperation Division, FIU
- ALBANO, Gian Luigi, Dott., Research and Development Manager
- TAGLIAMONTE, Irene, Avv.
- BERRETTA, Gaetano, Cons. Dott.
- BERSANI, Chiara, Cons., Judge of Regional Chamber of Lazio
- GALTIERI, Claudio, Pres. Dott.
- MENCARELLI, Franco, Cons., Judge of Regional Chamber of Lazio
- POLITO, Maria Teresa, Cons., Judge of EU Affairs Chamber
- POMPONIO, Alessandra, Cons., Prosecutor of Regional Chamber of Marche
- REBECCHI, Paolo Luigi, Cons. , Vice Prosecutor General
- IZZI, Giovanni, Avv., Deputy President
- LABRUNA, Salvatore, Comm., Senior Executive
- BORTOLETTI, Maurizio, Col. CC.
- NADDEO, Antonio, Cons., Head of Department
- MARTINELLI, Massimo, Dott., Justice Counsel of

- SACE (Istituto per i Servizi Assicurativi e il Credito all'Esportazione)
- Commission of Senato della Repubblica
- SISTO, Francesco Paolo, On., PDL, Justice Commission of Camera dei Deputati
- TENAGLIA, Lanfranco, On., PD, Justice Commission of Camera dei Deputati
- ZOTTA, Domenico, Dott., Secretary of Justice Commission of Camera dei Deputati
- NAPOLITANO, Alessandro, Avv.
- SCHIRÒ, Massimo, Avv.

Law Enforcement Authorities and Judiciary

Law Enforcement

- Guardia di Finanza
- CATALANO, Alberto, Ten. Col.
- FRANCESCHIN, Alberto, Cap.
- GESUELLI, Stefano, Cap.
- LOMBARDI, Stefano, Ten. Col.
- SANTI, Roberto, Ten. Col., Special Unit for Public Administration
- SIRAVO, Domenico, Mar. A
- VINCIGUERRA, Luigi, Ten. Col.
- Ministry of Interior / Carabinieri
- CERA, Massimiliano, Cap., Raggruppamento Operativo Speciale (R.O.S.)
- TROMBETTI, Gianluca, Magg., Comando Generale dell'Arma dei Carabinieri Ufficio Addestramento
- DE MARIA Paolo, Tenente Col., Ufficio Coordinamento e pianificazione delle Forze di Polizia

Public Prosecutors

- Prosecutors to the Court in Milan
- DE PASQUALE, Fabio, Cons.
- FUSCO, Eugenio, Cons.
- LIBERATI, Edmondo Bruti, Cons.
- ORSI, Luigi, Cons.
- PRADELLA, Grazia, Cons.
- ROBLEDO, Alfredo, Cons., Chief Prosecutor
- SICILIANO, Tiziana, Cons.
- SPADARO, Sergio, Cons.

- Prosecutor to the Court in Naples
- Prosecutors to the Court in Rome
- Prosecutor to the Court in Turin
- SIRIGNANO, Cesare, Cons.
- DI NICOLA, Paola, Cons.
- IELO, Paolo, Cons.
- PERDUCA, Alberto Ernesto, Cons., Vice Chief Prosecutor

Judiciary

- High Council for the Judiciary
- Supreme Court of Cassation
- Tribunale e Corte d'Appello penale
- GRASSO, Gianluca, Cons., Magistrate in Charge
- COLOMBO, Gherardo, Judge
- GANDUS, Nicoletta, President of Chamber in the Court
- MAGI, Oscar, President of Chamber in the Court

Private Sector

Private enterprises

- ENI
- Fiat S.p.A.
- Italcementi
- Telecom Italia
- MANTOVANI, Massimo, Dott.
- NICASTRO, Davide, Dott., Forensic Audit Manager of Fiat Revi Scrl
- Name not provided
- TONUSSI, Daniele, Dott.

