

Implementing the OECD Anti-Bribery Convention

REPORT ON ITALY

Foreword

Italy signed, together with thirty-three other countries, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) in 1997. Today, thirty six countries are Party to this Convention. After enactment of the necessary implementing legislation, Italy ratified the OECD Convention and deposited the ratification instrument with the OECD in December 2000.

This report surveys the legal provisions and the institutions in place in Italy to combat bribery of foreign public officials and evaluates their effectiveness. It examines the mechanisms introduced, in both the public and private sectors, to prevent and detect acts of bribery of foreign public officials. It also reviews the effectiveness of mechanisms for investigating and prosecuting the offence of bribery of foreign public officials and related offences such as fraud and money-laundering. The report concludes with specific recommendations regarding prevention and detection, as well as prosecution and punishment. Key legal provisions to deter, prevent and fight corruption as submitted by Italy to the review process are also included.

Review of the implementation by Italy of the OECD Anti-Bribery Provisions is part of the wider mandate of the OECD Working Group on Bribery in International Business Transactions. This group is entrusted with the systematic and detailed monitoring and follow-up by all countries party to the OECD Anti-Bribery Convention.

Table of Contents

The Foreign Bribery Offence: Application and Practice by Italy	7
Introduction.....	7
Measures for Preventing and Detecting the Bribery of Foreign Public Officials.....	13
Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences	33
Recommendations	61
<i>Annex 1</i> Additional Provisions Relating to False Accounting.....	64
<i>Annex 2</i> Statistics On The Number of <i>Concussione</i> and Corruption Cases	66
<i>Annex 3</i> List of Participants in the On-Site Visit.....	67
<i>Appendix 1</i> Evaluation of Italy by the OECD Working Group Legal Framework.....	69
<i>Appendix 2</i> Principal Legal Provisions	73
<i>Appendix 3</i> Suggested Further Reading.....	79
<i>Appendix 4</i> Note: Appendices 1-3 are found after each Country Report and contain information specific to each country. Appendix 4 is identical in all of the 35 Country Reports comprising this binder edition. For that reason it is placed at the back of each binder. The reader may download and print additional copies of Appendix 4 which is found on the OECD Anti- corruption website www.oecd.org/daf/nocorruption/convention	
(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Commentaries on the Convention	
(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions	
(iii) Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials	
(iv) Parties to the Convention: Countries Having Ratified/Acceded to the Convention	

The Foreign Bribery Offence: Application and Practice by Italy

Introduction

On-Site Visit

From 19 to 23 April 2004, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) conducted an on-site visit of Italy pursuant to the procedure for the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and the 1997 Revised Recommendation (the Revised Recommendation). The purpose of the visit was to study the structures for enforcing the laws and rules implementing these OECD instruments, and to assess their application in practice.

In preparation for the on-site visit, Italy provided the Working Group with responses to the Phase 2 Questionnaire and a supplementary questionnaire. Italy also supplied relevant legislation and case law. The examining team analysed these materials and conducted independent research to ensure that it had non-governmental viewpoints.

In preparation for the on-site visit, the lead examiners had proposed to the Italian authorities a one-day visit to Milan. The lead examiners felt that a visit to arguably the most important financial and industrial centre in Italy would have provided a useful opportunity to interview representatives of the private sector, the legal profession and certain public institutions in a context different from Rome. Although some commercial enterprises have their headquarters in Rome, it was felt that meeting with business representatives and their lawyers from regional offices outside of Rome would provide a useful and different perspective on their functioning and experiences. The lead examiners had also hoped to meet prosecutors and police services (including the *Guardia di Finanza*) in Milan since, as is the case in most countries, national law enforcement agencies may have different experiences outside of the capital. Furthermore, the authorities in Milan have investigated and prosecuted a particularly large number of corruption cases. The authorities in Milan are also investigating the first and only foreign bribery case in Italy to date (the Enelpower case, to be discussed later).

Italy did not share this view. In its opinion, such a visit was not necessary because it was of the opinion that the representatives present in Rome could give a sufficient record of the situation in Milan. During the on-site visit, the Italian government was represented by the following: members of several police agencies including the *Guardia di Finanza*, *Arma dei Carabinieri* and *Polizia di Stato*; prosecutors and judges, including magistrates who were on secondment to the Ministry of Justice; officials from several Ministries including Foreign Affairs, Economics and Finance, Production Activities and Interior; corporate and financial regulators such as *Banca d'Italia*, *Ufficio Italiano dei Cambi* and

CONSOB; and agencies involved in export activities such as SACE and SIMEST. Also in attendance were members from civil society and business organisations, trade unions and academics, as were representatives of companies from several sectors such as automobile manufacturing, energy and engineering.¹ However, apart from one judge of the Court of Milan and several academics (one of whom was also a defence lawyer), all other participants were based in Rome. The police officers who attended the meetings were of senior rank; none of them had recent hands-on experience in bribery investigations. The representatives of the Ministry of Justice were mostly magistrates that had been seconded to the Ministry. Most of them were previously involved in domestic corruption cases.

While appreciative of the hard work of the Italian authorities in preparing for and hosting the visit, the lead examiners were unable to find out whether law enforcement officials in Italy's biggest financial centres have adequate awareness of and are enforcing the laws on foreign bribery. The lead examiners were unable to meet with law enforcement officials in Milan (even those not involved with an on-going case) and a greater circle of police officers and prosecutors with regional perspectives and varied experiences. Such a meeting would have provided a more complete picture of the interpretation, application and enforcement of Italian law against corruption, and Italy's compliance with the Convention and implementation of the Revised Recommendation.

General Observations

Italy's Political, Legal and Economic Systems

The executive branch of government is led by an elected President who appoints a Prime Minister who in turn appoints the Council of Ministers (cabinet), subject to the President's approval. The legislative branch consists of a democratically-elected bicameral parliament which has exclusive jurisdiction to enact criminal laws.

International law and conventions play a unique role in the Italian legal system. According to one legal academic during the on-site visit, under article 10(1) of the Italian Constitution,² where a domestic law conflicts with an international treaty or convention to which Italy is a party, the international instrument prevails. Article 117 of the Constitution (which was recently amended by Constitutional Law 3/2001) further provides that Italian laws enacted by the State and the Regions which do not comply with international conventions are unconstitutional. There is no jurisprudence on this point from the Italian Constitutional Court.

Italy's judiciary is comprised of judges and public prosecutors, both of whom are considered magistrates. The Constitution guarantees the independence of magistrates from the executive branch of government by assigning to the *Consiglio Superiore della Magistratura* (CSM) – which is an independent, self-governing judicial body – the exclusive competence to appoint, assign, move, promote and discipline public prosecutors. The judiciary is subdivided geographically on an administrative basis. Prosecutors may apply to be judges (and *vice versa*) when openings arise. Prosecutors are responsible for directing the police to conduct investigations, although the police can conduct their own investigations in limited circumstances.

Italy's diversified industrial economy is the 7th largest in the world, with a per capita GDP just behind that of France and the United Kingdom.³ There are important economic disparities between the highly-developed industrial north and the less-developed agricultural south.⁴ Similar to most other advanced OECD economies, Italy has a small

and diminishing primary sector, and services that contribute close to two-thirds of gross value added.⁵

The few large private companies in operation play a major role in the economy and are usually owned and run by families. These families exert control through holding companies and cross-shareholdings with industrial and financial allies to allow them to maintain ownership with a small shareholding.⁶ The strongest components of the economy are the clusters of small and medium-sized, family-owned companies in so-called industrial districts, mostly in the north-east and the centre of the country. Many of these companies produce for export high-quality consumer goods, including clothing, furniture, kitchen equipment and white goods.⁷

In 2002, Italy was the world's 7th biggest importer and 8th biggest exporter. It trades mainly with countries in the European Union (EU), although trade with emerging economies such as China and Russia has risen significantly.⁸ Major imports include transport equipment, chemical and pharmaceutical products, and energy products. Major exports are mechanical machinery equipment, transport equipment, textiles and clothing, and chemical and pharmaceutical products.⁹

Both inflows and outflows of investment are low by EU standards. Foreign investors originate mainly from the EU and North America. Outward investment has been increasing. The EU is the main destination, but the share of investment in Central-Eastern Europe and, to a lesser extent, Asia (particularly China) is increasing. Many medium firms have moved production operations to the Balkans.¹⁰

The government has recently privatised enterprises in electricity (Enel), gas and telecommunications, but it retains a controlling interest in electricity and gas, and golden shares in both of these industries. The Italian government has confirmed its intention to reduce its holdings in Enel, pending favourable market conditions.¹¹

Italy's Implementation of the Convention and the Revised Recommendation

Italy implemented the obligation to introduce an offence of foreign bribery in September 2000 by enacting article 322bis(2) of the Criminal Code, which extends the domestic active bribery offences in the Criminal Code to foreign public officials. One advantage of this approach is that much of the large body of pre-existing jurisprudence on domestic bribery is applicable to the offence of foreign bribery. However, the provision is somewhat complicated because of its chain of cross-references to various domestic (active and passive) bribery offences in the Criminal Code.¹² In addition, Italy enacted Legislative Decree 231 on 8 June 2001 which imposes administrative liability against legal persons for the offence of foreign bribery. This enactment was a milestone in Italy's legal history, as legal persons were not previously liable for any criminal offences.

Since the Phase 1 review in April 2001, Italy has enacted several laws which impact on the implementation of the Convention and the Revised Recommendation. These include overhauling the false accounting offences in the Civil Code and amending the rules on the admissibility of evidence obtained through mutual legal assistance. Other changes include expanding the plea bargaining process (*patteggiamento*) to more offences and expanding the reasons for changing the venue of a trial.

Italy has made noteworthy efforts to tackle domestic bribery. In April 2001, Italy published a code of conduct for public employees and a statute providing for the immediate dismissal of corrupt public officials. On 16 January 2003, Italy enacted a law

creating a High Commissioner to prevent and combat bribery within the public administration. The High Commissioner was recently appointed.

Cases Involving the Bribery of Foreign Public Officials

Prior to the on-site visit, Italy had advised the Working Group of two investigations of bribery of foreign public officials: the Telekom Serbia case and the Enelpower case. The Telekom Serbia involved allegations of bribery of Serbian officials concerning the purchase by Telecom Italia of a 29 per cent interest in Telekom Serbia in 1997. Magistrates and a Parliamentary Committee investigated the case. By the time of the on-site visit, the Parliamentary Committee had concluded that there was insufficient evidence of bribery of foreign public officials. The Enelpower case is on-going and is discussed in detail below.

Outline of the Report

The report is structured as follows: Part A focuses on the prevention and detection of foreign bribery and discusses ways to enhance their effectiveness. In a similar manner, Part B deals with the prosecution and sanctioning of foreign bribery, and the related accounting and money laundering offences. This part also examines the recent legislative developments in Italy that impact on the implementation of the Convention and the Revised Recommendation. Part C sets forth the recommendations of the Working Group and issues that the Working Group has identified for follow-up.

Notes

1. See the List of Participants in the Annex to this Report.
2. Article 10(1) of the Constitution states that “[t]he legal system of Italy conforms to the generally recognized principles of international law.”
3. The World Bank Group (August 2003), *World Development Indicators Database*
4. OECD (2001), *Territorial Reviews – Italy*, OECD, Paris, Chapter 1
5. The Economist Intelligence Unit (2003), *Country Profile 2003 – Italy*, The Economist Intelligence Unit, London, pp. 31-32
6. *Ibid.*
7. *Ibid.*
8. Italy’s major export partners in 2002 were Germany (EUR 36.305 bn), France (EUR 32.275 bn), United States (EUR 25.854 bn), United Kingdom (EUR 18.132 bn) and Spain (EUR 16.824 bn). Major export partners amongst emerging economies were Poland (EUR 4.278 bn), Turkey (EUR 4.073 bn), China (EUR 4.018 bn), Russia (EUR 3.801 bn) and Romania (EUR 3.613 bn).

Italy's major import partners in 2002 were Germany (EUR 45.613 bn), France (EUR 28.987 bn), Netherlands (EUR 15.080 bn), United Kingdom (EUR 12.868 bn) and United States (EUR 12.507 bn). Major import partners amongst emerging economies were China (EUR 8.307 bn), Russia (EUR 7.915 bn), Libya (EUR 4.908 bn), Algeria (EUR 4.254 bn) and Romania (EUR 3.815 bn) (Istituto Nazionale di Statistica (2003), *Italy and the World Economy, Summary, ICE Report 2002-2003*, Istituto Nazionale di Statistica, Rome, p. 39).

9. *Ibid.* pp. 32 and 39-40
10. *Ibid.* p. 24; The Economist Intelligence Unit (2003), *Country Profile 2003 – Italy*, The Economist Intelligence Unit, London, p. 31. Inward FDI in 2002 was USD 142.919 bn. Outward FDI in 2001 was USD 201.752 bn (Istituto Nazionale di Statistica (2003), *Italy and the World Economy, Summary, ICE Report 2002-2003*, Istituto Nazionale di Statistica, Rome, p. 33).
11. OECD (2003), *Economic Surveys: Italy*, OECD, Paris, p. 91 and note 72
- 12.. The Phase 1 report of Italy states at p. 33 that “[i]n view of the complexity of the cross-references, the Working Group recommended that this issue be followed up in Phase 2.”

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

In Public Administrations

As noted above, article 322bis of the Criminal Code is somewhat complicated. While this is not unusual in the Italian legal system, lead examiners nonetheless consider that the somewhat complex nature of article 322bis – including its cross-references to and differences with the domestic bribery offence – would warrant specific training programmes addressed in particular to staff in contact with enterprises with activities abroad, and to those in charge of enforcing and prosecuting the offence of bribery of a foreign public official. Indeed, to date, training and awareness raising programmes focusing specifically on the foreign bribery offence appear insufficient.

Police

Where the law enforcement authorities are concerned, the State police, *Carabinieri*, and *Guardia di Finanza* are informed and trained with regard to foreign bribery essentially during their training at the police and *Guardia* academies, but insufficiently in the context of continuing education in the course of their career. Although the lead examiners were informed that the *Guardia* had held specific training on the issue of foreign bribery, it was not clear, based on indications from the *Guardia* representatives interviewed that the foreign bribery offence had been fully understood. Although the judicial police¹ operate essentially under the authority of a public prosecutor, the police nonetheless retain a certain autonomy to conduct a number of activities (such as preserving evidence or identifying the offender) in the interim period after the offence has been reported to the prosecution. In this respect, it is essential that the judicial police fully understand article 322bis.

Prosecutors and Magistrates

As for prosecutors and magistrates, the *Consiglio Superiore della Magistratura* (Superior Council for Magistrates) provides training sessions, attendance to which is necessary for career advancement. A public prosecutor interviewed during the on-site visit indicated that courses on bribery, notably with respect to confiscation of proceeds and instrument, were planned for 2005. The Ministry of Justice also indicated that a course had been held on international forms of bribery in May 1998, and that, following the enactment of the implementing legislation, other training courses had been organised by the *Consiglio Superiore della Magistratura* focusing on confiscation, liability of legal persons, including analysis of the foreign bribery offence. Given the necessity to fully grasp all the elements of the complex offence under article 322bis, as well as the particular difficulties of detection and specificities of seeking evidence in cases of bribery of foreign public officials, further training would appear appropriate.

Key Ministries and Agencies

Information on the Convention has also been provided to personnel from public administrations involved with Italian companies operating abroad: the Ministry of Foreign Affairs has alerted its diplomatic missions on the adoption of the legislation criminalising foreign bribery; SIMEST, the Italian financial institution, under the control

of the Ministry of Industry and Trade, for the development and promotion of Italian business abroad, has issued an internal note for its staff; and the Customs Agency has provided training to its staff, including on the offence of bribery of foreign public officials, and is preparing a code of conduct. Following the on-site visit, the lead examiners were advised that the code will refer to foreign bribery offences. A general code of conduct for civil servants exists as well, but it does not recall the obligation for Italian public officials under article 331 of the Code of Criminal Procedure to report automatically suspicions of offences. Overall, training and awareness raising activities concerning the foreign bribery offence appear uneven across the various public administrations.

Finally, as indicated by Italy during the meetings of the Working Group on Bribery, a law approved on 16 January 2003 has established a High Commissioner for the Fight against Corruption (as well as other forms of illicit practices in the public administration). In their answers to the Phase 2 questionnaire, the Italian authorities further reported the High Commissioner's tasks would include supervision and monitoring of the work of the public administration, with special emphasis on bribery. As specified by the Italian authorities, the High Commissioner is not vested with investigative powers but has free access to the administrative documentation and databases of the public administration, authority to exercise powers on his/her own initiative or at the request of government departments, an obligation to report every six months to the Prime Minister and to refer cases to the judiciary and the State Audit Court as required by the Italian legislation. The High Commissioner was recently appointed, but his/her specific functions remained to be further defined.

Commentary

The lead examiners encourage the Italian authorities to increase efforts to raise awareness among the public administration on the offence of bribery of foreign public officials. In this respect, they recognise the Italian initiative to appoint a High Commissioner for the Fight against Corruption to oversee the public administration and recommend that his tasks include the fight against foreign bribery. Given the somewhat complicated nature of the foreign bribery offence as defined in the Criminal Code, they also recommend that additional training be provided to law enforcement authorities in order to ensure full understanding of the technicalities of this offence.

In the Private Sector

It was generally acknowledged by representatives of the public administration, as well as of business organisations, corporations, the legal profession and academia, that awareness of the foreign bribery offence has come about in Italy largely in the context of the administrative liability of legal persons, introduced into Italian law by Legislative Decree no. 231 of 8 June 2001 (Decree 231/2001). Prior to the adoption of this Decree, legal persons could not be held liable under Italian law. The introduction of liability of legal persons has thus been considered as a small revolution in the Italian legal system, causing business organisations to alert their constituents and corporations to focus their attention, notably on the foreign bribery offence, as the Decree applies, to date, to a number of offences including *concussione*, corruption, false accounting, fraud and other commercial offences. Italy is considering adding money laundering to the this list (see Section A.2.e)(i) The Money Laundering Offence).

Government Initiatives

Answers to the Phase 2 questionnaires, as well as a report published by the Italian Chapter of Transparency International on public awareness of the OECD Convention in Italy, indicated that Italian officials - most of them representatives of the Government and of the judiciary - have regularly provided information on the OECD Convention to civil society and the private sector by participating in numerous meetings, workshops and conferences held by business associations, NGOs, law firms and corporations.

