Directorate for Financial and Enterprise Affairs

ITALY: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 23 March 2007.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of Findings

1. Italy presented its Written Follow-Up to the Phase 2 Report[1], outlining its responses to the Recommendations adopted by the Working Group on Bribery (WGB) at the January 2007 meeting of the WGB. Since its evaluation under Phase 2, Italy has taken important steps in a number of areas to implement the Recommendations adopted by the Working Group.

2. In mid-2003, Italian prosecutors issued an indictment for a violation of article 322 of the Penal Code (i.e., the offence of *istigazione alla corruzione* or "incitement to corruption") in relation to a case allegedly involving illicit payments made to foreign public officials to obtain overseas contracts. This case also involves the application of the Legislative Decree on the administrative liability of legal persons. So far, the case is in the pre-trial stage. However, several important preliminary steps have been taken, including requests for mutual legal assistance and the application of a precautionary measure pursuant to the Legislative Decree.

3. Italy has taken a number of initiatives to raise awareness of and improve training on the foreign bribery offence. Notably, the *Guardia di Finanza*, prosecutors and magistrates have already received or are due to receive in 2007 supplementary training on the foreign bribery offence. The Working Group reminded Italy that further training has yet to be developed for law enforcement bodies such as the *Carabinieri* or the State Police. Regarding public and para-public agencies, the Ministry for Economic Development, SACE (Italy's export credit agency) and the Ministry of Foreign Affairs have been active in disseminating information on foreign bribery, both to their staff as well as private sector stakeholders.

4. With regard to Working Group Recommendations to improve the reporting and detection of foreign bribery, Italy did not report on any specific action to remind Italian public officials of their legal obligation to report suspicions of foreign bribery offences detected in the course of their work. Similarly, no steps were taken to introduce stronger whistleblower protections for employees who report suspicions of foreign bribery, as recommended by the Working Group. Italy indicated that protection from wrongful dismissal included in Italian labour laws would be sufficient to protect whistleblowers. Nevertheless, the Working Group was of the opinion that the system of reporting by whistleblowers might work more effectively by specifically providing protection to employees who report in good faith suspicions of foreign bribery. Italy also informed the Working Group that it is preparing to ratify the Civil Law Convention on Corruption of the Council of Europe, which requires whistleblower protections for employees who report acts of corruption. Italy agreed to report back to the Working Group on this issue.

5. The Italian authorities are highly committed to improving the laws on false accounting, and so far have taken an important step in this respect. Whereas previously prosecution was excluded for false accounting where specified monetary thresholds were not met (e.g., where false statements or omissions caused a variation in the opening results before tax not exceeding 5 per cent), amendments to the false accounting offence in the Civil Code now provide administrative penalties in such cases. In order to fully

[1] The Phase 2 Report of Italy was approved by the Working Group on Bribery in November 2004.

implement the Phase 2 Recommendation on false accounting, Italy will also have to eliminate the following two criteria for the application of the offence: (i) that the false accounting appreciably distorted the trading, balance sheet or financial situation of the company; and (ii) that there was an intent to deceive the shareholders, creditors or the public. Regarding the first requirement, the Working Group noted that the Court of Cassation deemed that "qualitative" and not just "quantitative" factors may be considered in certain circumstances.

6. Italy has also taken certain steps to respond to the Phase 2 Recommendation concerning external audits. Previously non-listed companies were not subject to an external audit, including those with a high turnover and substantial international business. Now it appears that at least some of these companies will be subject to improved controls, such as the attachment of the annual accounts of foreign affiliates to the annual accounts of the Italian company. Moreover, concerning the Working Group's Phase 2 Recommendation to ensure that suspicions of foreign bribery are reported by external auditors to CONSOB, Italy now points out that CONSOB issued a "Communication" in March 1993 clarifying that "facts deemed censurable", which are required to be reported to CONSOB, include illicit payments "which may have a material effect on the accounting". Whether this "Communication" effectively addresses the Working Group's concerns depends on how well it has been communicated and the level of materiality that must be met to make a report.