Business associations

- CONFAPI
- Confindustria
- DI BAGNOLI, Valentina Sanfelice, Dott.ssa
- CONDINO, Isabella, Dott.ssa
- PANUCCI, Marcella, Avv., Director of Legal Affairs Department

Legal profession and academics

- Bocconi University in Milan
- Centre for Macroeconomics and Finance Research (CeMaFiR)
- Gianni, Origoni, Grippo & Partners
- Studio Legale Bana
- Studio Legale Biamonti
- Tor Vergata University in Rome
- University of Catania
- SACERDOTI, Giorgio, Prof.
- ARNONE, Marco, Director
- BORLINI, Leonardo, Dott.
- BUSATTA, Federico, Avv.
- CAGNOLA, Fabio, Avv.
- LO GAGLIO, Andrea, Avv.
- PIGA, Gustavo, Prof.
- PARISI, Nicoletta, Prof.ssa

Accounting and auditing profession

- Consiglio Nazionale Dottori Commercialisti e degli esperti contabili (CNDC, National Organisation of Accountancy)
- E&Y

Civil Society

- Corriere della Sera
- Osservatorio 231 Farmaceutiche
- Transparency International – Italy

- DE VIVO, Annalisa, Dott.ssa
- MAGRASSI, Lorenzo, Dott.
- NEIROTTI, Luigi, Avv., Auditor

- GUASTELLA, Guiseppe
- ARENA, Maurizio, Avv.
- BRASSIOLO, Maria Teresa, Dott.ssa, President
- CALDARONE, Raffaele, Avv.
- CALLERI, Michele, Avv.
- FRASCHINI, Giorgio, Dott.
- SARDELLO, Fabrizio, Avv.

ANNEX 5 KEY DATA AND STATISTICS

General	
Land Area ⁹¹	301,340 square kilometres
Population	60.051 million
Labor force	24.975 million (in 2010)
Life Expectancy	81.5 (in 2007)
Religions ⁹²	Roman Catholic 90 percent; other 10 percent
Languages	Italian (official), German, French, Slovene
Literacy	98.4 percent (2001 census)

Economy	
Currency	Euro (EUR)
GDP ⁹³	EUR 1.549 trillion (2010)
GDP per capita ⁹⁴	USD 30,500 (PPP, 2010 estimate)
Real GDP Growth	1.3 percent (2010 estimate)
Inflation	1.4 percent (2010 estimate)
Unemployment	8.4 percent (2010 estimate)
Primary Trading Partners	Germany, France, US, Spain, UK, Switzerland

Government	
Form of Government	Constitutional republic with bicameral parliament
Head of State	Giorgio Napolitano
Head of Government	Mario Monti

⁹¹ OECD Economic Surveys: Italy (2011).

⁹² CIA World Factbook.

⁹³ OECD Economic Survey.

⁹⁴ CIA World Factbook.

ANNEX 6 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

2009 Recommendation	2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions
2009 Tax Recommendation	2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions
AML/CFT	Anti-money laundering / counter-financing of terrorism
Anti-Bribery Convention <i>or</i> Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
CCP	Code of Criminal Procedure
CC	Criminal Code
CONSIP	Italy's public procurement agency
CONSOB	<i>Commissione Nazionale per le Società e la Borsa</i> , the Italian securities regulator
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
Good Practice Guidance	Good Practice Guidance on Internal Controls, Ethics and Compliance, in Annex II of the 2009 Recommendation
IFRS	International Financial Reporting Standards
LD	Legislative decree
MOFA	Ministry of Foreign Affairs
MOJ	Ministry of Justice
MLA	Mutual legal assistance
SACE	<i>Società Assicuratrice Commercio Estero</i> , the Italian export credit agency
SAET	<i>Servizio Anticorruzione e Trasparenza</i> , the Italian Anti-Corruption and Transparency Service

SIMEST	<i>Società Italiana per le Imprese all'Estero</i> , the Italian company that promotes financial development and the promotion of Italian businesses abroad
SME	Small or medium-sized enterprise