Foreign Representations

Specific measures to raise awareness among Italian enterprises operating abroad have notably been taken by SIMEST, which has undertaken the dissemination to enterprises of Law 300/2000 introducing the foreign bribery offence into the Italian Criminal Code; in addition, SIMEST has prepared and issued provisions pertaining to this legislation. The Ministry of Industry and Trade has also, through its National Contact Point in charge of the implementation of the OECD Guidelines for Multinational Enterprises, held briefings and workshops for entrepreneurs, as well as in universities.

Since November 2001, Italian embassies, with the co-operation of the Italian Institute for Foreign Trade and the Italian Chambers of Commerce abroad, have disseminated materials to and met with Italian entrepreneurs abroad to raise the awareness of the Convention and Italy's implementing legislation. Italian embassies were instructed to liaise with diplomatic representations from other parties to the Convention to discuss their efforts in implementing the Convention. The Commercial Office of the Italian Embassy in Australia has published an explanatory note on the Convention, along with the text of the Italian implementing legislation and the Decree 231/2001 on liability of legal persons. Italian embassies and consulates have also reported their efforts to raise awareness of Italy's implementation of the Convention. Nevertheless, further efforts in this respect could usefully contribute to raising awareness of Italian enterprises exporting or investing abroad, particularly given the central role as contact point played by diplomatic missions.

Decree 231/2001

As noted earlier, the entry into force of Decree 231/2001 concerning the administrative liability of legal persons, has also greatly contributed to raising awareness regarding the offence of bribery of foreign public officials. Beyond the introduction of this new concept of liability of legal persons in the Italian legal system, the legislative decree has had a more immediate impact on the Italian business environment through the provisions recommending the development of organisational and management models in companies. Indeed, article 6(1)(a) provides that legal entities shall not be held liable if "before the fact was committed, (management) offices had adopted and effectively implemented organisational and management models so as to prevent offences of the kind which occurred". Article 6(2) provides the criteria for organisational models to qualify as acceptable for the purpose of article 6(1)(a).²

Where an organisational model was not in place at the time an offence occurred, a company's sanction may be reduced if, in the time between the offence and the trial, "an organisational model in order to prevent offences such as the one which occurred has been adopted and made effective" (article 12(2)(b)).³ The responsibility for drafting the codes of conduct lies with business associations (hence the initiatives taken by bodies such as Confindustria or ABI, see below), and the codes can be submitted for approval to the Ministry

of Justice. At the time of the on-site visit, the Ministry had received 40 codes of conduct, some of which have been reviewed but only three had been approved. It is not wholly clear what consequence such approval by the Ministry may have at the trial stage. Representatives of the Ministry of Justice as well as prosecutors and magistrates interviewed during the on-site visit stressed that such approval of an organisational model by the Ministry of Justice would not preclude legal persons having adopted such approved models from being held liable before a court. Thus, it would appear that this approval could be taken into account by the courts as *prima facie* evidence that the company made reasonable efforts to prevent the commission of an offence, and at least as a mitigating factor in sentencing.⁴

Public Subsidies

Public Processes: Procurement and Privatisation

Where public procurement processes are concerned, the Italian authorities indicated that, to date, companies have not been held ineligible to enter public tender because of their involvement in the payment of bribes to foreign public officials. As regards sanctions for corruption of domestic public officials, in the Enelpower case, Siemens AG has been prohibited from entering into contracts with the public administration for one year as a sanction for bribing Italian public officials, pursuant to the Decree 231/2001⁵ (see also below part B.3.b)(ii) on the possibility to impose prohibitive sanctions for foreign bribery offences). With respect to sanctions for corruption in public procurement processes, the lead examiners were informed that such instances usually resulted in the Italian Courts imposing custodial sentences on the officials concerned.

Corruption issues have been identified in the Italian public procurement process. In their answers to the Phase 2 questionnaires, the Italian authorities indeed acknowledge that some Italian public officials have been involved in either predetermining the price at which the contract is awarded or acquiescing in agreements external to the adjudicating department in order to distort the general framework of bids made as part of the tendering process. Cases have also occurred where an official has been bribed either to exclude competitors not aligned with the so-called “*cordata*” (roped party) or to arrange competitions with “tailor-made” admission requirements, in order to favour a particular participant or a restricted group of participants. Finally, a rarer and more subtle form of bribery involves tendering processes above the EU-set threshold, in which the official is bribed to exercise “discretion” in accepting or rejecting the documentation, which the participants have to present to justify the soundness and competitiveness of their bids.

Efforts at increasing transparency have however been undertaken. The Italian authorities indicated that, at the local level, certain administrations have attempted to prevent such practices by developing a protocol of understanding, whereby all the bids are subject to a “validation” process to ensure that the competition is genuine before the public procurement is publicly awarded. This appears, however, somewhat limited, both territorially, and in scope, since it would, notably, not fully prevent bribes being paid to public officials to grant or reject certain submissions in the course of the “validation process”. Thus, further efforts could usefully be undertaken to reinforce transparency in the public procurement process in Italy, notably through consolidation of the rules governing it, and supervision by a central authority.

Similarly, where privatisation processes are concerned, sanctions for corruption of (domestic or foreign) public officials have not resulted, to date, in companies being held

ineligible to participate in privatisation programmes of state-owned companies. Since the early 1990's, there has been widespread political consensus and government commitment on the progressive privatisation of state run companies in industrial, and service activities, including in oil and natural gas (ENI), banking (IRI), public utilities (ENEL), aviation (Alitalia), and food distribution (SME), and transparency needs to be sought in the context of this wide privatisation process underway in Italy. Decisions to privatise are taken by the government, with non-binding advice provided by Parliament.⁶ The Special Government Privatisation Committee, chaired by the Director General of the Treasury, is the body overseeing privatisation processes in Italy, with the objective to guarantee transparency in public tenders. In the course of a privatisation, an examiner from the Committee oversees the entire process; in this capacity, he usually appoints a bank to assess the estimated price of the company's assets. Once such an evaluation has been given, a decision is made by the Committee to proceed with the privatisation, which proposes an agenda to the government for the transactions to be opened. Safeguards are built into the process in order to prevent corruption, including exclusion of bidders with a history of corruption or in a potential situation of conflict of interest, and drawing up of a list of (twelve to fifteen) authorised bidders. Like other public officials, those employed by the privatisation authorities are under an obligation to inform judicial authorities of suspected bribery occurring in the process; no such report has been made to date in this context.

Export Credits

Applicants requesting official export credit support to SACE⁷ are informed, in the application form, of the legal consequences of paying bribes to foreign public officials in the context of their international business transactions.⁸ Further, the applicant must certify in the application form that (i) the applicant has not been and will not be involved in any act of bribery relating to the subject transaction, (ii) the applicant, its directors and its employees have not been convicted of any criminal offences against the public administration or foreign bribery, (iii) the applicant has never been banned from any list or register held by the World Bank or other international bodies, and (iv) the applicant is not aware of any criminal offence attributable to other third parties in relation to the subject transaction.⁹ Lead examiners were informed that, beyond these provisions in the application form, SACE had not informed applicants for support of the risks of corruption in foreign markets.

There was some uncertainty regarding SACE's course of action upon discovering that an insured or an exporter may be involved in bribery. At the on-site visit, the SACE official interviewed indicated that for a guarantee to be invalidated, a final judgement, handed down by an Italian court, would be necessary; awareness of evidence of corruption on the part of an Italian company under contract with SACE would not be sufficient to suspend guarantees. According to the SACE official, if, on the other hand, SACE were informed of proceedings underway in a foreign country against an Italian company having contracted export credit guarantees with SACE, it would be under an obligation to alert the prosecuting authorities,¹⁰ although, as the lead examiners were informed, no specific internal guidelines exist in this respect.

SACE provided further explanations after the on-site visit. If suspicions of bribery arise before a decision to provide support, SACE will deny coverage and alert the prosecuting authorities if appropriate. If SACE becomes aware of pending proceedings against an insured, an exporter or a person acting on their behalf under Law 300/2000 and Decree 231/2001, it would be allowed to suspend payment of the indemnity until the

proceedings are concluded. Upon conviction, SACE is entitled to recover any indemnity that has been paid. Finally, if sufficient evidence of bribery relating to the contract arises after support has been provided, SACE may ask the courts to invalidate the contract under article 1892 of the Civil Code and deny further indemnity, without having to wait for a final conviction. SACE officials indicated that, to date, such guarantees have never been revoked on the grounds of corrupt practices, as sufficient evidence of bribery by insured parties has never been ascertained.

Following the on-site visit, the lead examiners were also advised that SACE had developed an organisational model and a code of ethics pursuant to Decree 231/2001. Although the code itself is addressed to SACE employees, article 1.3 specifically states that principles contained therein apply to third parties with whom SACE deals. Article 1.5 specifies that SACE employees must inform third parties of their obligations under the code, and that clauses establishing this obligation shall be included in the contracts between SACE and its clients. In addition, violations of the code are to be reported to a supervising committee which consists of two internal members and one independent external member. The code does not specifically address the foreign bribery offence nor the obligation for SACE clients to abide by this interdiction, but merely provides a general principle of legality and morality (articles 2.1 and 2.2). Article 3.2 further indicates that SACE's clients shall respect the fundamental principles and rules contained in the code, "taking into account their legal, social, economic and cultural rules". This raises some concern as to whether the particular "cultural" context favouring the payment of bribes in certain countries or in certain industrial sectors may be taken into account.

Commentary

Given the contradictions between the views expressed by the SACE representatives interviewed, and the information and texts provided following the on-site visit, the lead examiners recommend that efforts be undertaken to promote awareness among SACE officials of the foreign bribery offence and of related obligations existing under the law and the SACE code of ethics. They encourage SACE to further develop their internal guidelines to specifically address the issue if the foreign bribery offence, and to deal with client companies suspected of bribing foreign public officials, including revocation of credit and refusal of future applications for credit. The effectiveness of SACE's code of ethics in preventing foreign bribery should be further monitored.

Development Aid

In line with Italy's commitment to the OECD's Development Assistance Committee, the documentation relating to competitive tendering for contracts funded by the Italian co-operation and development agency, whether on a gift or a loan basis, has included the following anti-bribery clause for a number of years: "No offer, gift or payment, favour or benefit of any kind whatsoever, which might be interpreted as illegal practice or bribery, has been or will be extended, either directly or indirectly, as an incentive or reward for the awarding or performance of this contract. Should any event of this kind occur, the competition would be rendered null and void." Additionally, the guidelines on poverty reduction in the context of Italian development aid include the fight against corruption as part of their general objective. At present, Italy requests any participant in competitive tendering for contracts funded by the Italian co-operation and development agency to subscribe to an "integrity pact" against corruption. The pact includes enforcement clauses such as cancellation of contract, seizure of any deposits and responsibility for any damage

caused by corruption. Following the on-site visit, the Italian authorities responsible for development aid amended the above-mentioned “integrity pact”. The pact now requires enterprises that participate in the tender process to certify that they have not been involved in acts of bribery.

A representative of the Ministry of Foreign Affairs in charge of development assistance indicated that additional texts were being prepared dealing specifically with the risks of corruption in public procurement, and containing an analytical description of the procedures to be followed in the call for tenders, particularly in developing countries. A handbook defining the procedures to be followed in funding development co-operation initiatives is also being developed and is destined for internal operators (including auditing companies), any specific interest, procurement companies appointed by those countries receiving development aid, as well as companies requesting it. An operative manual for monitoring and evaluating development co-operation initiatives (“*Manuale operative di monitoraggio e valutazione delle iniziative di Cooperazione allo Sviluppo*”) has also been published in April 2002, which does not, however, address specifically the foreign bribery offence.

Private Sector Initiatives

Actions by Business Organisations

Business organisations, such as Confapi (association of small enterprises), Confindustria, Confcommercio, AICE (Italian Association for Foreign Commerce), Assolombarda and other industrial unions have organised seminars and meetings mainly focused on the introduction in the Italian legislation of the new administrative liability for legal persons (Legislative Decree 231/2001), as well as on the reform of the false accounting legislation. Workshops and public campaigns were also held in order to encourage exchange of information on codes of ethics, organisational models and best practices. As noted previously, the specific issue of bribery of foreign public officials has essentially been addressed in the broader context of the exception under the recently introduced liability of legal persons for effectively implemented organisational and management models.

Confindustria¹¹ and Confcommercio¹², two of the largest business organisations, have issued organisational models, as recommended by the Legislative Decree 231/2001 introducing the administrative liability of legal persons in Italian law (see also on this point *Government Initiatives* above), and submitted them to the Ministry of Justice. These documents are meant to provide suggestions to enterprises wishing to adopt internal organisational models. Among the basic principles to be included therein is the prohibition of offers of bribes and illicit payments to public officials (domestic and foreign), directly or through third parties. Additionally, any violation (whether real or potential) committed should be reported in a timely manner to the competent internal body. The models also recommend establishing control and sanction mechanisms where breaches of the code have occurred. A specific “reading” (“*chiave di lettura*”) of this organisational model is also provided for small enterprises. Finally, the Confindustria guidelines provide a case study on the issue of corruption which includes examples of acts of corruption and of preventive control measures, such as the explicit prohibition of corruption in ethical principles, control of financial flows and control of external collaborators, while the Confcommercio model proposes a checklist for enterprises to ensure that all factors which may limit specific risks with respect to corruption are covered.

In 1998, the Italian Stock Exchange (*Borsa Italiana*) developed a Corporate Governance Code for listed companies, which was revised in July 2002. The Code aims to consolidate the use of best practices in governance within Italian companies, with a view to enhancing their image and appeal towards the global financial community. Compliance with the Code is voluntary. However, companies are required to report to shareholders and to *Borsa Italiana*, on the level of adoption of the Code's provisions, giving reasons for any non-compliance. Although this Code does not specifically address issues relating to the conduct of business in general and corruption in particular, it does provide for the establishment of internal control mechanisms in enterprises, which could be useful in preventing and/or detecting acts of bribery. Such internal control and risk management systems are meant to “monitor the efficiency of the company's operations, the reliability of financial information, compliance with laws and regulations, and the safeguarding of the company's assets”, and are the responsibility of the board of directors. Additionally, the Code recommends that the persons appointed to run the internal control system should be “free from hierarchical ties [...] in order to prevent interference with their independence of judgement”.

Corporate Responsibility in Italian Companies

As is the case in many OECD countries, an increasing number of Italian companies (large corporations essentially) are adopting corporate codes of conduct. These codes or principles of conduct cover various ethical issues ranging from social to environmental issues, as well as conduct of business. A preliminary review of codes made available to the examining team indicates that the issue of corruption (or the broader issue of offering gifts or bribes) is covered in most codes, through a general statement prohibiting the offer or payment of bribes (also referred to as gifts, donations of money or other assets, payoffs, presents, etc.); however, reference is only made to company policy in this regard, and not to the interdiction as set out in Italian law. Although, the geographical scope of application of these ethical principles is not always specified, most of the codes under review indicate in general terms that the principles are intended to apply to international business, or that there are to be no exceptions, not even in those countries where offering gifts of value to commercial partners is the custom. There are a few exceptions, with certain codes specifying that gift and entertainment policies of the customers and suppliers must be respected, or that attention should be paid to local custom in this respect. The issue of bribes paid through intermediaries is not expressly identified, nor are bribes paid to third parties referred to. The codes do not address either the behaviour of foreign agents, representatives and subsidiaries. However, these issues are addressed in the organisational models (see above).

With regard to whistleblowing, discussions with Italian officials and academics during the on-site visit indicated that this issue could be sensitive in Italy, due to the negative connotation linked to informers during the Second World War (concept of *delazione*). This, however, is not reflected in the company codes reviewed by the examining team. A majority of these specifically encourage employees to internally report violations of the code (usually to the body in charge of monitoring application of the code). Other codes have a more general statement entrusting employees with the efficient implementation of ethical principles. A few companies go as far as providing

confidentiality for individuals reporting violations of the code in good faith, and guaranteeing that “those making the reports are not subject to any acts of retaliation”.

Beyond the good image that the enterprise may gain from adopting codes of ethics, the question arises of the real value of these principles inside the company. The existence of efficient control mechanisms (internal and/or external) may be an indication of the importance given to the code in the company. In all the codes under review, there is always an internal body identified as “guarantor” of the code. Where they are detailed, the responsibilities of this body may include promoting and monitoring knowledge of the code, organising information and training programmes, investigating reports of violations of the code’s principles, and, sometimes, presenting the Chairman or Board of Directors with reports (generally on an annual basis) on the implementation of the code within the company. Outside controls remain rare, although one company interviewed during the on-site visit does provide for a social report on ethical and social responsibilities to be submitted to an outside audit by an independent accredited firm on a periodic basis.

Specific Situation of Small and Medium Enterprises

Similar to Confcommercio and Confindustria, Confapi (*Associazione Piccole e Medie Imprese*), a business organisation for small and medium enterprises (SMEs), has, in collaboration with M&P Risk Agency SpA, set up an organisational model for small enterprises. The “*Disciplinare API 231*” takes the form of an organisational and control system in accordance with the requirements contained in Legislative Decree 231/2001. The “*Disciplinare API 231*” is validated by the independent company RINA (*Gruppo Registro Italiano Navale*) which verifies and certifies companies adopting this model.

Representatives of Confapi (*Associazione Piccole e Medie Imprese*), a business organisation for SMEs, as well as representatives of the legal profession, indicated that, SMEs are well aware of the introduction of the administrative liability of legal persons by Decree 231/2001, although awareness of SMEs of the offence of foreign bribery appears to be uneven. The examining team was however unable to meet with representatives of SMEs. Overall, it would appear that further efforts to raise awareness among SMEs on the foreign bribery offence are warranted, notably given the important role played by Italian clusters of small and medium-sized companies operating in foreign markets.

Commentary

The lead examiners welcome initiatives already undertaken by the Italian authorities to raise awareness of the foreign bribery offence within the private sector. They encourage Italian authorities to pursue their efforts in this respect, notably where SMEs are concerned. Finally, they recommend that the Italian authorities sustain the current proactive awareness raising activities carried out by institutions such as the Ministry of Foreign Affairs through its diplomatic missions abroad.