7. Italy also reported on key developments to ensure effective prosecution of the foreign bribery offence. Most notably, Bill no.878/06 was submitted to the Senate on 26 July 2006 and proposes to modify the functioning of statutes of limitation in Italian law. The proposed legislation aims to increase both the "base" and the "ultimate" limitation periods.[2] In addition, these time limits would only concern the period of time until the first instance judgment is pronounced. This draft legislation was welcomed by the Working Group, which encouraged its prompt adoption and recommended that Italy report back on future developments in this respect. Italy also reported on initiatives by the Ministry of Justice to increase and improve coordination with law enforcement authorities regarding outgoing mutual legal assistance requests, in answer to a Working Group Recommendation on this matter.

8. Regarding the related money laundering offence, Italy reported on the adoption of Law no.146 of 16 March 2006, which provides for administrative sanctions for money laundering offences committed by legal persons. In 2004, the Working Group had also recommended that Italy criminalise money laundering by a person who commits the predicate offence. While no steps have been taken in this regard, the Working Group acknowledged that this Recommendation in fact exceeds the scope of Article 7 of the Convention, which only requires that a country's money laundering legislation apply to foreign bribery on the same terms as for domestic bribery.

9. Regarding the Phase 2 Recommendation that Italy pay particular attention to information arising as a result of tax amnesty programmes to ensure that they are not used for the dissimulation of bribes, the Working Group noted that the specific tax amnesty programme which gave rise to concern at the time of Phase 2, had expired. In addition, Italy informed the Working Group that the new Government does not support a continuation of such programmes. The Working Group agreed that the Recommendation had therefore lost its relevance.

10. A major issue for the Working Group was Italy's non-implementation of the Phase 2 Recommendation to amend its legislation to exclude the defence of *concussione* from the offence of bribing a foreign public official. In Phase 2, the Working Group had serious concerns about this defence, which the Court of Cassation stated applies when a payment is made in response to serious psychological

[2] For explanations on the distinction between the "base" and the "ultimate" limitation period, see paragraphs 146 et seq. of the Phase 2 Report.

pressure to avoid the undue exercise of public powers that will probably cause serious economic loss. The Working Group felt in Phase 2 that this kind of pressure could be broad enough to cover cases involving a payment to obtain or retain business where substantial outlays have already been made. In presenting the Written Follow-Up Report, the Italian authorities emphasised that the defence only applies where the payment is made to seek something to which one is entitled. The Working Group noted that Italy's justifications for the defence had not changed since Phase 2, and recalled that Commentary 4 on the Convention requires that the foreign bribery offence apply even where the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business. The Working Group agreed that the Recommendation to amend the law still stands, and recommended that Italy report back on the issue in one year as well as regularly in the interim regarding any progress in amending the legislation.

b) Conclusions

11. Based on the findings of the Working Group on Bribery with respect to Italy's implementation of its Phase 2 Recommendations, the Working Group reached the overall conclusion that Recommendations 1(c) and 7(c) have been satisfactorily implemented. Recommendations 1(a), 3, 4 and 7(b) have been partially implemented. Recommendations 1(b), 2 and 7(a) have not been implemented. Furthermore, the Working Group acknowledged that Recommendation 5 goes beyond the scope of the Convention, and that Recommendation 6 is no longer relevant.

12. With respect to issues identified for follow-up in Phase 2, the Working Group agreed to continue monitoring in particular follow-up issue 8(b) on the application of the offence of *istigazione alla corruzione* and the law on attempts to the foreign bribery offence, due to continuing concerns about the coverage of cases where the offer, promise or gift has not been accepted by the foreign public official.

13. In addition, the Working Group will continue to follow-up on issues 8(d)(i) and 8(d)(ii) on the liability of legal persons for the foreign bribery offence as practice develops. In particular, follow-up is still needed to confirm the application of the Legislative Decree on the liability of legal persons in certain situations, including where the foreign bribery offence is committed by a state-owned or controlled enterprise, or by a foreign enterprise not registered in Italy. The defence of "organisational models" also warrants follow-up, in part due to its novelty. Finally, regarding follow-up issue 8(e), the Working Group also agreed to continue to follow-up the sanctions for natural and legal persons as practice develops.