Detection of the Foreign Bribery Offence and Related Offences

Reporting by the Parties Involved or Third Parties

Foreign bribery cases may be reported to law enforcement authorities by companies which discover that their employees have engaged in such conduct. By proactively

investigating and reporting such crimes, companies may eventually receive reduced punishment.

Foreign bribery committed by companies may also be reported by the company's employees who discover the crime. However, several police officers, academics and representatives of trade unions at the on-site visit believed that Italian employees are unlikely to become whistleblowers. First, whistleblowing is not ingrained in the Italian culture because it is linked to the historical concept of “*delazione*” (informers). Second, according to several trade union representatives, Italian labour law does not sufficiently protect whistleblowers. The representatives cited an example in which an employee was fired for reporting accounting offences committed by her company, even though the company's code of conduct contained provisions to protect whistleblowers. To encourage whistleblowing, the representatives believed that stronger whistleblower protection (whether in employment contracts or labour legislation) and additional training within companies are necessary.

Despite these problems, the lead examiners noted positively that the investigation in the Enelpower case was initiated by a source “definitely inside the company and in all probability one of the persons commissioned to verify the contracts entered into...”¹³ Furthermore, the pre-trial investigation judge has refused a request by the defence to question this source so as to protect the source's identity (on this issue of witness protection, see also part B.1.b(i) on Investigative Techniques and Resources).

Commentary

The lead examiners recommend 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.

In the Public Administration: A General Obligation

In addition to disclosure by the parties involved in committing the offence or third parties, foreign bribery offences may also be revealed by Italian public officials where they become aware of an offence in the course of performing their duties.¹⁴ Article 331 of the Code of Criminal Procedure provides that “public officials and persons charged with a public service who, in the exercise or because of their functions or their service, have news of a crime [...], must make written denunciation even if the perpetrator of the crime has not been identified”. The article further provides that such denunciation must be made “without delay”. Criminal sanctions are provided for officials that omit to make such reports in the form of fines from EUR 30 to 513, as well as imprisonment penalties where the officials omitting to make such reports are police officers.¹⁵ This level of sanctions is however not very significant and may not be sufficiently proportionate and dissuasive for public officials to feel strongly compelled to make such reports. No statistics are available concerning the number of denunciations made on the basis of this obligation, and representatives of the different administrations interviewed as well as police officers and prosecutors did not recall specific incidences where such reports had been made under this article (see also above part A.1.b(ii) on SACE's role in detecting foreign bribery offences).

Commentary

The lead examiners encourage the Italian authorities to ensure awareness by public officials, notably those employed by public agencies which could play a role in detecting and reporting bribery, of the obligation under article

331 of the Code of Criminal Procedure to report crimes detected in the course of performing their duties to law enforcement authorities, and of the sanctions which apply if this obligation is not complied with.

The Tax Administration

Non-Deductibility of Bribes

Italian tax laws now expressly prohibit the deduction of bribe payments. The tax legislation, as amended by Article 2(8) of Law 289/2002, stipulates that, “in determining income, [...] costs and expenses resulting from facts, actions or activities which may be qualified as criminal are not deductible”. The provision, which applies to both natural and legal persons, has not been considered by the courts. Prior to this amendment, courts had already held that bribe payments were illegitimate deductions.¹⁶

Given the non-deductibility of bribes, categories of allowable expenses may be used to disguise bribe payments illegally. Representatives of the Tax Administration indicated that, in their experience, the main category of allowable expenses that could be used to disguise bribe payments would be the one concerning service and consultancy expenses, as it may easily conceal bribes paid through third parties; furthermore, creation of off-shore facilities via which such expenses transit would make the uncovering of bribe payments disguised as service expenses even more difficult.

In this respect, the translation into Italian by the Ministry of Economy and Finance of *The OECD Bribery Awareness Handbook for Tax Examiners* and the accompanying explanatory note may provide useful information on the techniques used to falsify accounting records and tax documents for the purpose of hiding bribe payments. This Handbook has been made available in Italian to officials of the Tax Administration as well as to the *Guardia di Finanza*.

As regards the reporting of suspicious bribery transactions by the tax authorities to the judicial authorities, tax officials are submitted to the same general obligation as other public officials under article 331 of the Code of Criminal Procedure to report offences they discover to the criminal law enforcement authorities. Tax authorities reported 5 500, 4 800 and 2 500 cases in 2001-2003 respectively, but it is unclear how many of these cases concerned bribery.

Tax Amnesty Programmes

On 25 September 2001, Italy established a tax amnesty programme (Law 409 of 23 November 2001), known as the “Tax Shield”, which enabled Italian residents to repatriate offshore capital and assets and pay a one-time tax rate of 2.5 per cent of the principal¹⁷ (financial income is ordinarily taxed at 12.5 per cent).¹⁸ To participate, a special “confidential” return was required to be filed with an Italian bank or other financial intermediary disclosing the assets to be regularised. Those who took advantage of this programme obtained a protective shield for some tax or social security violations occurring before 1 August 2001 which may have been connected to the offshore investments being repatriated or regularised. In the Phase 2 responses, the Italian authorities provide that this programme lasted from November 2001 to 15 May 2002, and resulted in the repatriation and regularisation of assets of approximately EUR 60 billion. Due to its success, the programme was repeated at the end of 2002 through the Finance

Act for 2003, which provided for the taxation of repatriated or regularised assets at a 2.5 per cent rate for returns made by 15 May 2003, and at a 4 per cent rate for returns made after 15 May 2003 and no later than 30 June 2003.¹⁹

Law 409/2001, which establishes the tax amnesty programme, provides that criminal sanctions not having a fiscal nature (including money laundering sanctions) remained applicable with respect to the repatriated capital and assets. This was confirmed by representatives of the Tax Administration present at the on-site visit. The lead examiners expressed concern, however, that the only information available to the tax authorities to ascertain whether such assets may be liable to criminal sanctions was provided in the confidential tax returns filled by those taxpayers wishing to repatriate assets.²⁰

Representatives of the Tax Administration indicated that assessment programmes had been modified in order to allow for more efficient evaluation of such tax returns. They further indicated that in the context of the repatriation of funds under the amnesty programmes, 70 reports to the law enforcement authorities had been made by tax auditors, and that bribery investigations were under way arising from certain reports.

Commentary

The lead examiners are concerned that the tax amnesty programmes may be misused for the dissimulation of bribe payments. They recommend 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.

Disclosure by Accountants and Auditors

Accounting and Auditing Obligations

Bribe payments made to foreign public officials in the context of commercial transactions can also be detected through the analysis of books and records violations. In the Italian accounting rules, article 13 of Presidential Decree 600/73 lists the entities that are required to keep account books. Pursuant thereto, bodies or companies (public and private) that are not subject to income tax are not required to keep books, whereas all public and private bodies subject to income tax are required to keep account books.²¹ In addition, pursuant to article 18, small companies -- *i.e.* those whose profits obtained during the year do not exceed EUR 155 000 and whose purpose is the supply of services, or those whose profits do not exceed EUR 520 000 -- are permitted to keep simplified accounts.

Listed companies as well as state-owned companies, insurance companies and a few other categories of firms are required to submit to an external audit by independent companies specialised in the field. Thus non-listed companies are not required to submit to an external audit, regardless of their size and business activity. There is concern that this rule may exclude from an external audit obligation a number of important companies, as only about 275 firms are listed in Italy²² and as among Italy's 100 biggest companies, more than 40 per cent are family-owned, and 60 per cent of these are not listed on a stock exchange. Furthermore, large foreign-owned subsidiaries would not be listed and would thus not be required to submit to an external audit.

The independence of auditors is guaranteed through a series of measures under Legislative Decree 58 of 1998, which include the supervision of auditing firms by

CONSOB²³ to verify their independence and technical adequacy (article 162(1)), establishment of a limit of three financial years for engagement of an auditing company, renewable twice, and a prohibition to hire auditing firms in situations of “incompatibility”, including situations of conflict of interests. Furthermore, auditing firms are only allowed to perform auditing and services which are strictly related to the organization of the accounting system. Services such as consulting are thus prohibited (Article 6, paragraph 1 (a) of Decree 88/1992). However, this rule can be circumvented by providing the additional services through non-audit companies belonging to the same network as the audit firm. Academics indicated that the full implementation of this last rule, could more usefully contribute to reinforcing the independence of auditors than the compulsory rotation of accounting firms.

As concerns the reporting obligations of auditors, pursuant to article 155 (2) of Legislative Decree 58 of 24 February 1998, auditing firms are obliged to inform CONSOB and the board of auditors of the company, without delay, of “any facts deemed to be censurable”. It is not clear, however, whether “any facts deemed to be censurable” would include the offence of bribery of a foreign public official in every circumstance. Furthermore, pursuant to article 163 of Decree 58/1998, where CONSOB discovers “serious irregularities in the performance of auditing activity with reference to one or more engagements” it may order the auditing firm to not use, for a period of up to 2 years, the person responsible for the audit in which the irregularities were found. Overall, CONSOB representatives indicated that approximately 24 administrative sanctions had been pronounced against auditors for breach of their reporting obligation, including five in 2004. (For discussion of false accounting and auditing offences and applicable sanctions, see part B.2.c.)

Employees of CONSOB are subject to different reporting obligations than the general ones provided for by article 331 of the Code of Criminal Procedure. While performing their supervisory functions, employees of CONSOB must report any irregularities (including criminal offences) which they discover exclusively to CONSOB, not the law enforcement authorities (article 4, paragraph 11 of Decree 58/1998). The Italian authorities clarified that the rationale for this departure from the general rule is to prevent uncontrolled public dissemination of information about a crime which could negatively impact the financial markets. There are certain exceptions to the CONSOB rule of professional secrecy under article 4, paragraph 5: for instance CONSOB may exchange information with administrative and judicial authorities in connection with winding-up and bankruptcy proceedings. Although Decree 58/1998 does not specify different reporting obligations for the Chairman of CONSOB, the Italian authorities indicated that the Chairman of CONSOB, as a government appointee and not an employee of CONSOB, is in turn obliged to report the matter to the law enforcement authorities pursuant to article 331 of the Code of Criminal Procedure. In support thereof, CONSOB indicated that it had reported 71 cases of insider trading over the past four years, in addition to 355 cases involving “financial salespersons” and 4 cases of re-statement of financial statements in 2003 to the judicial authorities. In the absence of clarification concerning the legal basis for these reports, there remains some uncertainty as to whether these cases were specifically exempted from the secrecy obligation pursuant to article 4, paragraph 5 of the Decree, or were made by the Chairman by virtue of the obligation under article 331 of the Code of Criminal Procedure.

Commentary

Given the important role of accounting and auditing with respect to the detection of foreign bribery offences, and consistent with sections V.B.(i) and (ii) of the 1997 Recommendation on Combating Bribery in International Business Transactions, the lead examiners recommend that Italy broaden the categories of companies subject to an independent external audit to include certain non-listed companies with higher turnover, and ensures that all necessary steps are taken to ensure the full independence of auditors.

In addition, consistent with section V.B.(iv) of the 1997 Recommendation, the lead examiners recommend that Italy ensure the term “facts deemed to be censurable” in article 155 (2) of Decree 58/1998 includes foreign bribery, thus obligating auditors to report them to CONSOB and the board of auditors.

Audit of State-Owned and State-Controlled Entities

Under Italian laws, certain public entities, including state-owned enterprises, are subject to state audit by the *Corte dei Conti* (State Audit Court).²⁴ With respect to its audit function, the *Corte* is responsible for the audit of the State budget’s management, and thus participates in the supervision of the financial administration of those bodies to which the State contributes funds on a routine basis. It then reports its findings directly to the Chambers of Parliament.

As indicated by a representative of the *Corte dei Conti* during the on-site visit, three criteria are taken into account to determine whether a body is to be audited by the *Corte*: whether the body has been set up to achieve results of general interest; whether it has legal personality; and whether it is funded or managed by the State, or management is appointed by the State. The list of bodies audited by the *Corte dei Conti* includes, *inter alia*, SACE, ENI SpA, and ENEL SpA, while certain bodies, including some which have an important role in dealing with Italian companies involved in business activities abroad, do not appear on this list, notably the Special Government Privatisation Committee, and bodies involved in public procurement, and official development aid. Furthermore, casinos, which, in Italy, are controlled by the municipalities, are not subject to state audit by the *Corte*; this raises an additional concern.

Auditing by the *Corte dei Conti* is carried out via the supervisory bodies of the company or entity itself, as explained by a representative from the *Corte* during the on-site visit. Where company law requires that a company is also subject to an external audit, the *Corte* does not work with the external auditors. This raised some concern regarding reliance on institutional auditing bodies which may result in the non-detection of accounting omissions and falsifications in which the auditing body is involved. Relaxing existing rules to allow for co-operation between the *Corte* and external auditors, where they are involved, could increase the *Corte*’s ability to detect foreign bribery.

A representative of the *Corte dei Conti* explained that evidence of bribe payments made to foreign public officials uncovered by a state audit would be reported to Parliament where there has been damage to the State, in keeping with the *Corte*’s role to ensure “good use of public money”. However, as for all other civil servants, *Corte dei Conti* officials are subject to the general obligation under article 331 of the Code of Criminal Procedure which provides that all public officials must inform the prosecuting authorities of any crime they become aware of in the course of their service. They are

thus obliged to report any indication of foreign bribery offences. Such instances have not occurred to date, as indicated by officials interviewed at the on-site visit.

Commentary

In order to enhance the detection of bribe payments in books and records of public or publicly managed entities, the lead examiners recommend that Italy broaden the list of bodies subject to state audit by the Corte dei Conti. The lead examiners additionally recommend that the Corte dei Conti be provided with the authority to perform audits of public enterprises, notably where these entities are not subject to an external audit requirement. They further encourage Italy to modify state audit rules in order to allow for co-operation between the Corte dei Conti and external auditors, where the body being audited is also submitted to an external audit obligation.

Money Laundering

The Money Laundering Offence

Effective sanctions against money laundering may reduce the incentive to bribe foreign public officials. In Italy, the offence of money laundering is implemented by two articles in the Criminal Code. Article 648bis prohibits the substitution and transfer of money, goods or assets obtained through intentional criminal offences, and the concealment of their origin. Article 648ter prohibits the use of money, goods or assets obtained by means of criminal offences in economic and financial activities.

With respect to sanctions, both offences are punishable by imprisonment of four to twelve years and a fine of EUR 1 040 to 15 600. The punishment is increased if the offence is committed in the course of a professional activity, but decreased if the predicate offence carries a punishment of 5 years imprisonment or less. Furthermore, as discussed below, the bribe (known as *prezzo* in Italian law) and proceeds (*profitto* and *prodotto*) of foreign bribery may be confiscated pursuant to articles 240 and 322ter of the Criminal Code.

Italian officials at the on-site visit clarified a number of matters regarding these offences. They confirmed that any intentional criminal offence, including domestic and foreign bribery, may form the predicate offence for money laundering. Both offences apply regardless of where the predicate offence occurred, or whether the principal who committed the predicate offence is identified, chargeable or punishable (Cass., Div. II, 12 March 1998). The offences cover the laundering of both the bribes and the proceeds of bribery. Following the on-site visit, Italian officials also confirmed that simple possession of proceeds is covered under article 648.²⁵

However, the money laundering offences do not cover laundering by persons who commit the predicate offence. They only cover laundering by other persons who subsequently come into possession of the proceeds. A proposed legislative amendment is before the Italian legislature which may address this concern.

Legal persons generally cannot be liable for money laundering in Italy. As discussed below, legal persons cannot attract criminal liability in Italy. Also, administrative liability cannot be imposed since Legislative Decree 231 of 8 June 2001 makes no reference to either articles 648bis or 648ter. The lead examiners were advised after the on-site visit that a proposed legislative amendment will rectify this deficiency by ratifying the

Palermo UN Convention on Transnational Organised Crime. In any event, limited administrative sanctions are presently available in certain circumstances. An Italian official at the on-site visit stated that legal persons who launder money may be barred from contracting with the public administration. Furthermore, if a financial institution under the supervision of the *Banca d'Italia* engages in money laundering, its licence may be suspended or revoked (article 26(1) of Act 55 of 1990).

Commentary

The lead examiners urge the expeditious adoption of the bill criminalising money-laundering by a person who commits the predicate offence, and establishing liability of legal persons for money laundering. The lead examiners also recommend following up the impact of the non-application to legal persons of the money laundering offence to the overall effectiveness of the money laundering offence.

Money Laundering Reporting

An effective regime for reporting suspected money laundering transactions may lead to detection of the illegal activity (e.g. foreign bribery) which forms the predicate offence. In Italy, money laundering reporting is overseen primarily by its financial intelligence unit, the Ufficio Italiano dei Cambi (UIC).²⁶

Obligations of Entities Subject to Reporting Requirements

According to Italian authorities, the obligation to report suspected money laundering transactions in Italy applies to major financial institutions including banks, internet financial institutions, investment firms, insurance companies and stockbrokers. Also subject to reporting obligations are trust companies, credit recovering agencies, carriers of cash and valuables, real estate agents, antique dealers, auctioneers, dealers in gold and precious metals, casinos, loan brokers, and loans and financial salespersons. Pursuant to article 2 of Legislative Decree 56 of 20 February 2004 (which comes into force in November 2004), the reporting obligation will be extended to accountants, external auditors, notaries, lawyers.

The obligation to report arises when the manager of a branch or office of a reporting entity believes that a customer is laundering proceeds of crime. The manager must then report the matter to the head or legal representative of the reporting entity. If the head or legal representative considers the suspicions to be well-founded, he/she must forward a suspicious transaction report (STR) to the UIC. Individuals who fail to comply with these obligations are punishable by a fine of 5 to 50 per cent of the value of the transaction (articles 3 and 5(5) of Decree 143 of 3 May 1991, as amended). If the individual is unable to pay, the fine may be collected from his/her employer.

Role of the Ufficio Italiano dei Cambi (UIC)

The UIC is responsible for receiving STRs from reporting entities and analysing them with statistical tools and a database that records all financial transactions in Italy exceeding EUR 12 500. The UIC may also request additional information from reporting entities, other financial institutions, government agencies and departments, local professional associations, foreign authorities, and other financial intelligence units (article 3(10) of Decree 143/1991 and articles 5(2) and 5(3) of Decree 56/2004).

After analysing an STR, if the UIC concludes that the transaction involves money laundering, it must forward the STR and a technical report to the Anti-Mafia Investigation Department (DIA) and the special foreign exchange unit of the Guardia di Finanza. At the request of one of these law enforcement agencies, the UIC may suspend a suspicious transaction for up to 48 hours. If the relevant law enforcement agency decides no further investigation is warranted, it will inform the UIC of its decision (articles 3(4)(f), 3(5) and 3(6) of Decree 143/1991).

During the on-site visit, representatives of the UIC provided some statistics on suspicious transaction reporting. Between 1997 to the end of March 2004, the UIC received 32 456 STRs. From 2001 to 2003, 202 STRs were determined to be unrelated to money laundering. Between 1997 to the end of March 2004, law enforcement agencies determined that 1 367 STRs received from the UIC did not merit further investigation. Since June 2001, the UIC has forwarded 20 000 STRs to law enforcement agencies, over 3 per cent of which has resulted in penal proceedings. Approximately 70 per cent of cases in Italy involving money laundering or related-offences resulted from these STRs. Over the same period, the UIC suspended 31 suspicious transactions at the request of law enforcement agencies.

In addition to dealing with STRs, the UIC is also responsible for enforcing money laundering reporting obligations. The UIC conducts regular inspections of reporting entities to ensure that they have appropriate reporting procedures. Bodies that regulate the reporting entities (e.g. Banca d'Italia with respect to banks and bar associations with respect to lawyers) and law enforcement agencies are also obliged to report to the UIC any breaches of reporting obligations that they discover (articles 5(4) and 7(3) of Decree 56/2004, and article 4(7) of Legislative Decree 374 of 25 September 1999).

The UIC also provides guidelines to reporting entities to assist them in complying with reporting obligations (article 150 of Law 388 of 23 December 2000). During the on-site visit, representatives of the Banca d'Italia provided the lead examiners with a copy of the guidelines prepared in January 2001. These guidelines are fairly extensive and cover issues such as the necessary content of STRs, procedures for identifying suspicious transactions and anomaly indicators. However, the guidelines do not contain any specific information on domestic or foreign bribery.

Commentary

The lead examiners are impressed by the number of money laundering investigations which originate from suspicious transaction reports. They encourage Italy to continually update the guidelines that it provides to entities that are subject to reporting obligations.

Notes

1. When conducting investigations, the State police, *Carabinieri* and *Guardia di Finanza* are considered judicial police.
2. Similarly, article 7 provides the criteria for organization models which exonerate legal persons for offences committed by natural persons who are subject to the management or supervision of senior managers or officers.
3. In the first case under Legislative Decree 231/2001 involving liability of a legal person for acts of corruption of a domestic public official, the sanction was reduced in application of this provision. See the sentence by the Court of Pordenone, 4 November 2002.
4. This issue of the defence provided to legal persons under article 6 of Decree 231/2001 is further discussed below under B.3.b) on Liability of Legal Persons.
5. Disqualification order in the Enelpower case by the Milan Ordinary Court, 27 April 2004
6. Law 481/1995.
7. SACE SpA (*Servizi Assicurativi del Commercio Estero*) is the Italian export credit agency. It provides support for the internationalisation of the Italian economy by ensuring and reinsuring political, economic and commercial risks to which Italian operators may be exposed in the process of their international transactions.
8. The application form states that: “The applicant is aware that in order for cover not to be invalidated, the trade (or loan) contract must abide by the prescriptions of the Italian and foreign law and in particular by the penal rules including the ones about bribery of foreign public officials.”
9. When the coverage relates to Buyer’s Credit Transactions, both the insured bank and the exporter must provide these declarations.
10. Under article 331 of the Code of Criminal Procedure.
11. Confindustria is a major Italian business organisation, representing the manufacturing and service industries in Italy and grouping together more than 111 000 companies of all sizes.
12. Confcommercio, the General Confederation of Trade, Tourism, Services and SMEs is the largest enterprise-representative in Italy, with 780 000 members from the trade, tourist, service and transportation sectors.
13. Remanding order in the Enelpower case by the Milan Ordinary Court, 5 June 2003.
14. Certain Italian public officials would be in a position to learn, in the course of performing their duties, about foreign bribery offences committed by companies and entrepreneurs, as well as foreign bribery offences committed by other public officials.
15. Article 361 of the Criminal Code.
16. For instance, see decisions of the Court of Cassation, Criminal Division III, 23 September 1994, no. 2001 and Civil Division V, 19 April 2001, no. 5796

17. In the alternative, the tax payer could subscribe special State bonds for an amount equal to 12 per cent of the total amount regularised.
18. The tax shield programme provided for two procedures: 1. the repatriation to Italy of the assets held abroad, or 2) the reporting of the assets held abroad without the need for repatriation.
19. The Italian authorities explain that the new programme provides that individual income from activities abroad and received by 31 December 2001, for which repatriation or regularization has been requested, would be taxed at a 2.5 per cent rate, if the corresponding tax return was made no later than 16 May 2003, and at a 4 per cent tax rate if the return was made afterwards, but no later than 30 June 2003. Similar provisions have been adopted for commercial partnerships and corporations.
20. According to the Italian authorities, the information in the tax return is confidential for the purpose of civil tax assessments only. Furthermore, banks and financial intermediaries must report (1) information about crimes contained in these returns to the law enforcement authorities (article 14(4) of Law 409/2001), and (2) suspected money laundering transactions to UIC, Italy's financial intelligence unit (article 17(2) of Law 409/2001).
21. Those bodies whose principal or exclusive purpose is not the performance of commercial activities are subject to less onerous standards.
22. See OECD (2003), *Economic Surveys: Italy*, OECD, Paris.
23. CONSOB, the *Commissione Nazionale per le Società e la Borsa*, is the public authority responsible for regulating the Italian securities market.

In this connection, CONSOB is the competent authority for ensuring transparency and correct behaviour by securities market participants, disclosure of complete and accurate information to the investing public by listed companies, accuracy of the facts represented in the prospectuses related to offerings of transferable securities to the investing public, and compliance with regulations by auditors entered in the Special Register. It also conducts investigations with respect to potential infringements of insider dealing and market manipulation law.
24. The Italian *Corte dei Conti* is an institution with the role of safeguarding public finance (audit function) and guaranteeing the respect of jurisdictional order (jurisdictional function).
25. Article 648 of the Criminal Code prohibits any person from acquiring, receiving or concealing money or goods which are the proceeds of a criminal offence, or who assists in acquiring, receiving or concealing such money or goods, with a view to gain for himself or another.
26. The UIC, which is the Italian Foreign Exchange Office, was designated as Italy's financial intelligence unit by Legislative Decree no. 153 of 26 May 1997.

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences

The Enelpower Case

The following information concerning the Enelpower case is taken from two orders of the Milan Ordinary Court, the text of which is available to the public.¹

Enelpower SpA specialises in power generation and transmission. The Italian government has *de facto* control of the company: the government owns a 68 per cent stake in Enel SpA, which in turn owns a 100 per cent stake in Enelpower SpA. Since 1999, Enelpower SpA has obtained three contracts to construct power and desalination plants in the Abu Dhabi Emirate, Oman and Qatar. The total value of the projects was over EUR 1 billion. A consultant in the Middle East assisted Enelpower SpA in securing the contracts. After obtaining the contracts, Enelpower SpA in turn subcontracted part of the project to other companies in the energy industry. For instance, Siemens AG (a German company) agreed to provide gas turbines for a part of the project, while Alstom (a French company) agreed to supply several boilers.

Between September 2002 and January 2003, two internal audits at Enelpower SpA revealed several irregularities concerning the projects. A significant portion of the fees for the consultants in the Middle East (totalling more than USD 6 million) had been secretly transferred by the consultants into the foreign bank accounts of two senior officers of Enelpower SpA. In addition, several subcontractors of the projects (such as Alstom and Siemens AG) also transferred over EUR 6 million into the foreign bank accounts of the two senior officers, ostensibly as bribe payments to secure the subcontracts.

After receiving a tip from a confidential informer, the Italian authorities commenced an investigation into the case. The two officers of Enelpower SpA were ultimately charged with conspiracy to embezzle and conspiracy to request illegal disbursements from the subcontractors. Since the two officers are considered Italian public officials (because Enelpower SpA is controlled by the Italian government), they were also charged with domestic passive bribery for accepting payments from the subcontractors. On 5 June 2003, the Milan Ordinary Court remanded the two officers in custody pending trial. In addition, pursuant to Decree 231/2001, Siemens AG and Alstom were charged with bribery of Italian officials for allegedly bribing the two officers to win the subcontracts. On 27 April and 5 May 2004, the Milan Ordinary Court banned Siemens AG from selling gas turbines to the Italian public administration for one year as a precautionary measure.

In addition to these crimes, the two senior officers of Enelpower SpA are also being investigated for foreign bribery. The reasons for the remanding and disqualification orders indicate that, based on the confidential tip and a statement of another senior officer of Enelpower SpA, the two accused allegedly bribed officials in the Abu Dhabi Emirate, Oman and Qatar to secure the contracts for Enelpower SpA. The bribes were paid through a consultant in the Middle East; the two officers of Enelpower SpA had no direct contact with the officials. In the reasons for the remanding order at p. 29, the Court stated:

Investigations are currently in progress specifically relating to the following: identification of other criminal conduct with reference to purchases by EPW [Enelpower], the role of foreign companies in the EMI Group, the role of Interconstruct, the purchasing sector, the corruption of foreign government officials, the conduct of additional sponsors in contact with EPW...

Investigation

Law Enforcement Authorities

Independence of the Public Prosecutors' Office

Prosecutions in Italy are conducted by the Public Prosecutors' Office (PPO). Both judges and prosecutors are considered magistrates under the Constitution.²

Public prosecutors are also independent of other prosecutors, despite a hierarchical structure within the PPO. The PPO is headed by the Prosecutor General and is divided into numerous local offices, each of which covers a specific geographic region and a specific court. Each local office is staffed by prosecutors and a Chief Prosecutor, who is responsible for the general administration of the office. Cases are assigned to prosecutors on a random basis. Once assigned to a case, a prosecutor has total autonomy from the government and other prosecutors. He/she may be removed from the case only in accordance with strict rules set down by the CSM. Each prosecutor can also prioritise his/her case load. However, since each prosecutor makes these decisions individually, it is conceivable that prosecutors may take inconsistent approaches to foreign bribery prosecutions.

According to Italian officials, pursuant to directives from the CSM, all PPOs are further subdivided into working groups which specialise in particular crimes. For example, the PPO in Rome has a working group staffed with 40 public prosecutors who specialise in offences against the public administration (including bribery). However, there are no working groups in Italy which specialise only in foreign bribery, nor is there a centralised body that co-ordinates or oversees all foreign bribery cases.

Conflict of Competence

Under Italian law, the competence of a public prosecutor to investigate and prosecute a crime is based on territoriality. As noted above, the PPO is divided into local offices, each of which covers a specific geographical region. Prosecutors from a particular PPO are only competent to investigate and prosecute crimes that are connected to the region in which that PPO is located.

This principle may result in multiple simultaneous proceedings against the same person(s) for the same crime. Many crimes (including foreign bribery) have connections to more than one physical location. For instance, a company of significant size may have offices throughout Italy. Crimes committed by such a company are arguably connected to every place in which these offices are located, and therefore PPOs in each of these locations are competent to investigate. A "conflict of competence" results when multiple prosecutors from different PPOs exercise their competence to investigate the same crime.

Such "conflicts of competence" are "not infrequent" in Italy, according to one prosecutor at the on-site visit. As noted by some prosecutors during the visit, concurrent investigations resulting from these conflicts can be wasteful and counterproductive. Concurrent investigations may also waste valuable time in view of the limitation periods for concluding investigations and prosecutions.

Procedures exist to resolve multiple proceedings. One Italian official stated that prosecutors try to informally resolve the conflict whenever possible. Furthermore, under

the Code of Criminal Procedure, a prosecutor or a defendant may seek a determination of which prosecutor should have exclusive competence to prosecute. The Prosecutor General of a district Court of Appeal or the Prosecutor General of the Court of Cassation decides the matter, depending on whether the public prosecutors investigating the case are from the same district. The Code of Criminal Procedure lists the factors to be considered for resolving the conflict. The most important factor is the location of the crime.

There are also means for prosecutors to share information which may reduce the likelihood of concurrent proceedings. The PPO has a national database which contains the names of the accused and the victim (if any), the nature of a charge and the location of the offence for all on-going cases. Prosecutors may therefore search the database to verify whether similar proceedings have been brought against the same accused in a different jurisdiction.

It remains to be seen whether these procedures and mechanisms are sufficient in foreign bribery cases, or whether concurrent investigations will occur, thus causing delay and wasting resources.

Commentary

The lead examiners recommend following up the issue of whether conflicts of competence in Italy lead to delay and waste of resources, thereby decreasing the effectiveness of foreign bribery investigations.

Police Forces in Italy

Italy has a number of police forces, each with different and overlapping jurisdiction. 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).

Established under the Ministry of Finance, the *Guardia* is a national police force. It specialises in financial crimes including bribery, money laundering and tax offences and has expertise in dealing with issues that frequently arise in such investigations, such as forensic accounting. The *Carabinieri* and the State Police answer to the Ministry of Defence and Ministry of the Interior respectively. They 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. None of these forces have units specialising in foreign bribery (although the *Carabinieri* has special units dealing with bribery generally). There are also other police forces which specialise in other types of crimes. For example, the *Direzione Investigativa Antimafia* (DIA) specialises in organised crime and consists of police officers from the *Guardia*, the *Carabinieri* and the State Police.

During the visit, an issue arose regarding the presence of law enforcement in Campione d'Italia, a small enclave surrounded by Switzerland 20 miles from the Swiss-Italian border. The enclave is part of Italy and subject to Italian law. During the visit, there was some uncertainty amongst Italian officials over how easy it would be, in practical terms, to enforce the foreign bribery offence in the enclave. After the visit, Italian authorities clarified that Campione d'Italia is governed by Rome via the administrative province of Como. The enclave's main source of revenue is from its casino, which is owned by the Italian government. The official currency is the Swiss franc and all banking is done through Swiss banks. Residents are subject to corporation, personal income and municipal taxes.

The Conduct of Investigations

Under Italian law, a public prosecutor is in charge of criminal investigations and has the power to direct the judicial police to conduct investigations. Accordingly, the police have no authority to withhold information; they must provide all intelligence and complaints that they receive to public prosecutors.

When a prosecutor is assigned to a case, he/she may choose which police force(s) to use for the investigation. The prosecutor has a great deal of flexibility in this regard and the decision is often driven by the nature of the case. For instance, in a case of foreign bribery, a prosecutor may choose the *Guardia* for its expertise in financial matters, or he/she may choose the *Carabinieri's* special units on bribery offences. Such flexibility allows a prosecutor to draw on the strengths of the available law enforcement agencies. However, since no agency is vested with the responsibility of investigating foreign bribery cases, there may be less incentive for the agencies to develop expertise in this area.

Investigative Techniques and Resources

As with other serious crimes, a range of investigative techniques is available for investigating foreign bribery, including wiretapping, interception of e-mail and faxes, bugging, and video surveillance. Undercover operators may be used where money laundering is involved. Protection may be offered to co-operating witnesses in exchange for their testimony. The identity of a confidential informer may be withheld from an accused during the investigation, as shown by the Enelpower case.³ All police forces have the usual powers of compelling, inspecting and seizing records from financial institutions. Police forces such as the *Guardia* have some special skills in investigating financial crimes. When more specialised skills (such as complex forensic accounting) are required, a prosecutor may hire an outside expert.

The use of these investigative techniques and outside experts is expensive. As one Italian prosecutor pointed out, the pressure on resources is particularly great in bribery investigations since such investigations often lead to discovery of additional offences, which increases the demand for resources.

Up until 2003, the resources for criminal investigations in Italy appeared almost limitless. There was no pre-allocated budget for criminal investigations prior to each year; the amount that was actually spent was entered into the government's books at the end of each year. Significant resources were expended on criminal investigations under this system. In 2003 alone, an estimated EUR 300-345 million was spent on wiretapping. In 2004, this practice was changed to the more conventional approach of allocating a fixed amount at the beginning of each year. The impact of this new method on the effectiveness of foreign bribery investigations remains to be seen.

Mutual Legal Assistance

The significance of mutual legal assistance under the Convention is two-fold. First, article 9 of the Convention requires each Party to provide prompt and effective legal assistance to another Party to the fullest extent possible under its laws, treaties and arrangements. Second, a Party can effectively investigate and prosecute foreign bribery only if it can seek and use evidence from abroad. Therefore, an efficient and comprehensive system to both seek and provide mutual legal assistance is crucial.

International Instruments

Italy is a party to several multilateral conventions on mutual legal assistance, including the European Convention on Mutual Assistance in Criminal Matters (1959 – the Strasbourg Convention) and its Additional Protocol (1978), the Convention Applying the Schengen Agreement (1990), and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990). A bill is pending to implement the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000). Italy is also a party to 21 bilateral treaties on mutual legal assistance. In total, it has arrangements for mutual legal assistance with 8 non-EU Parties to the OECD Convention. In the absence of an applicable treaty or convention, Italy will exercise its discretion to render assistance if a requesting state guarantees reciprocity (article 723 of the Code of Criminal Procedure).

According to Italian officials, although Italy does not impose criminal liability against legal persons, Italy can nevertheless provide and obtain mutual legal assistance in investigations of crimes committed by legal persons, regardless of whether natural persons are also being investigated. The sole precondition to assistance is whether the activity under investigation is criminal. In support of its position, Italy provided the lead examiners with copies of several incoming and outgoing requests for assistance.

Commentary

The lead examiners recommend that the Working Group monitor Italy's ability to provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons.

Recent Amendments

On its face, articles 9 and 13 of Law 367 of 5 October 2001 may reduce Italy's ability to obtain foreign evidence. These provisions require the execution of requests for assistance to conform to general international law and international conventions (including the Strasbourg Convention). Evidence gathered in breach of these provisions is inadmissible at trial. Initially, the lead examiners were concerned that a strict application of these provisions (such article 3 of the Strasbourg Convention which requires a requested state to provide certified copies of documents) may hinder Italy's ability to use foreign evidence.