14. The Italian authorities agreed to report orally within one year as well as during the regular discussions of the Working Group, notably on the implementation of Recommendations 2, 3, 4, 7(a) and 7(b), and on follow-up issues 8(b), 8(d) and 8(e).

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: **Italy**

Date of approval of Phase 2 Report: **29 November 2004**

Date of information: **7 December 2006**

Part I: Recommendations for Action

Text of recommendation 1.(a):

1. 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:

(a) 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

a) TRAINING MAGISTRATES, POLICE, PROSECUTORS.

i) The Superior Council of the Judiciary organizes periodic courses to provide magistrates with the latest legislative news, trends in the courts' decisions and the jurisprudence debate.

First of all, it must be highlighted that, at the request of the new delegation for the organization of a course specifically focused on the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", the Ninth Commission, in charge of training, gave the following formal answer:

"With reference to the request to organize an international workshop concerning the fight against bribery of foreign public officials in international business transactions, the role played by the Organization for Economic Co-operation and Development (OECD) and Italy's position towards the implementation of the Paris Convention of Nov. 21, 1997, I communicate that the Ninth Commission, in its 21 Nov. 2006 session, invited the scientific Committee to plan a course in 2007 including the examination of this specific issue and, in particular, a report on the state-of-play of the implementation of the Convention and comparisons of initiatives between different Countries.

In 2005, the **Superior Council of the Judiciary** organized *six courses* on Legislative Decree no. 231/01 on responsibility of legal persons and the application of precautionary disqualification measures against those entities. The said legislative decree allows to impose heavy monetary sanctions and disqualification sanctions on legal persons whose bodies have committed offences among which bribery (of national and foreign officials) and therefore it represents an instrument directly aimed at preventing the offence covered by the Convention.

Always in 2005, the **Superior Council of the Judiciary** organized a course "*The reform of the offence of False accounting and consumers' protection"* aimed at analyzing the reform of company law and in particular of Articles 2621 and 2622 of the Civil Code.

Moreover, as far as training is concerned, a course entitled *"Public Administration and penal risk"*, particularly focused on more recent legislative modifications, is scheduled for the year 2006. First of all, there is D.P.R. (Decree of the President of the Republic) no. 258 of Oct. 6, 2004, through which the government adopted the regulation on the functions of the High Commissioner for the prevention and fight against bribery within the Public Administration, whose establishment was provided for by law no. 3 of Jan. 16, 2003, with tasks of surveillance and control over administrative activities, and subsequently, with access to administrative documents and databanks of the Public Administration, with the task of reporting to the Prime Minister every six months.

ii) Training is particularly important not only for Magistrates, but also for Police Forces involved in the fight against bribery and corruption.

In this regard, the active participation of the Ministry of the Interior in the organization of training activities and refresher courses of the law enforcement bodies whose task is the fight against corruption is noteworthy.

In particular, the personnel of the **Financial Police** (Guardia di Finanza), created to carry out investigations in the economic sector and in relation to all bribery offences, regularly attend advanced training courses on new offences created by the development of legislation, and on the various types of conduct aimed at hiding the proceeds of bribery.

Within the framework of the didactic activity, both of *basic training* and of *advanced training*, conferences, seminars and *ad hoc* lessons on the matters covered by the Convention are periodically included; moreover, on the Intranet network of the Financial Police, useful documents are disseminated to promote the personnel's awareness of the issues covered by the OECD Convention, such as "*The OECD Bribery awareness Handbook for tax Examiners*".