However, Italian officials referred to case law that addressed these concerns. In particular, the Court of Cassation has held⁴ that admissibility of foreign evidence must be determined in light of recent international custom which demands less formalism in international assistance. Hence, evidence that do not strictly comply with the formal requirements in international conventions and international law may nevertheless be admissible in Italian courts. In light of this principled approach to interpreting Law 367/2001, the lead examiners are satisfied that the law will not prevent Italian law enforcement from using evidence gathered abroad effectively.

Practical Issues

Italian officials stated that they work closely with requesting states to ensure that assistance is provided readily and efficiently. Problems are rare and Italy has not denied a request in the past two-and-a-half years. Incoming requests under the Schengen Convention are sent directly to judicial authorities for execution. Other requests are forwarded by the Ministry of Justice to the Prosecutor General of the relevant district

before being assigned to a prosecutor who specialises in mutual legal assistance matters. All requests are executed as promptly as possible.

Outgoing requests appear to be more problematic. Officials from the Ministry of Justice and law enforcement agreed that requests to countries in the European Union under the Schengen Convention are often executed with little delay. On the other hand, non-EU countries usually take longer to respond, if they respond at all. Representatives of law enforcement also stated that they have encountered difficulties in seeking assistance from non-EU countries because the procedures differ amongst countries. In some cases, requests are not formulated properly and are returned. Therefore, the lead examiners believe that it may be beneficial for officials at the Ministry of Justice who are more familiar with the procedures of non-EU countries to provide more training and assistance to law enforcement. Italy should also consider organising meetings to facilitate an exchange of experiences and concerns amongst officials who are involved in mutual legal assistance.

Commentary

The lead examiners are satisfied that, as interpreted by the jurisprudence, Italy has an operational legal framework for seeking and providing mutual legal assistance. On a practical level, it may be beneficial for 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. The lead examiners also suggest that Italy organise meetings to facilitate an exchange of experiences and concerns amongst officials who are involved in mutual legal assistance.

Extradition

An effective scheme for providing and obtaining extradition is essential to combating foreign bribery. In Italy, extradition is implemented by Book XI, Title II of the Code of Criminal Procedure. Dual criminality is a precondition to extradition under most extradition treaties to which Italy is a party.

The lead examiners are concerned that the requirement of dual criminality, coupled with the defence of *concussione*, may be an obstacle to extradition for foreign bribery. As discussed below,⁵ an individual in Italy is not guilty of bribery if an official extracts an advantage from the individual as consideration for performing or omitting to perform an official act. In the extradition context, if there is evidence that a foreign official extracted (within the meaning of Italian law) an advantage from the person sought for extradition, then arguably the conduct of that person is not an offence under Italian law. Therefore, there is no dual criminality and the individual could not be extradited from Italy.

At the on-site visit, officials from the Ministry of Justice were unable to say whether such a defence could be raised in the extradition process. If the answer is yes, *concussione* may be a significant obstacle to Italy's ability to extradite persons who have bribed foreign public officials considering how little evidence is needed to raise the defence. One official suggested that in these circumstances the person sought may be extradited on the condition that he/she will not be convicted if there had been *concussione*. This solution is unsatisfactory because it essentially allows a briber to raise the Italian defence of *concussione* in a foreign state which may have a different standard or no defence of *concussione*.

Commentary

The lead examiners are concerned that a person sought for extradition can raise the defence of *conscuzione* to prevent extradition. In the absence of case law or practice to the contrary, this issue should be monitored.

Prosecution and Adjudication

The Offence of Foreign Bribery

Establishing the Offence

Istigazione Alla Corruzione and Attempt

Under Italian law, acceptance of a bribe by an official is an essential element of the basic offence of bribery (including foreign bribery). However, the offence of foreign bribery in article 1 of the Convention is broader and covers bribes that are given, offered or promised but not accepted by an official. To cover these additional cases, Italian law resorts to an additional offence of *istigazione alla corruzione*.

The offence of *istigazione alla corruzione* is defined in article 322 of the Criminal Code:

- (1) 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.
- (2) 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/her office, or to act in breach of his/her 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.

Following the on-site visit, Italian officials further explained that *istigazione alla corruzione* arises only when the official concerned has not accepted (including a refusal of) the offer or promise of money or other assets. The offence does not cover an offer or promise that was made but was not received by the official.

Concerning the application of article 322 to foreign bribery, it is not wholly clear to the lead examiners whether the offence complies fully with the Convention. Italy defined *istigazione alla corruzione* in its response to the Phase 2 questionnaire at p. 6:

For [*istigazione alla corruzione*] to be prosecuted, the offer (or promise) must nevertheless be serious, potentially and functionally likely to induce the recipient to perform an action contrary to his official duties, and such as will probably affect the mind of the public official or public service agent in such a way that there is a danger of his accepting the offer or promise. The likelihood of the offer achieving its purpose has to be assessed by making an ex-ante judgement taking into account the magnitude of the reward, the personal qualities of the recipient,

his financial position and all other aspects of the individual case (Cass., Div. VI, 29 January 1998; Cass., 15 December 1989; Cass., 25 February 1987). [Underlining added]

Italy continued at p. 18:

According to Italian specific cases, the offence of [*istigazione alla corruzione*] has been committed when the offer or promise of money or other benefit gives rise to a danger of the public official accepting the offer or promise, taking into account the magnitude of the payment, the personal qualities of the recipient, his financial position, and every other aspect of the individual case (Cass., Div. 29 January 1998). [Underlining added]

After the on-site visit, Italian authorities added that *istigazione alla corruzione* does not arise when a payment is unlikely to be persuasive and minimal. The means, circumstances and position of the public official concerned are all factors that must be considered.

These points initially caused the lead examiners some concern. Pursuant to Commentary 7 of the Convention, foreign bribery is an offence “irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.” The offence of *istigazione alla corruzione* appears to take into consideration some of these extraneous factors and therefore may be inconsistent with Commentary 7.

However, this concern has been largely alleviated by the offence of attempt. Italy explained that attempted bribery applies to offers or promises to bribe that have not been rejected by the public official. Attempted bribery is broader in scope than *istigazione alla corruzione* because it covers attempts that are thwarted and attempts to do the impossible. As well, according to one prosecutor, attempted bribery covers an offer to bribe which is mailed by a briber but is not delivered to an official.⁶ It also covers a case in which negotiations between a briber and an official are interrupted (*e.g.* by a police investigation) before an agreement is reached. Unlike *istigazione alla corruzione*, attempted bribery does not involve a consideration of the magnitude of the payment, or the personal qualities and financial situation of the public official.⁷

Commentary

The lead examiners recommend that the Working Group monitor 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.

Bribery through Intermediaries

Unlike article 1 of the Convention, article 322bis(2) does not expressly cover bribery through an intermediary. On the contrary, since an agreement between a briber and an official is an essential element of the offence, the lead examiners wanted to be sure that the offence does not cover a briber who uses an intermediary to approach a public official since there is no direct contact or agreement between the parties.

During the on-site visit, Italian officials referred to one case in support of their position that bribery through an intermediary is covered where there is no direct

agreement between the briber and the public official. In this case, an individual was convicted of bribing a domestic public official through two intermediaries, even though the individual never met the public official.⁸

The Italian authorities also pointed out that in the Enelpower case, two officers of Enelpower allegedly hired an agent to bribe a foreign public official. There was no evidence that the briber had any direct contact with the official, or that the official knew the briber had given funds to the intermediary for the bribe.

Third Party Beneficiaries

Unlike article 1 of the Convention, article 322bis(2) does not refer to situations where bribe payments are provided directly to third parties. During the Phase 1 review, Italy stated that third parties are covered since article 322bis(2) refers to articles 318 and 319 (through articles 321 and 322), which state that the offence of bribery covers a public officer who “receives money or other assets or the promise thereof, for himself or a third party”. In view of the complexity of the cross-references, the Working Group recommended revisiting this issue in Phase 2.

In its responses to the Phase 2 questionnaire and supplemental questions, Italy reiterated its position in Phase 1. During the on-site visit, Italy added that the key element in the bribery offence is whether a briber and a public official have reached an agreement. The offence is complete once the briber agrees to provide a benefit (whether to the public official or a third party, and whether directly or indirectly) in return for performing or omitting to perform an official act. It is immaterial to whom the benefit is ultimately provided or whether the benefit is in fact provided at all. During the visit, all Italian representatives agreed that the offence covers a benefit that is provided directly to a third party without having first passed through the foreign public official.

Italian courts have considered a similar but not identical situation. The Court of Cassation has held that the offence of domestic bribery is complete when a public official, after receiving a bribe, forwards all or part of the bribe to his/her political party (Cass., 12 May 1982, S.). However, the courts have yet to consider a case in which a briber pays a bribe directly to a third party beneficiary.

Although there is no case law that is directly on point, the lead examiners are nevertheless satisfied with Italy’s exhaustive explanation that article 322bis(2) covers third party beneficiaries.

Defence of Concussione

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 of the Criminal Code, while the individual is considered a victim.⁹ During the Phase 1 review, the Working Group was concerned that the concept of *concussione* may weaken the application of the Convention and decided that this matter merited further study in Phase 2.

At the on-site visit, the vast majority of the participants opined that the defence of *concussione* applies equally to domestic and foreign bribery. However, some participants took the contrary position because, unlike article 322bis(1) of the Criminal Code, article 322bis(2) does not refer to article 317, which defines the offence of *concussione*. One

legal academic reached the same conclusion on the basis that the availability of this defence is inconsistent with the Convention and hence contrary to article 10(1) of the Italian Constitution.¹⁰ No case law was cited in support of any of these positions.

Assuming *concussione* applies to foreign bribery, one issue is the scope of the defence. The Italian Court of Cassation has stated that *concussione* arises when a public official has psychologically coerced a private individual:

[I]t is not sufficient that the private individual be convinced that he is bound to accede to the public official's demand for money or some other benefit; it is necessary that such conviction be the result of the official's actual behaviour. This behaviour must take the form of some kind of psychological coercion, for instance the interposing of specious obstacles or delays to the normal performance of the administrative activity, such as to exercise over the mind of the passive party pressure that makes him decide to go along with the imposition in order to avoid the danger of damage that could not otherwise be avoided, the occurrence of which derives from the agent's functions (Cass., Div. VI, 13 November 1997, M.). [Underlining added]

During the on-site visit, the participants offered various opinions on this issue. Some participants distinguished *concussione* from bribery in terms of a balance of power. *Concussione* arises when a public official abuses his/her position of power over a private individual by demanding an advantage from the individual in return for not harming him/her. Perceiving no alternative of avoiding the harm, the individual submits to the demand. On the other hand, bribery occurs when a private individual bargains with a public official on equal footing and provides one advantage to the official in return for another.

Several participants of the on-site visit stated that another important factor in identifying *concussione* is the nature of the thing accruing to a private individual. Bribery generally occurs when an individual provides an advantage to obtain a benefit to which he/she was not entitled. One prosecutor explained that *concussione* usually arises when an individual provides an advantage to avoid harm or damage. He did not state whether harm avoidance includes a payment to retain business, and payment to obtain business where substantial outlays had already been made.

A representative of the Ministry of Justice added that *concussione* arises when a public official's conduct is "promotional" in nature, which appears to mean that there had been positive solicitation by the official.

The definition of *concussione* is further complicated by the concept of *concussione ambientale* which was developed by the jurisprudence in the 1990s. According to a prosecutor and a judge at the visit, this form of *concussione* occurs when an individual is in an environment which leads him/her to believe that he/she must provide a public official with an advantage, either to avoid harm or to obtain something to which he/she is entitled. Compelled by this environment and without any express demands from the official, the individual obliges. This concept demonstrates that the defence of *concussione* may apply even where there is no solicitation or a threat by an official.¹¹

The task of distinguishing bribery from *concussione* may sometimes be driven by practical, evidentiary concerns. During the on-site visit, one judge pointed out that magistrates often have scant evidence in bribery or *concussione* cases, which makes it very difficult to determine whether an individual was psychologically coerced or whether

there was an imbalance of power between the parties. For this reason, according to two defence counsel at the visit, 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. By proceeding in this fashion, a magistrate has at least enough evidence to secure a conviction against the official for *concussione*, rather than see both the individual and the official be acquitted of bribery.

Another defence counsel believed that the seriousness of an offence may also play a role. The more serious an offence, the greater the pressure on magistrates to solve the case, and the stronger the temptation to characterise the case as *concussione* in order to obtain testimony from a private individual for use against an official.

These points raise several concerns. Given this myriad of factors, it is no surprise that the distinction between bribery and *concussione* is often nebulous in practice. According to a judge at the on-site visit, this issue has been the subject of much judicial debate. What is clear is that there is no clear line between the two concepts. For instance, the lead examiners asked participants in the on-site visit to consider a hypothetical situation in which an official refused to allow an individual to tender for a contract unless the individual provided him/her with an advantage. Most participants agreed that this would be a case of bribery, not *concussione*. One magistrate disagreed. Neither side cited case law in support.

This hypothetical situation illustrates another concern: the potential breadth of the defence. An individual who perceives a need to pay an official in order to submit a tender or to retain a contract so as to avoid the loss of jobs can conceivably invoke this defence. It is also not clear whether the defence applies to payments made to retain business, or to obtain business where substantial outlays had already been made. Such a state of affairs is inconsistent with Commentary 7 of the Convention,¹² which states that it is an offence under the Convention “irrespective of, *inter alia*, the ... alleged necessity of the payment in order to obtain or retain business or other improper advantage”.¹³

At the on-site visit, Italy justified the application of the defence of *concussione* to foreign bribery on the basis of “equivalence”. 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. However, this argument fails to address two points. First, when *concussione* arises in a case of domestic bribery, the official who committed the offence will be prosecuted. Indeed, this is one motivation for magistrates to characterise a transaction as *concussione* rather than a bribe. In a case of foreign bribery, there is no guarantee that the foreign official will be convicted since the foreign state may refuse to prosecute the official, or because the foreign official’s conduct does not amount to an offence. Second, while the offence of domestic bribery is aimed primarily at preserving the integrity of a country’s own public administration, the Convention aims primarily to preserve good governance and economic development, and to prevent distortion of international competitive conditions.¹⁴ Therefore, in the lead examiners’ view, there remains no justification for making *concussione* available as a defence to foreign bribery.

The lead examiners also believe that the defence of *concussione* is connected to the requirement of an agreement as an element of the offence of bribery. During the visit, a prosecutor and a judge described the essence of this issue as the distinction between an agreement and *concussione*. Thus, the defence of *concussione* hails back to the underlying requirement of an agreement as the basis of bribery. A valid agreement (*i.e.* a

meeting of minds) does not exist where one party has entered it under duress. It may be impossible to remove the defence of *concussione* as long as bribery is construed as an agreement, since the defence of *concussione* is a logical consequence of the requirement of an agreement.

Commentary

The scope of the defence of concussione appears to be broad in scope and not clearly limited. The policy reasons which underpin the defence in domestic bribery do not apply in the same manner in the foreign bribery context. Furthermore, if the defence is available for foreign bribery, it may be inconsistent with Commentary 7 of the Convention. Accordingly, the lead examiners recommend that Italy amend its legislation to exclude the defence of concussione from the offence of foreign bribery.

Limitation Periods and Delays in Proceedings

To effectively combat foreign bribery, any statute of limitations applicable to the offence must allow an adequate period of time for investigation and prosecution. In Italy, two limitation periods apply to the offence of foreign bribery, one for the conclusion of an investigation and one for the conclusion of a prosecution.

Limitation Period for the Conclusion of an Investigation

The Code of Criminal Procedure limits the length of an investigation in order to protect the interests of persons under investigation. After commencing an investigation by filing a *notitia criminis*, a public prosecutor has six months to complete an investigation. Before the expiry of this period, the public prosecutor must present the evidence to a preliminary investigations judge (GIP), who will decide whether there is sufficient evidence to commit the investigated person to trial. In complex cases, the GIP may extend the limitation period to 18 months on application of the prosecutor. In exceptional cases, the GIP may further extend the period to 24 months.

Italian officials at the on-site visit were divided over whether this limitation period is sufficient for investigating foreign bribery offences. One public prosecutor stated that, in his experience in prosecuting domestic offences, the period is sufficient as long as the prosecution pursues an investigation diligently.

Yet the same may not be true of transnational cases, such as foreign bribery, which often entail gathering evidence from abroad through mutual legal assistance arrangements. Delays in receiving foreign evidence appear to be common in Italy; however, this is not a factor which extends the limitation period for investigations. Representatives from the *Carabinieri* and the *Guardia di Finanza* both stated that, although gathering evidence from countries in the European Union is relatively efficient and simple, gathering evidence from non-EU countries is often cumbersome and slow. Another prosecutor added that requested states sometimes do not reply to requests at all.

Italian officials believe that some of these concerns are alleviated because evidence received from a foreign state outside the limitation period is admissible at trial if the request for assistance was sent within the limitation period. Nevertheless, the lead examiners remained concerned that some cases may be jeopardised if an investigation cannot progress until foreign evidence arrives. Italian officials also stated that, if an investigation is terminated because a GIP dismisses the case at a preliminary hearing for

lack of evidence, a public prosecutor may apply to the GIP to re-open the investigation if additional foreign evidence arrives later. While this may be true, the resulting delay may cause the limitation period for concluding a prosecution to expire (see next section).

Limitation Period for the Conclusion of a Prosecution

The base limitation period for a prosecution of foreign bribery in Italy is five years.¹⁵ The limitation period commences when the offender completes the offence or, in the case of an attempt, when he/she ceases to perform activities that constitute an attempt.

The limitation period may be suspended or interrupted in certain circumstances (*e.g.* when a defendant seeks an adjournment of a trial for medical reasons). An interruption resets the limitation period and time runs anew from the end of the event causing the interruption. A suspension merely stops the running of time temporarily.

Superimposed on this base limitation period is an “ultimate” limitation period, which is one-and-a-half times the length of the base limitation period (*i.e.* seven-and-a-half years for most foreign bribery offences). Both the base and ultimate limitation periods commence at the same time. The only difference between the two periods is that no suspensions or interruptions apply to the ultimate limitation period.