Also **the Carabinieri** have included in their training programs subjects concerning the fight against corruption. In particular, at the *Scuola Ufficiali*, the teaching activity is mainly focused on **technological support (analyst's notebook)** and on procedural instruments (property assessments), as well as on a detailed study of the texts of criminal law and the Law of Criminal Investigation Police (Polizia giudiziaria), with specific references to the offences of public officials, also following the new legislative reforms.

b) GOVERNMENT AGENCIES

i) The Convention has been published on the web-site of the Ministry for Economic Development, in the documents of the Office for International and Community Policies of the Directorate General for Productive Development and Competitiveness; the main contents of the Convention were explained in a

series of congresses with enterprises, institutions and experts on company internationalization.

VICENZA - 11 April 2006 Seminar for experts on relations and business opportunities with foreign countries: Glocal Business Movers (GBM) – Organized by the Giacomo Rumor Foundation - Centro Produttività Veneto of Vicenza, a training structure of the system of the Chambers of Commerce – The initiative was promoted by the Regione Veneto (Programma Veneto Netgoal 2006) and put into practice by the Unione Regionale delle Camere di Commercio del Veneto (Unioncamere del Veneto).

The global aim of the initiative was to train experts on services to support internationalization processes of small and medium-sized enterprises of Veneto and global business activators both at commercial and productive levels.

On that occasion, three interrelated subjects were presented and discussed: OECD Guidelines for Multinationals; Anti-Corruption Convention, Global Compact.

I presented the report on the first two aspects; as to Global Compact, there was an ILO representative.

GENOA, October 6, 2006 - "Workshop on the principles of OECD Guidelines to SMEs"

Workshop of the Chamber of Commerce of Genoa, in which the Chairman of the Italian Franchising Federation and officials from the Ministry for Economic Development participated; the OECD Guidelines were specifically explained as well as the Convention on the fight against bribery; experts on international cooperation, university teachers, representatives from the Unione degli Industriali Italiani also participated; Representatives of local institutions and enterprises were present too.

c) SACE (SOCIETÀ ASSICURATRICE COMMERCIO ESTERO).

As to the application of the Convention to the field of export credit, since September 2004 the company has adopted an organizational Model for the prevention of offences, including international bribery, as per Legislative Decree no. 231/01. In addition, it has adopted a Code of Conduct, among whose inspiring principles there is abidance by the principle of legality.

Through internal training courses, SACE has informed the personnel, both employees and managerial staff, about the content of the Model and about the conduct to adopt according to its Code of Conduct. These courses are intended to promote full awareness of the offences which may occur within the framework of SACE activities, including the offence of bribery of foreign public officials.

Lastly, as provided for by the Action Statement of the OECD Secretariat, SACE is going to adopt a procedure which provides for a particular due diligence activity when dealing with transactions in which the applicant has pending proceedings for corruption and/or has been convicted or included in one of the black lists drawn up by IFIs.

If no action has been taken to implement recommendation 1.(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 1.(b):

1. 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:

(b) 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

All public officials are subject to the obligation to report, which is part of the more general duty of loyalty and fidelity to the Public Administration. They are made aware of their responsibility in case they fail to report.
In particular, those who, because of their role and functions, carry out commercial transactions within the framework of foreign trade, are made fully aware of the various offences which may occur, including bribery of foreign public officials.
Lastly, it must be recalled that incumbents at our Embassies and consulates are Officials carrying out a public service abroad and therefore it is their duty to inform the Italian competent authorities of cases of bribery set out in the Convention.

If no action has been taken to implement recommendation 1.(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 1.(c):

1. 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:

(c) 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

In this regard, the Ministry of Foreign Affairs has invited several times - with written instructions - the Italian diplomatic network abroad to put on the Web site the Italian law following the adjustment to the

OECD Convention; moreover, through their consular offices, ICE offices and Italian Chambers of Commerce working there, Embassies have taken steps to inform and make aware economic operators who actively operate in their respective fields of competence, drawing their attention to the innovations introduced into the Italian legislation by the OECD Convention. The monitoring of this activity is carried out by verifying the relevant activity of individual Embassies.
(It is also important to underline that, in order to better follow all the phases concerning the Working Group and, in particular, the legislative developments and court cases concerning the OECD Convention, the Ministry of Foreign Affairs has had a magistrate attached to its offices with the specific task of monitoring the implementation of the Convention and following the work of the working group on bribery.
Moreover, last year, the Ministry of Foreign Affairs promoted, together with the Ministry of Justice, two interministerial coordination meetings involving all the bodies dealing with problems of bribery in international trade, including the Ufficio Italiano Cambi [Italian Foreign Exchange Office] and SACE).

If no action has been taken to implement recommendation 1.(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 2:

2. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

None (see below)

If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

The Italian law already provides for (Law no. 45/2001) the possibility of applying special measures to witnesses who are in serious and present danger as a consequence of their statements. These measures are applicable to both witnesses and members of their family and may, *inter alia*, include measures to: ensure a person's safety, preserve their job, transfer them to protected locations, give them social and financial support and change their ID details.
These measures are explicitly applicable to domestic and international bribery offences.

Text of recommendation 3:

3. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The provisions on false accounting have been amended by Law no. 262, dated 28.12.2005, published in the Official Gazette [Gazzetta Ufficiale] Ordinary Supplement no. 208, dated 28.12.2005 no. 208. This law has introduced the following changes which are significant in relation to the recommendation:

a) Previously, facts which did not involve exceeding monetary thresholds were legal, now they are punished with an administrative sanction from 10 up to 100 quotas, and disqualification from holding executive offices of legal persons and companies from 6 months up to 3 years; disqualification from holding the office of director, auditor and, in general, manager in charge of drawing up the financial reports of a company, as well as from any other office with power of representation of the legal person or company (art. 30).
b) the false accounting is criminalized in relation either to listed or non-listed companies; the fact that a listed company is involved is only relevant in relation to the gravity of the offence (it means, the punishment is harsher if a listed company is concerned).
c) as to the sanctions for the case of false accounting, the L. 262/2005 states:
    1. a harsher punishment (up to 2 years' detention [arresto] in the case of false accounting without damage for shareholders/creditors - the period for completion of prosecution is here 5 years from the commission of the fact-; from 6 months up to 3 years' imprisonment [reclusione] in the case of false accounting causing damage for shareholders/creditors- the period for completion of prosecution is here 7 years and 6 months from the commission of the fact-, raising up to 6 years in case of listed companies and great damage for the shareholders).
    2. the above mentioned administrative sanctions in case of offences under a monetary threshold. These sanctions ought to be considered proportionate and effective.
    3. the government shall adopt by the end of the year (27.12.2006) one or more decrees to introduce accessory sanctions for the above mentioned violations (suspension or deprivation of an elective office; publicity officially given to the imposed sanction; confiscation of the result or product of the crime, also the relevant equivalent).

If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 4:

4. 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)).

Actions taken as of the date of the follow-up report to implement this recommendation:

Law no.262/2005 ("Provisions for the protection of savings and the regulation of financial markets) has introduced innovative rules aimed at ensuring transparency of companies with their registered office in States which do not ensure corporate transparency and which are controlled by, or affiliated with, or which control companies with their registered office in Italy.
The law was introduced after the "Parmalat case", in order to prevent phenomena characterized by the setting up of corporate networks in tax/legal havens, potentially exploitable as a vehicle to carry out illegal transactions because of the lack of transparency of the laws of these Countries and lack of controls. The identification of the Countries which are to be considered as lacking in corporate transparency is left to a decree of the Ministry of Justice, issued in agreement with the Ministry of Economy, after examining the legislation in force in those Countries.
The provisions in question apply to Italian companies with control and affiliation obligations with companies having their registered office in the so-called *offshore centers* and they include a series of obligations and relevant responsibilities for the management of the Italian company. In particular, the law provides that the annual accounts of the foreign company shall be attached to the annual accounts of the Italian company, shall be audited by the same firm which audits the annual accounts of the Italian company and shall be drawn up in accordance with the rules and principles of the Italian Company Law.
In conclusion, the ultimate goal is to prevent the commission of illegal activities, imposing transparency in budget and accounting matters, promoting effective rules of governance.