The lengths of these limitation periods in Italy are *prima facie* unremarkable when compared to those in other jurisdictions. However, the lead examiners are concerned that lengthy delays in Italian criminal proceedings may cause limitation periods to expire in foreign bribery cases.

Delays in the Italian criminal justice system are well-documented. At the on-site visit, one judge stated that there are long delays in complex cases involving multiple defendants. Other practitioners and academics noted that the cause of delay is multifarious. Complex investigations, lengthy trials, an overburdened judiciary and prosecutors’ office, and too many cases in the system (because of the principle of mandatory prosecution¹⁶) all contribute to the problem. The situation is exacerbated in a foreign bribery investigation because, as noted above, there are frequent delays in gathering evidence.

The lead examiners are further concerned that recent legislation for changing the venue of a trial may worsen the situation. Previously the venue of a trial was changed only when there were serious, unavoidable local circumstances which were likely to disturb the progress of the trial, and which affected the impartiality of a judge or the safety of the public. Under Law 248 of 7 November 2002, the venue can now be changed when there is only a “legitimate suspicion” that these circumstances exist. Whether this new provision leads to increased trial delays remains to be seen. However, the Court of Cassation¹⁷ has held that a “legitimate suspicion” arises only in exceptional cases, and that notions such as “grave local conditions” should be strictly interpreted. Such a narrow interpretation of Law 248/2002 will hopefully minimise the impact of the law on trial delays.

Commentary

The lead examiners are concerned that the limitation periods for investigating and prosecuting foreign bribery may be too short because of lengthy delays in the Italian criminal justice system. The lead examiners recommend that Italy consider extending the length of the ultimate limitation period for the offence of foreign bribery. In the lead examiners’ view, this issue also merits further monitoring.

Jurisdiction

Nationality Jurisdiction

The provisions relevant to the application of nationality jurisdiction over the offence of bribery of foreign public officials committed abroad are covered in articles 7 and 9 of the Italian Criminal Code.

Under article 7(4) and (5) of the Criminal Code, Italy can exercise nationality jurisdiction over a citizen or an alien for an offence committed by a public officer in the service of the State by abusing the powers or violating the duties of his/her office, as well as for offences for which specific provisions of Italian law or international conventions prescribe the applicability of Italian penal law. Since article 322bis of the Italian Criminal Code on bribery of foreign public officials does not specifically provide for the application of nationality jurisdiction under article 7, these provisions may not apply in cases involving foreign bribery offences.

Concerning nationality jurisdiction under article 9 of the Italian Criminal Code, which applies for offences other than those covered by articles 7 and 8,¹⁸ the Ministry of Justice provided conflicting views during the on-site visit concerning its application. According to certain Ministry representatives, since the foreign bribery offence is punishable by imprisonment, nationality jurisdiction for foreign bribery offences would apply upon the request of the Minister of Justice or upon application or complaint of the victim, pursuant to article 9(2);¹⁹ in this respect, foreign governments could be considered as victims, as established, in other situations, by Italian jurisprudence. Other Ministry of Justice magistrates, as well as an academic, stated, however, that in their view the basis for nationality jurisdiction in foreign bribery cases would be article 9(3) of the Criminal Code, since such offences should be considered as offences to the detriment of a foreign country.²⁰ Furthermore, they indicated that application of article 9(3) is exercised at the absolute discretion of the Minister of Justice where the offence is considered “political”, and confirmed that bribery of a high ranking foreign public official could be considered a political crime in this respect. However, they were of the view that, in such cases, the Minister of Justice would be bound by Italy’s engagements under article 5 of the Convention in exercising his discretion.

Commentary

In the absence of case law, the lead examiners recommend following up the use of the powers of the Minister of Justice in deciding whether to assert nationality jurisdiction to prosecute a natural person.

Liability of Legal Persons

Criminal liability cannot be attributed to legal persons in Italy (article 27(1) of the Constitution). However, under Decree 231/2001, administrative liability may be attributed to legal persons for certain criminal offences (including foreign bribery and false accounting) committed by a natural person. During the Phase 1 Review, the Working Group concluded that the Decree complies with the requirements of the Convention but that its application should be monitored in view of its novelty.

Italian officials have provided the details of one case under the Decree. In November 2002, the Court of Pordenone convicted a company whose representative had attempted to bribe an Italian public official. Sixteen other cases under the Decree are pending. Eight

companies have been ordered to stand trial, while others have plea-bargained. Detailed information on these additional cases was not provided.

Scope of Application

“Bodies” Covered by the Decree

Decree 231/2001 applies to a wide-range of entities known as “bodies”. Pursuant to article 1, in addition to corporations, the Decree applies to companies and associations that do not have legal personality. However, the Decree does not apply to state, regional and local public authorities, other not-for-profit public bodies, and bodies “performing functions of constitutional significance”.

Concerning the application of the Decree to state-owned and state-controlled companies, a representative of the *Corte dei Conti* (State Audit Court) stated that companies audited by the Court “should” be covered by the Decree, but that this has not yet been tested. When asked why Enelpower has not been charged with foreign bribery, representatives of the Ministry of Justice responded that Enelpower did not commit an offence because it did not receive an advantage, although Enelpower could have liability in the abstract. The representatives did not reconcile this statement with article 5.1 of the Decree, which does not require that bodies receive an advantage, only that they are liable for offences “committed in their interest or at their advantage”. The Italian authorities indicated nonetheless that, in their view, state-owned and state-controlled companies would be covered.

Commentary

The lead examiners recommend that the Working Group monitor whether Decree 231/2001 effectively covers state-owned and state-controlled companies.

Principal Offenders Covered by the Decree

The Decree imposes liability against 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 those who carry out “activities of representation, administration or management of the body or of one of its organisational units having financial and operating autonomy.” Also included are “persons carrying out ... activities of management and supervision of the said body”, including persons who perform such functions on a *de facto* basis (article 5(1)).

Liability under the Decree also depends on whether a body benefits from the crime. A body is liable only for offences “committed in its interest and to its advantage”. The body is not liable if the principal offender acted exclusively in the interests of him/herself or a third party (article 5). Thus it remains to be seen whether the Decree imposes liability against a body when a principal offender bribes to the advantage of the body’s subsidiary and *vice versa*.

Proceedings in Relation to Principal Offender

Since liability against a body depends on whether a natural person has committed a crime, the Decree contemplates that the body and the natural person will generally be

tried together (article 38). However, according to Italian officials, a conviction against the principal offender is not necessary to ground a conviction against the legal person, since article 8(1)(a) stipulates that a body 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.

The procedure for initiating proceedings against a body is similar to proceedings against a natural person. When a public prosecutor is informed of an administrative violation by a body, he/she must file a *notitia criminis* in a register (article 55). The *notitia criminis* does not have to identify a suspect (whether a natural or legal person) (article 335, Code of Criminal Procedure). If the subsequent investigation identifies only a legal but not a natural person as a suspect, the proceedings will continue against the legal person (article 38(2)(c), Decree 231/2001 and article 415, Code of Criminal Procedure). After a *notitia criminis* is filed, the prosecutor must conduct an investigation within the same limitation period which applies when a natural person commits the offence (article 56). A preliminary investigations judge then conducts a preliminary hearing to determine whether there is sufficient evidence to commit the body to trial (article 61). Other provisions in the Decree define the trial and appeal process (articles 62 to 73). Furthermore, the Code of Criminal Procedure and all procedural provisions that apply to a principal offender also apply to proceedings against bodies under the Decree, to the extent that they are compatible (articles 34 and 35).

Although article 8 provides for “autonomous prosecutions” of legal persons, other provisions in the Decree appear to presuppose that legal persons may be prosecuted only if a natural person has been identified and charged. Article 38(1) mandates that the proceedings for the legal person shall be consolidated with the criminal proceedings against the offender. And article 38(2) provides the only circumstances under which the proceedings for a legal person shall be separated from those against the natural person. Both these provisions appear to presuppose that a natural person has been identified and charged. Furthermore, a magistrate and a prosecutor at the on-site visit reiterated the principle of autonomous prosecution of legal persons. Thus this issue should be further monitored.

Commentary

The lead examiners recommend follow-up of the procedure for the administrative liability of legal persons to verify whether, in practice, there are legal difficulties involved in proceeding against legal persons in the absence of proceedings against the natural person who perpetrated the bribery acts.

Jurisdiction

As indicated above, jurisdiction under the Decree varies depending on whether the principal offender committed the offence in Italy (in which case Italy exercises territorial jurisdiction to prosecute the principal) or abroad (in which case Italy must exercise nationality jurisdiction to prosecute the principal).

Offences Committed in Italy

When the principal commits an offence in Italy, Italy has jurisdiction to proceed against “corporations with legal personality and to companies and associations, including those which do not have legal personality” (article 1(2)). It is clear that this provision covers legal persons incorporated in Italy.

With respect to legal persons incorporated elsewhere, Italian officials explained that legal persons who conduct business in Italy must be registered, which would bring them within the purview of article 1(2) of the Decree. This is demonstrated in the Enelpower case in which, as noted above, Siemens AG (a German company) has been charged under the Decree for bribing officers of Enelpower (who are Italian public officials). However, it remains to be seen whether the Decree covers a legal person who does not conduct business (and hence is not registered) in Italy, and who sends a representative to Italy to bribe a non-Italian public official.

Also, the Ministry of Justice explained that article 6 of the Criminal Code on territorial jurisdiction applies to offences under Decree 231/2001. Given that article 6 expressly applies to acts or omissions that occur in Italy “in whole or in part”, it is important that this broad form of territorial jurisdiction applies to legal persons. Nevertheless, the Decree does not expressly refer to the Criminal Code in this respect, whereas it contains an autonomous provision concerning extraterritorial jurisdiction.

Italian authorities provided a different explanation after the on-site visit. When an offence is committed “in whole or in part” in Italy, Italian authorities have jurisdiction to prosecute the natural person who committed the offence, and jurisdiction to prosecute any legal persons necessarily follows.

Commentary

There is uncertainty over whether Italy has jurisdiction to prosecute foreign legal persons whose representatives bribe non-Italian officials in Italy, and whether article 1 of Decree 231/2001 can be the basis for jurisdiction in these cases. The development of case law on this issue should be monitored.

Offences Committed Abroad – Generally

When a principal offender commits an offence abroad, Italy may exercise nationality jurisdiction over the principal under the Criminal Code. In these circumstances, Italy may proceed against a legal person only if the legal person has a head office in Italy and if the country in which the offence was committed does not initiate proceedings against the body in question (article 4(1)).

The definition of “head office” is not defined in the Decree. During the introductory remarks, a representative of the Ministry of Justice stated that the most important Italian companies have their headquarters in Rome. She clarified that the meetings of the Boards of Directors of most of these companies are held in Rome. Later, in a different panel, a representative of the Ministry of Justice stated that the headquarters of a company are in the country where it is registered. An official from the Ministry of Justice also stated that the headquarters does not have to be the main office of a company, and that an assessment would be made on a case-by-case basis. Another representative of the Ministry of Justice stated that the main headquarters must be in Italy.

In addition to the absence of clarity about where a company’s headquarters is located, the provision does not appear to cover a company that is incorporated in Italy but has its headquarters outside of Italy. It is also unclear how the provision applies to companies with more than one headquarters.

Commentary

Due to the absence of clarity on the scope of jurisdiction to legal persons for foreign bribery offences committed abroad, the lead examiners recommend follow-up on this issue once there has been sufficient practice.

Offences Committed by a Non-Italian National Abroad

It is unclear whether the Decree covers offences committed abroad by a principal offender who is a non-Italian national. The only provision in the Decree which deals with jurisdiction to prosecute offences committed abroad is article 4(1). That article provides jurisdiction only when there is nationality jurisdiction (under articles 7-10 of the Criminal Code) to prosecute the principal offender. Accordingly, if the principal offender is not an Italian national, article 4(1) of the Decree does not apply. Whether article 1(2) (the provision normally used to prosecute legal persons for offences committed in Italy) applies in this situation is unclear.

If it exists, such a jurisdictional lacuna would raise significant concerns. An Italian company can bribe foreign public officials with impunity by merely using a non-Italian national to commit the bribe while outside of Italy. Considering the ease with which this could be accomplished, this jurisdictional gap represents a major loophole in practice.

Commentary

The effectiveness of the measures available against a legal person may be impaired if administrative liability cannot be imposed against a legal person who uses a non-Italian national to bribe a foreign public official while outside of Italy. The lead examiners recommend that the Working Group follow up on this issue on a horizontal basis.

Investigative Issues

As noted earlier, the Code of Criminal Procedure applies to proceedings under the Decree to the extent that they are compatible (article 34).²¹ During the on-site visit, a representative of the *Guardia di Finanza* stated that he “understood” that all investigative activities that can be used in the investigation of a natural person can be used in respect of a legal person. Ministry of Justice officials confirmed this view.

However, since Decree 231/2001 does not provide specifically the authority to conduct investigations of legal persons, the question remains whether investigatory powers can only be applied to legal persons in connection with investigations of natural persons. If this is the case, the effectiveness of the administrative liability of legal persons would be diminished.

Commentary

Decree 231/2001 does not expressly provide that investigative techniques that can be used in investigations of a natural person can also be used in proceedings against a legal person. The lead examiners recommend following up whether the reference to article 34 of the Criminal Code of Procedure is a sufficient comprehensive basis in this respect.

Defence of Organisational Models

The Decree provides a “defence of organisational models” to a body which makes reasonable efforts to prevent the commission of an offence. Pursuant to article 6(1), a body is not liable for offences committed by persons in senior positions if it proves the following. First, before the offence was committed, the body’s management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that has occurred. Second, the body had set up an autonomous organ to supervise, enforce and update the model. Third, this autonomous organ had sufficiently supervised the operation of the model. Fourth, the perpetrator committed the offence by fraudulently evading the operation of the model.

It is important to note that the defence of organisation models operates as a full defence which completely exculpates a legal person. In many other jurisdictions, similar defences only mitigate the sentence to be imposed.

Article 6(2) of the Decree stipulates the essential elements of an acceptable organisational model. First, the model must identify activities which may give rise to offences. Second, the model must define procedures through which the body makes and implements decisions relating to the offences to be prevented. It must also prescribe procedures for managing financial resources to prevent offences from being committed. Third, the model must oblige the internal organ responsible for supervision and enforcement to provide information to the body. Finally, the model must include a disciplinary system for non-compliance.

Despite article 6(2), what constitutes an acceptable organisational model is not clearly defined. Article 6(2) prescribes only very general criteria. It is of little assistance in determining what an acceptable model is in a particular case and could give rise to a broad application of the defence. On the other hand, courts may also take a restrictive view that if an offence occurs in spite of an organisational model, then the model is *prima facie* unacceptable. Depending on which position is taken, the threshold for the defence to succeed may vary greatly.

When designing an organisational model, a body may rely upon codes of conduct which have been drafted by business associations and have been approved by the Ministry of Justice. According to Italian officials, such approval is not conclusive proof of the model’s sufficiency for the purpose of the defence. However, the lead examiners feel that this statement might reflect that there are other requirements under article 6 that must be met in order for the defence to apply (e.g. no omission or inadequacy in supervision activities). In other words, the lead examiners do not feel that the Italian authorities necessarily denied that approval from the Ministry of Justice means that the model *per se* meets the standard under article 6(2). In fact, once there is sufficient practice under the Decree, one may discover that the standard under article 6(2) is lower than the standard of the Ministry of Justice for approving a code of ethics in cases where liability is not a factor.

Commentary

Because Decree 231/2001 does not precisely define the defence of organisational models, the ease at which such a defence succeeds in practice remains to be seen. In light of the absence of practice concerning the defence, the lead examiners recommend follow-up on the standard applied by Italy in applying this defence.

The False Accounting Offence

Scope of the Offence

Thresholds for Prosecution

After the Phase 1 review, Italy overhauled its false accounting offences by enacting Legislative Decree 61 of 11 April 2002. Under the new legislation, false accounting is defined in articles 2621 and 2622 of the Italian Civil Code as the act of:

...directors, chief executives, auditors and liquidators, who, with the intention of deceiving shareholders or the public in order to obtain an unlawful gain for themselves or others, in the financial statements, reports or other corporate communications addressed to shareholders and the public as required by law, publish untrue material facts (albeit subject to assessment) or omit information communication of which is a legal requirement concerning the trading, balance-sheet or financial position of the company or the group to which it belongs, in such a way as to deceive the recipients as to the said position...[Underlining added]

What amounts to a “material fact” is not defined. Italy did not provide case law on this point.

The Civil Code contains separate offences of false accounting (article 2621(1)), falsification which damages shareholders or creditors (article 2622(1)), and falsification of accounts of a listed company (article 2622(3)). Each offence carries a different penalty.

Further, the Civil Code provides immunity from prosecution for all false accounting offences unless the magnitude of the falsehood exceeds certain thresholds. There is no prosecution if:

1. the false information or omission does not appreciably distort the trading, balance-sheet or financial situation of the company or the group to which it belongs (articles 2621(3) and 2622(5));
2. the false information or omission results in a distortion of the pre-tax trading results for the year of not more than 5 per cent (articles 2621(3) and 2622(5));
3. the false information or omission results in a distortion of the net asset position of not more than 1 per cent (articles 2621(3) and 2622(5)); or
4. the offence is a consequence of estimated figures which, considered individually, differ by not more than 10 per cent from the correct figure (articles 2621(3) and 2622(6)).

These thresholds for prosecution and the requirement of material falsehood in the definition of the offence may leave many instances of the activities described in article 8(1) of the Convention unpunished.²² Considering the size of many Italian companies, the thresholds may be extremely high in absolute terms. For instance, according to published financial statements, the total value of assets net of liabilities of one Italian automaker at the end of 2003 was over EUR 5 billion. Hence, a company of this size could have held EUR 50 million in an off-the-books account for the purpose of bribery with impunity. A recent decision of the Court of Cassation confirms this view.²³ Such a situation would be contrary to article 8(1) of the Convention, which prohibits the establishment of off-the-books accounts for the purpose of bribing foreign public officials or hiding such bribery.²⁴

At the on-site visit, the Italian participants were divided over whether these thresholds limit the effectiveness of the legislation. Some representatives of the Ministry of Justice believe that the thresholds have no effect on the detection of bribery since the determination of whether the thresholds are exceeded occurs at the end of an investigation, at which point any acts of bribery would have been uncovered. On the other hand, a judge viewed the thresholds as a negative feature of the legislation. A representative of the Treasury Department agreed that there is probably some risk that the thresholds leave some acts of false accounting unpunished.

That the Italian government shares these concerns is reflected in its decision to amend the false accounting offences in the Civil Code again.²⁵ According to a draft of the proposed amendment, the present false accounting offences will be replaced by a single offence that applies equally to listed and unlisted companies. The new offence will contain no thresholds for prosecution. The requirements of material falsehood and appreciable distortion will be removed. This new offence, if implemented, will greatly ease the lead examiners' concerns over the present offences. As of October 2004, the draft bill was before the Italian Parliament.

However, the lead examiners note that the proposed amendment requires that the false accounting must pertain to the "economic or financial situation of the company". Such a requirement would not necessarily apply to cases of omissions and falsification in respect of the books, records, accounts and financial statements of companies for the purpose of bribing foreign public officials or of hiding such bribery, as required by article 8(1) of the Convention. Italy did not comment on this during the visit.

Distinction between Listed and Unlisted Companies and Damage to Shareholders or Creditors

A further potential shortcoming of the false accounting offences is their differential treatment of listed and unlisted companies. False accounting relating to unlisted companies cannot be prosecuted *ex officio* and is punishable only if an offender intends to deceive shareholders or the public.²⁶ This raises two issues. First, the intent to deceive the public is not present because the companies are not listed. Second, in the case of unlisted "closely held corporations" where a closely-knit group of shareholders (or single shareholder) is active in the conduct of the business, the shareholders themselves might be aware of or involved in the corrupt transaction, and thus would not have the intention to deceive themselves. Hence, no offence arises in these circumstances.

It should be noted that the proposed amendment to the false accounting offences preserves the requirement that the offender must intend to deceive shareholders or the public.

In addition, different sanctions apply depending on whether a false accounting offence is in relation to listed or unlisted companies, and whether the offence causes damage to shareholders or creditors.

Offence	Penalty against Natural Person	Penalty against Legal Person
False accounting not causing damage to shareholders or creditors	Up to 18 months	EUR 26 000 – EUR 234 000
False accounting causing damage to shareholders or creditors involving non-listed companies	6 months to 3 years	EUR 39 000 – EUR 468 000
False accounting causing damage to shareholders or creditors involving listed companies	1 to 4 years	EUR 52 000 – EUR 624 000

A judge at the on-site visit was concerned about the distinction between the sanctions for falsifying accounts in relation to unlisted companies and those in relation to listed companies, since unlisted companies “may represent a number of interests” in Italy. The lead examiners note that the proposed amendments to the false accounting offences do not maintain this distinction.²⁷

Italy appears to recognise that more severe sanctions may be needed for accounting offences. Under the proposed revision to the accounting offences, the criminal penalties for false accounting will be raised to one to five years imprisonment. However, fine penalties for natural persons which applied under the Civil Code prior to the current amendment will not be reinstated by the proposed amendments.

Commentary

The lead examiners urge 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.

False Auditing

The present offences of false accounting apply to “directors, chief executives, auditors and liquidators”. There is also a separate offence (in article 2624) for persons responsible for auditing who attest false information or conceal information concerning the trading, balance sheet or financial position of a company.

Under the proposed amendments, the new false accounting offences will no longer apply to auditors. The separate offence in article 2624 will also be repealed. These are to be replaced by a new offence in Legislative Decree 58 of 24 February 1998 which prohibits an auditor from certifying false information or obfuscating information concerning the economic or financial situation of a company. The offence is punishable by imprisonment of one to five years.

Sufficiency of Sanctions

Sanctions for Bribery of a Foreign Public Official

Sanctions against Natural Persons

Criminal and Administrative Sanctions

As indicated earlier, in the Italian legislation, the foreign bribery offence mirrors the domestic offence on many aspects. This results, notably, in the range of sanctions applicable: as an offence against the administration, only imprisonment sanctions and no fines can be imposed against natural persons (whereas fines are available for economic and financial offences such as money laundering or false accounting). The Italian authorities indicated in their Phase 2 responses as well as during the on-site visit that

there was, to date, no intention of introducing monetary sanctions for the offence under article 322bis.

Thus, sentences applicable are the same for foreign as for domestic bribery, with penalties of 6 months to 3 years imprisonment for bribes offered, promised or given to a public official to obtain the performance of acts related to the public official's office,²⁸ and 2 to 5 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 his/her office or the performance of an act in breach of official duties,²⁹ with higher sentences 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.³⁰ Although, to date, there is no case law on foreign bribery offences, the Italian authorities indicated in their Phase 2 responses that many definitive sentences had been handed down for the offence of bribing domestic public officials, and that the penalties imposed had been severe.

Regarding application of aggravating and mitigating circumstances, as indicated in the Phase 1 Report, magistrates have full discretion in the determination of the penalty, which must be explained in the decision handed down. The criteria to be applied by the judge are listed in articles 64 to 69 of the Criminal Code on aggravating and mitigating circumstances, and in articles 132 and 133-bis regarding the objective gravity of the offence and of the subjective conditions of the offender to be taken into account.

Confiscation

Article 322ter(1) of the Criminal Code provides for the obligatory confiscation of the "price or the proceeds" where passive bribery is committed by European Union officials. On the other hand, article 322ter(2) provides only for the obligatory confiscation of the "proceeds" where active bribery of a foreign public official is committed. Officials of the Ministry of Justice explained, however, that application of article 240 of the Criminal Code, which provides for the discretion to confiscate the bribe, is not excluded by article 322ter(2), and could thus still be relied on by the courts to decide confiscation of the "price" of the bribe.

In the responses to the Phase 2 questionnaires, the Italian authorities indicated that there had been one case of domestic bribery where the bribe ("price") was confiscated (Court of Milan, 8 July 1998), and no known cases in which the confiscation of the proceeds of bribery had been ordered. In this respect, representatives of the Ministry of Justice, prosecuting authorities and the *Guardia di Finanza* indicated that the "proceeds of crime" is a concept subject to broad interpretation. Although this is undeniable and a recurring issue among other countries party to the Convention, in view of the absence in Italian law of fine penalties for natural persons for the foreign bribery offence, the absence of practical examples of confiscation of the proceeds of bribery raises particular concern.

Principles and Practice of *Patteggiamento*

Under the *patteggiamento* procedure, akin to plea-bargaining, the prosecution and defence can jointly ask the judge for the imposition of a specific penalty (*patteggiamento applicazione di pena su richiesta*) on which they both agree, as long as the envisaged sentence for the offence tried does not exceed 5 years of imprisonment, even when reduced to one-third of the time. The judge retains discretion to accept or reject this kind

of procedure. Benefits of the procedure for the defendant include a reduction by one third of the penalty handed down by the judge, extinction of the offence if the defendant commits no other offences of the same kind during the five years following sentence, absence of additional sanctions imposed on the defendant, and exoneration from the payment of court costs. Although the plea-bargaining procedure is applicable to the offence of bribery, the Italian authorities indicated that there are no known cases in which the *patteggiamento* procedure has been used in relation to the bribing of public officials (for a case in which the procedure was applied to a legal person in respect of bribery, see part B.3.b(iv)).

The law on Extended Plea Bargaining (Law no. 134 of 12 June 2003) which, *inter alia*, amends article 444.1 and article 445 of the Code of Criminal Procedure on *patteggiamento*, has modified the law on plea bargaining. Consequently, the threshold for its application has been increased from an envisaged sentence that does not exceed 5 years of imprisonment, to an envisaged sentence not exceeding 2 years of imprisonment. Additionally, *patteggiamento* may now be requested solely by the defendant, permitting suspension of the trial for a period “of not less than forty-five days to allow time for assessing the appropriateness” of the application, during which time the statute of limitations shall be suspended.

Commentary

Given the absence of financial sanctions for the foreign bribery offence, the lead examiners recommend that the Working Group monitor the level of sanctions and application of confiscations measures, as well as reliance on patteggiamento when there has been sufficient practice, in order to ensure that the sanctions handed down by the courts are sufficiently effective, proportionate and dissuasive. In this regard, they invite the Italian authorities to compile relevant statistical information concerning sanctions imposed by the courts.

Sanctions against Legal Persons

Decree 231/2001, which imposes administrative liability against legal persons, provides for a range of sanctions including fines, prohibitions, confiscation and the publication of sentences (Article 9(1)).

Fines

The amount of fine that may be imposed against a body for foreign bribery depends on the nature and gravity of the offence (article 25). Bribery and *istigazione alla corruzione* of official acts is punishable by a fine of up to EUR 312 000. Bribery and *istigazione alla corruzione* for acts against official duties, and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings are punishable by a fine of EUR 52 000 to 936 000. Aggravated bribery that results in a wrongful conviction, or involves the award of public offices, salaries, pensions or contracts with the government attracts a fine of EUR 78 000 to 1.248 million.

The fine imposed in a given case may be reduced by the presence of certain mitigating factors. First, a fine is reduced by one-half and in any event no less than EUR 104 000 if the perpetrator committed the offence mainly in the interest of him/herself or a third party, and the body has derived little or no advantage from the offence (article 12(1)). Second, a fine is reduced by between one-third and one-half if, before a trial

against a body commences, the body compensates any victims, takes effective steps to eliminate the consequences of the offence, and implements an appropriate organisational model to prevent similar offences in the future (article 12(2)). Third, if the first two conditions are both met, a fine is reduced by between one-half and two-thirds (article 12(3)). A fine may also be reduced by one-third because of plea-bargaining. However, regardless of these mitigating factors, a fine cannot be reduced to less than EUR 10 400 (article 12(4)).

Prohibitive Sanctions

In addition to a fine, a body may be subject to prohibitive sanctions. Italian officials stated that such sanctions are available for all forms of foreign bribery except bribery and *istigazione alla corruzione* for official acts. The length of the prohibition is at least one year (article 25(5)). The range of available measures include: suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence; prohibition on contracting with the public administration, except to obtain the performance of a public service; denial of facilitations, funding, contributions and subsidies, including those already granted; and prohibition on advertising (articles 9 and 14). If a court considers that none of these sanctions are adequate, it may prohibit the body from conducting business activities.

Notwithstanding the assertions of Italian officials to the contrary, the lead examiners stress the need to ensure that prohibitive sanctions can be applied in a case of foreign bribery. Article 13 states that prohibitive sanctions shall apply “in connection with the offences for which they are explicitly provided”. Since article 25(5) states that prohibitive sanctions shall apply to the domestic bribery offences, but there is no referral to the offence under article 322bis, it is not clear that such sanctions apply to the foreign bribery offence. In addition, the lead examiners have been informed that in the Enelpower case, pursuant to the Decree 231/2001, Siemens AG has been prohibited from entering into contracts with the public administration for one year as a sanction for bribing Italian public officials. However, since Siemens AG was sanctioned for domestic bribery, prohibitive sanctions are available under article 25(5) of the Decree.

A court must also consider the presence of mitigating factors before imposing a prohibitive sanction. Prohibitive sanctions will not be imposed if, prior to the start of a trial, the body implements an appropriate organisational model to prevent similar offences in the future; fully compensates all victims; takes effective steps to eliminate any consequences of the offence; and surrenders any profits derived from the offence for confiscation (article 17).

Confiscation

Upon conviction a court must confiscate from a legal person the “profit and the price of the offence” (article 19(1)). In the context of foreign bribery, this provision requires a court to confiscate both the bribe payment and the proceeds of bribery. If it is not possible to confiscate the property, “sums of money, goods or other assets of a value equivalent to the price or profit of the offence may be confiscated” (article 19(2)). Even where a body successfully raises the defence of organisational models, a court must confiscate any profits which accrued to the body as a result of the offence (article 6(5)).

Sufficiency of Sanctions

On its face, the sanctions available under the Decree for legal persons may not be sufficiently effective, proportionate and dissuasive. The maximum fine that may be imposed for non-aggravated bribery is only EUR 936 000, which may not be sufficiently high considering the size of Italian companies. Various mitigating factors discussed above may substantially reduce the base fine and thus diminish its impact. The ability to confiscate proceeds lessens but does not eliminate this concern.

Prohibitive sanctions would also somewhat ameliorate these concerns if they are available for foreign bribery. Indeed, the majority of the representatives of the private sector at the on-site visit stated that a prohibition on conducting business activities, which may put a company out of business, is an enormous deterrence. Similarly, the representative of one company which obtains most of its business from the public sector stated that a ban on contracting with the government would have devastating effects on his company. The lead examiners were also encouraged to see that in the Enelpower case Siemens AG has been banned from contracting with the Italian public administration for one year as a precautionary measure.

Prohibitive sanctions do have deterrent effect, but they do not eliminate the concerns about the overall sufficiency of penalties under the Decree. Prohibitive sanctions are not always available, such as in the case of bribery for official acts, or when a company undertakes mitigating actions (by making restitution, developing an organisational model prior to trial and surrendering profits for confiscation). A prohibition on conducting business is also a remedy of last resort which a court will impose only if other prohibitive sanctions are inadequate. The readiness of the courts to impose these prohibitions in practice remains to be seen.

The case before the Court of Pordenone illustrates the potential insufficiency of the sanctions. In imposing the sentence, the court considered that the company had fully compensated the public administration for the offence and that it had adopted an appropriate organisational model to prevent future offences. These two factors reduced the fine by one-half to two-thirds and precluded the imposition of prohibitive sanctions. The fine was further reduced by one-third because of plea-bargaining. The court also noted the company's financial condition and that the company had dismissed the principal offender. In the end, the court imposed a fine of just EUR 11 556, which amounts to no more than the cost of doing business.

Commentary

In the absence of sufficient case law, it is difficult to assess whether in practice sanctions under the Decree are effective, dissuasive and proportionate. The lead examiners therefore recommend that the application of sanctions to legal persons, including fines, prohibitive sanctions and confiscation, be followed up when there has been sufficient practice. The lead examiners also recommend that Italy compile statistical information on the sanctions imposed under the Decree, and consider amending the relevant legislation to make clear that prohibitive sanctions apply equally to domestic and foreign bribery.

Notes

1. The remanding order dated 5 June 2003 and the disqualification order dated 27 April and 5 May 2004.
2. The government is reforming the judiciary by separating the Public Prosecutors' Office from the judiciary.
3. Remanding order in the Enelpower case by the Milan Ordinary Court, 5 June 2003
4. Cass., Div. II, 15-10-2002 and Cass., Div. II, 8 November 2002
5. See the discussion on the Defence of *Concussione*.
6. One prosecutor at the on-site visit stated that this situation would amount to attempted *istigazione alla corruzione*.
7. One Italian prosecutor stated that attempted bribery requires “all the ingredients of *istigazione alla corruzione*”, but he was not asked to clarify whether the “ingredients” refer to “the magnitude of the payment, and the personal qualities and financial situation of the public official”. The prosecutor also stated that *istigazione alla corruzione* and attempt are slightly different but are punished in the same way.
8. The Court of Cassation has stated that, in order for bribery to be committed, a direct agreement between a public official and the briber is not necessary. It is sufficient if the agreement is made through a third party who co-operates in committing the crime, provided that the identity of the public official is ascertained (Cass. 16 febbraio 1998, n.10962; Cass. 27 novembre 1984, n.1094).
9. 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.
10. As noted earlier, article 10(1) of the Italian Constitution provides that, where Italian domestic law conflicts with an international convention to which Italy is a party, the latter prevails.
11. According to the Court of Cassation, *concussione ambientale* arises “in a system of broad illegality, widespread in the public administration”, such that “the conduct of *concussione* by the public official can be realized through a tacit acceptance, that the individual recognizes, without words by the public official” (Cass., sez. VI, 13-07-1998, Salvi). Courts have generally given a narrow interpretation to the concept (see Cass., sez. VI, 19-01-1998, Pancheri; Cass., sez. VI, 26 marzo 1996, Garbato).
12. The Commentary constitutes an authentic interpretation of the Convention.
13. See also statistics on the number of *concussione* and corruption cases in Annex 3.
14. OECD Convention, preamble
15. The only exception is bribery which results in a wrongful conviction and imprisonment of another person in excess of five years, in which case the limitation period is ten years (article 157 of the Criminal Code).

16. Under article 112 of the Constitution, once a public prosecutor has sufficiently specific and detailed information about a crime, he/she must commence an investigation by filing a *notitia criminis* in a register. There is no discretion in whether to proceed.
17. Decision of 17 November 2003
18. Article 8 of the Criminal Code covers nationality jurisdiction over citizens and aliens for political crimes other than those covered by article 7.
19. Article 9(2) of the Criminal Code provides that “Where the offence committed is punishable by a penalty restrictive of personal liberty for a shorter period, the offender shall be punished either at the request of the Minister of Justice or upon application or complaint of the victim.”
20. Article 9(3) of the Criminal Code provides that “In the cases as per the preceding provisions, where the offence was committed to the detriment of the European Communities, of a foreign country or an alien, the offender shall be punished at the request of the Minister of Justice, provided his extradition was not granted or was not acceded to by the government of the country in which he committed the aforesaid offence.”
21. For instance, the provisions in the Code of Criminal Procedure dealing with arrest and body searches obviously have no application to legal persons.
22. Pursuant to article 8(1) of the Convention, Parties are obliged to:

... prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
23. In Cass., SS.UU. Penali, sentenza 16-06-2003, no. 25887, the Court confirmed that the scope of article 2621 of the Civil Code has been significantly reduced. For instance, the provision no longer covers false information or omission that does not appreciably distort the financial situation of a company.
24. The issue of whether these provisions in the Civil Code are inconsistent with the Convention was recently raised before the Constitutional Court. However, the Court disposed of the case on other grounds and did not deal with this issue.

It should also be noted that sanctions may apply to cases that do not meet these thresholds, e.g. civil sanctions for causing the nullity of a balance sheet, criminal sanctions when tax laws are violated and criminal sanctions for fraud.
25. The draft amendments are contained in the draft Decree on the Protection of Savings.
26. An official from the Ministry of Finance stated that the “public” includes “all interested persons including auditors”.
27. Additional sanctions may apply (see Annex 2).
28. Articles 318(1), 321 and 322(1) of the Criminal Code.
29. Articles 319, 321 and 322(2) of the Criminal Code.
30. Article 319ter of the Criminal Code.

Recommendations

The Working Group is appreciative of Italy's hard work in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process. Nevertheless, the Working Group regrets that Italy did not accede to the request of the lead examiners to visit Milan for one day to interview law enforcement representatives of that city with first-hand experience in foreign and domestic bribery cases, as well as Milan's significant financial and industrial sectors.

Based on its findings regarding Italy's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the recommendations to Italy under part 1, and (ii) will follow up the issues in part 2 when there are sufficient cases of foreign bribery in Italy.

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

With respect to promoting awareness of the Convention and the offence of bribing a foreign public official under article 322bis of the Italian Criminal Code, the Working Group recommends that Italy:

1. 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);
2. 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);
3. 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).

With respect to whistleblowing protection, the Working Group recommends 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 (Convention, Article 5; Revised Recommendation, Paragraph I).

With respect to the prevention and detection of foreign bribery through accounting requirements, the Working Group urges 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).

With respect to the role of an independent external audit in the detection of foreign bribery, the Working Group recommends that Italy 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)).

With respect to the prevention and detection of foreign bribery through anti-money laundering measures, the Working Group urges 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).

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends 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 (Revised Recommendation, Paragraph IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

With respect to the prosecution and sanctioning of foreign bribery, the Working Group recommends that Italy:

1. Amend its legislation to exclude the defence of *concussione* from the offence of foreign bribery (Convention, Article 1 and Commentary 1);
2. Take 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 (Convention, Article 6);¹
3. 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).

Follow-up by the Working Group

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

1. The effectiveness of the code of conduct of SACE (Italy’s export credit agency) in preventing foreign bribery (Revised Recommendation, Paragraph I);
2. 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);
3. With respect to the prosecution of foreign bribery:

¹ The Working Group notes that this is a general issue for many Parties.

- (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).
4. 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 Italy¹ (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);
5. 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);
6. 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)).

¹ The Working Group notes that this is a general issue for many Parties.

*Annex I***Additional Provisions Relating to False Accounting**

Legislative Provision	Description of Provision	Sanctions
Articles 2377-2379 of the Civil Code, in relation to articles 2423 <i>et seq.</i>	These provisions provide the right to challenge the decision of a shareholders' meeting approving a company's statement of accounts if the law or the company's articles of incorporation have been breached. This challenge may be brought before a civil judge by the company's directors, auditors or dissenting partners.	The decision of approving the fraudulent presentation of a company's financial situation is nullified since its aim was illegal. This nullification is binding on all partners and the company's directors are required to prepare a new statement of accounts to be submitted at a shareholders' meeting.
Article 2409 of the Civil Code	In the event of a serious irregularity in a company's management – which according to case law includes fraudulent accounting – legal action may be taken before a civil court. The court may order an investigation after hearing the company's directors and auditors. This legal action may be brought by partners holding an adequate share of the company's capital, the board of auditors, the supervisory board, the management control board and, in the case of companies with financing from the venture capital market, by the public prosecutor's office.	If, following the investigation, the serious irregularities continue, the court may take urgent measures and call a shareholders' meeting. In the most serious cases, the court may remove the directors and auditors of the company and designate a court-appointed administrator with clearly defined powers for a specific period of time.

Legislative Provision	Description of Provision	Sanctions
Articles 2634-2635 of the Civil Code (introduced by Decree Law No. 61 of 11 April 2002)	<p>This provision establishes the criminal offence of breach of trust (<i>infedeltà patrimoniale</i>). Directors, chief executives, and liquidators, who, having an interest in conflict with that of the company, in order to procure themselves with an unlawful gain or other advantage, misappropriate or participate in the misappropriation of corporate assets, thereby damaging the company's asset position are guilty of a criminal offence (article 2634).</p> <p>Administrators, chief executives, internal auditors, liquidators and external auditors, who, as a result of the giving or promise of benefits, perform or omit to perform actions, in violation of the obligations of their office, thereby causing damage to the company, are also guilty of a criminal offence. Persons who give or promise the benefit are liable to the same penalty (article 2635).</p>	<p>Article 2634: imprisonment for a period of six months to three years</p> <p>Article 2635: imprisonment for a period of up to three years</p>
	<p>Legal action in these cases is initiated by an injured party.</p>	
Article 2638 of the Civil Code (introduced by Decree Law No. 61 of 11 April 2002)	<p>This provision establishes the criminal offence of obstruction of the duties of the public supervisory authorities. Directors, chief executives, liquidators or auditors of companies subject to these authorities, who, in communications to the said supervisory authorities, with the aim of obstructing them in the exercise of their duties, state untruthful material facts, albeit subject to assessment, relating to the trading, balance-sheet or financial circumstances of the entities subject to supervision are guilty of an offence. The provision also covers these persons who, for the same purpose, conceal by other fraudulent means, in whole or in part, facts that they should have communicated concerning the company's circumstances.</p> <p>According to the Italian authorities, the provision of false information to the supervisor authorities may also include information regarding fraudulent or falsified accounts. However, there is no case law on this offence.</p>	<p>The offence is punishable by imprisonment for one to four years. Article 2641 of the Civil Code also provides for the confiscation of the proceeds of the offence and of the things used to perpetrate it or an equivalent amount.</p>

*Annex 2***Statistics on the Number of *Concussione* and Corruption Cases**

Year	<i>Concussione</i> (Article 317 of the Criminal Code)	Bribery (Articles 318 and 319 of Criminal Code)
1992	180	408
1993	469	524
1994	498	1488
1995	517	1807
1996	553	1317
1997	280	1042
1998	323	1153
1999	231	630
2000	293	1010
2001	168	258
2002	114	390
2003	73	137

Annex 3

List of Participants in the On-Site Visit

Ministries and Bodies of the Italian Government:

-
- Ministry of Foreign Affairs
 - Ministry of Economics and Finance (including Treasury Department, Tax Policies Department, Tax Authority and Customs Agency)
 - President of the Tax Committee of Milan
 - Ministry of Production Activities
 - Ministry of the Interior
 - *Banca d'Italia*
 - *Ufficio Italiano dei Cambi*
 - CONSOB
 - SACE
 - SIMEST
 - *Guardia di Finanza* including:
 - Chief Second Division of the General Command, Financial Intelligence for Fraud
 - Former Chief of the Regional Department of Fiscal Police of Region of Lazio
 - Official Attaché to the Second Department of the General Unit
-
- *Arma dei Carabinieri*
 - *Polizia di Stato*
 - *Direzione Nazionale Antimafia*
 - Magistrates:
 - A judge of the preliminary enquiry at the Court of Milan, formerly an Examining Magistrate of the Court of Milan
 - The Chief Prosecutor of Office of the Prosecutor General of Rome
 - An Associate Public Prosecutor of the Prosecutor's Office of Rome, formerly a member of the *Consiglio Superiore della Magistratura*
 - A Deputy Prosecutor of the Prosecutor's Office of Rome, member of the working group specialising in crimes against public administration
 - Two magistrates from the State Audit Court
-
- Magistrates seconded to the Ministry of Justice:
 - Vice Head of the Cabinet at the Ministry of Justice, formerly Deputy Prosecutor of the Prosecutor's Office of Naples
 - General Director of the Criminal Justice at the Ministry of Justice, formerly a judge of the preliminary enquiry at the Court of Rome and Examining Magistrate specialising in crimes against public administration
 - Magistrate attached to the Minister's Cabinet, formerly a Deputy Prosecutor of the Prosecutor's Office of Vercelli
 - Director of Office II of the General Directorate of the Criminal Justice at the Ministry of Justice, formerly a Deputy Prosecutor of the Prosecutor's Office of Frosinone
 - Magistrate attached to General Directorate of the Criminal Justice at the Ministry of Justice, formerly a criminal judge at the Court of Foggia
 - Magistrate attached to General Directorate of the Criminal Justice at the Ministry of Justice, formerly a judge at the Court of Catania
 - Magistrate attached to General Directorate of the Criminal Justice at the Ministry of Justice, formerly a Deputy Prosecutor of the Prosecutor's Office of Potenza
 - Magistrate attached to General Directorate of the Criminal Justice at the Ministry of Justice, formerly a judge of the preliminary enquiry at the court of Cosenza
-

Civil Society:

-
- | | |
|-------------------------------------|----------------------------------------------------------------------------------|
| • Cittadinanzattiva | • UIL (trade union) |
| • Transparency International Italia | • Academics and practitioners in international law, criminal law and criminology |
| • CGIL (trade union) | |
-

Private Sector:

-
- | | |
|--------------------------|-------------------------------------|
| • CNDC | • Sacmi Cooperativa Meccanica Imola |
| • Confindustria | • Impregilo SpA |
| • Confcommercio | • Eni SpA |
| • CONFAPI | • Pirelli & C SpA |
| • OICE | • Tecnimont SpA |
| • Alstom Power Italia | • Confapi |
| • Alenia Aeronautica SpA | • Fiat SpA |
| • Astaldi SpA | • Fiat GeVa |
| • Enel SpA | • Technip Italy SpA |
| • Finmeccanica | |
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APPENDIX I

Evaluation of Italy by the OECD Working Group (April 2001)

Legal Framework

Evaluation of Italy¹

General remarks

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

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

The Working Group considered in the light of the available documentation and explanations provided by the Italian authorities that Italy's legislation conforms to the requirements of the Convention². However, certain aspects of the Italian implementing legislation, listed below, have been identified and should be followed up in Phase 2.

Specific issues

Third party

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

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1. This evaluation was completed by the Working Group on Bribery in April 2001.
 2. The Italian authorities informed the Group that the Council of Ministers enacted the legislative decree on 2 May 2001. It will enter into force as soon as it is published in the Official Journal (26 June 2001).

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

Payments after performance of duty

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

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

Exception: abuse of power by the public official (concessione)

The Italian law does not extend criminalisation to the payment (or the offering, promising or giving) of any undue pecuniary or other advantage to a public official in cases covered by article 317 where a public official “takes advantage of his/her functions or power to oblige or induce another to unduly give or promise money or other assets to himself or a third party”. In this case, article 317 provides for the punishment of the public official only. The Italian authorities explained that this implied coercion on the part of the public official and that it was in practice up to the defendant to prove that he/she was the victim of the public official’s behaviour and that this argument has been very rarely invoked successfully.

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

Responsibility of legal persons

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

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

Sanctions

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

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

Overlapping jurisdictions

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

APPENDIX 2

Principal Legal Provisions

CRIMINAL CODE

Article 322bis - 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 artt. 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.

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 322ter - 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.

[...]

**LEGISLATIVE DECREE NO. 231 OF 8 JUNE 2001 – ADMINISTRATIVE
LIABILITY OF LEGAL PERSONS****5. Responsibility of the corporation**

1. A corporation is liable for offences committed in its interest and to its advantage:
 - a) by persons performing functions as representatives, directors or managers of the said corporation or of an organisational unit of the corporation having financial and functional autonomy, and by persons exercising management and control of the corporation, albeit on a de facto basis.
 - b) by persons subject to the management or supervision of one of the parties referred to in paragraph a) above.

2. The corporation shall not be held liable if the persons mentioned in sub-section 1 have acted exclusively in their own interests or those of third parties.

6. Persons in senior positions and models of organisation

1. If the offence was committed by the persons referred to in Article 5, sub-section 1, paragraph a), the corporation shall not be held liable if it can prove that:
 - a) before the offence was committed, the management has adopted and effectively implemented appropriate organisational and management models to prevent offences of the kind that has occurred;
 - b) the task of supervising, ensuring compliance with and updating the models has been entrusted to an organ of the corporation able to exercise autonomous powers of initiative and control;
 - c) the persons committed the offence by fraudulently finding a way round the organisational and management models;
 - d) supervision on the part of the organ mentioned in paragraph b) has not been neglected or insufficiently exercised.
2. In relation to the extent of the powers delegated and the risk of offences being committed, the models referred to in paragraph a), sub-section 1, must fulfil the following requirements:
 - a) they must identify the activities in relation to which offences are likely to be committed;
 - b) they must lay down specific procedures for planning the taking and implementation of decisions on the part of the corporation in relation to the offences to be prevented;
 - c) they must identify appropriate procedures for managing financial resources to prevent offences from being committed;
 - d) they must oblige the organ tasked with ensuring the proper operation of and compliance with the models to provide information;
 - e) they must introduce an appropriate disciplinary system for penalising non-compliance with the measures set out in the model.
3. To guarantee compliance with the requirements set out in sub-section 2, the organisational and management models may be adopted on the basis of codes of conduct drafted by business associations and communicated to the Ministry of Justice. The Ministry of Justice, in consultation with other competent ministries, may, within thirty days, make comments on the suitability of the models to prevent the commission of offences.
4. In the case of small corporations, the tasks set out in paragraph b), sub-section 1, may be performed directly by the management.
5. Nevertheless, any profit the corporation has derived from the offence shall be confiscated, and may also be confiscated in an equivalent form.

CIVIL CODE

Article 2621 - False corporate communications

Except as provided for by Article 2622, directors, chief executives, auditors and liquidators, who, with the intention of deceiving shareholders or the public in order to obtain an unlawful gain for themselves or others, in the financial statements, reports or other corporate communications addressed to shareholders and the public as required by law, publish untrue material facts (albeit subject to assessment) or omit information communication of which is a legal requirement concerning the trading, balance-sheet or financial position of the company or the group to which it belongs, in such a way as to deceive the recipients as to the said position, shall be liable to detention for up to eighteen months.

This shall also apply when the information concerns assets possessed or administered by the company on behalf of third parties.

Prosecution shall be ruled out if the false information or omissions do not appreciably distort the trading, balance-sheet or financial situation of the company or the group to which it belongs. Prosecution shall in any case be ruled out if the false information or omissions result in a distortion of the trading results for the year, before tax, of not more than 5 per cent or a distortion of the net asset position of not more than 1 per cent. In any case, the offence is not prosecutable if it is a consequence of estimated figures which, considered individually, differ by not more than 10 per cent from the correct figure.

Article 2622 - False corporate communications damaging to shareholders or creditors

Directors, chief executives, auditors and liquidators, who, with the intention of deceiving shareholders or the public in order to obtain an unlawful gain for themselves or others, in the financial statements, reports or other corporate communications addressed to shareholders and the public as required by law, by publishing untrue material facts (albeit subject to assessment) or omitting information communication of which is a legal requirement concerning the trading, asset-and-liability or financial position of the company or the group to which it belongs, in such a way as to deceive the recipients as to the said position, cause damage to the assets of shareholders or creditors, shall be liable, following private prosecution by the aggrieved party, to a prison term of between six months and three years.

Private action shall be taken even if another offence is also involved, even if aggravated, which is damaging to the assets of persons other than the shareholders and creditors, unless it was committed to the prejudice of the State, other public bodies or the European Communities.

In the case of companies subject to the provisions of Part IV, Chapter III, Section II, of Legislative Decree no. 58 of 24 February 1998, the penalty for the offences provided for in sub-section 1 shall be of between one and four years and the offence shall be prosecuted automatically.

Prosecution for the offences provided for by sub-sections one and three shall also be extended to cases in which when the information concerns assets possessed or administered by the company on behalf of third parties.

Prosecution for the offences covered by sub-sections one and three shall be ruled out if the false information or omissions do not appreciably distort the trading, balance-sheet or financial situation of the company or the group to which it belongs. Prosecution shall in any case be ruled out if the false information or omissions result in a distortion of the trading results for the year, before tax, of not more than 5 per cent or a distortion of the net asset position of not more than 1 per cent.

In any case, the offence is not prosecutable if it is a consequence of estimated figures which, considered individually, differ by not more than 10 per cent from the correct figure.

APPENDIX 3

Suggested Further Reading

1. Reports and other Publications

Phase 1 Report, Review of the OECD Anti-Bribery Convention and 1997 Recommendation: <http://www.oecd.org/dataoecd/39/61/2019055.pdf>

2. Legislation

La législation de mise en oeuvre (Loi du 29 septembre 2000 n°300, publiée au Supplément ordinaire 176-L du Journal officiel du 25 octobre 2000 n°250) est disponible en anglais sur le site OCDE à l'adresse suivante: <http://www.oecd.org/dataoecd/63/2/2377889.pdf>.

3. Other materials

Financial Action Task Force (FATF) Reports - Extracts from FATF IX (1997-1998) and IV (1992-1993) Annual Reports on Italy:
http://www1.oecd.org/fatf/Ctry-orgpages/ctry-it_en.htm

APPENDIX 4

*i) Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions*

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

*ii) Revised Recommendation of the Council on Combating Bribery
in International Business Transactions*

Annex
Agreed Common Elements of Criminal Legislation and Related Action

*iii) Recommendation of The Council on the Tax Deductibility of Bribes
to Foreign Public Officials*

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.
4. For the purpose of this Convention:
 - a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - b) “foreign country” includes all levels and subdivisions of government, from national to local;
 - c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which 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.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.
2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAF/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex
Statistics on OECD Exports

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US\$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	1 459 148	81,0%	100%
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	1 801 661	100%	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an “autonomous” definition not requiring proof of the law of the particular official’s country.
4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.
5. “Other improper advantage” refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*,

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. “Public international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. “Foreign country” is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to “principles” includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, “1997 OECD Recommendation”), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, “bribery of its own public official” is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company’s home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- ...
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

- I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.
- II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:
- i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;
 - ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;
 - iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;
 - iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;
 - v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;
 - vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;
 - vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

- III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

- IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: “that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

- i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

- i) Member countries should consider whether requirements to submit to external audit are adequate.
- ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.
- iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.
- iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

- i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.
- ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
- iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
- iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) RECOMMENDS:

- i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;
- ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.¹
- iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.²

International Co-operation

VII) RECOMMENDS that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

- i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;
- ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

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1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.
 2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

- i) receipt of notifications and other information submitted to it by the member countries;
 - ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.
 - iii) examination of specific issues relating to bribery in international business transactions;
 - iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
 - v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.
- IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.
- X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate thereafter, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

- XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.
- XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

- XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

- i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.
- ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.
- iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

- I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.
- II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION
Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21.	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia ¹	6 September 2001
35.	Ireland	22 September 2003

* In order of ratification/accession received by the Secretary General.

1. Slovenia, as a new member in the OECD Working Group on Bribery, deposited its accession instrument