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Bribery, both of Italian and foreign officials, is already included in the "facts deemed to be censurable", if we consider that this phrase covers all the offences, including bribery. Therefore, as stated by the Consob (Commissione nazionale per la Società e la Borsa) Office for International Affairs, for the recommendation in question no implementing step is necessary, because it is already transposed into our law.
As to extending the categories of the companies subject to external control, so as to include also some unlisted companies, with a high turnover, it must be said that if it is true that the system in force in Italy provides that control powers of Consob include only companies listed in the Stock Exchange, it is also true that for the other companies an equally effective control system – provided for by the law - is in force. In particular, mention must be made of the control system by the Audit Committee [Collegio Sindacale], by auditors, by the judicial authority in a phase of non-contentious jurisdiction [volontaria giurisdizione], as well as the judicial control as set out in Article 2409 of the Italian Civil Code, when there are the necessary conditions.
Moreover, unlisted companies, which carry out activities in specific sectors, are also subject to specific forms of public control, such as by ISVAP (Insurance Supervisory Authority) as to insurance activities; by the Bank of Italy as to financial and banking activities, an by the Ministry for Productive Activities for cooperative societies.

Text of recommendation 5:

5. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

LIABILITY OF LEGAL PERSONS FOR MONEY LAUNDERING

Law 16/3/2006 no. 146 (Art. 10.5-6) provides that in case of transnational offences an administrative sanction from two hundred to eight hundred «units» for the offence of money laundering (the amount of «units» ranges between 258 Euros and 1549 Euros) are imposed on the legal person and, for a length up to two years, the restraining orders provided for by the general provisions on the responsibility of legal persons are applied: interdiction from performing any activity; suspension or revocation of permits, licenses etc., ban on contracts with public administration; exclusion from facilities, lines of credit, subsidies etc., ban on advertising goods and services are provided for. However confiscation, also of goods having an equivalent value, is applicable.

If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

MONEY LAUNDERING BY A PERSON WHO COMMITS THE PREDICATE OFFENCE

Reasons why no action will be taken in order to establish the criminal responsibility for money laundering of the person responsible for the predicate offense.

a) According to a traditional viewpoint, the penalty both for predicate offence and for money laundering would be in contrast with the principle of substantive *ne bis in idem*; the subsequent concealment of money or items coming from an offence is considered as the natural continuation of a criminal conduct;

In any case our legal system can concretely apply repression in that:

a) the penalty for those who agree on perpetrating a predicate offence and then launder the money is provided for by a thirty-year well-established case law on handling stolen goods (see Court of Cassation 22/11/1977, CP 1979, 61): actually if an agreement to launder money is subsequent to the perpetration of a predicate offence, the case in point of money laundering is certainly applied.

b) In case of organised crime, money launderers are considered also as organisers and therefore the penalty is essentially similar (4-2 for money laundering; 3-7, but it can be increased up to one third in case of ten o more participants in the association;

c) In any case also a member of an association, who is not involved in the offence from which the goods to be laundered on behalf of the association come, is to answer for money laundering as well (Court of Cassation 14/2/2003 no. 10582, CED 223689)

d) By legislative decree 20/02/2004 no. 56 (transposing directive 2001/97/CE) the Italian legal system

revised a series of preliminary obligations as to identification, recording and reporting of suspicious operations, imposed on the following subjects (according to the procedures established by three different decrees issued by the Ministry of Finance: MD 3/2/2006, no. 141, 142, 143);

i) financial brokers;
ii) non-finance companies (e.g. agents, those who are in charge of custody and transport of valuables, trade of antiques, gold and jewels; auction houses, gambling houses);
iii) professionals (i.e. professional accountant, bookkeepers, auditors, notaries and counsels). Furthermore by law 25/1/2006 no. 29, the Government was enabled to issue a law implementing the third anti-money laundering directive (2005/60/CE). The enabling act to the Government also provides for the possibility of sanctioning legal persons for the offence of money laundering, which on the other hand was already considered as a source of responsibility in case of transnational crimes by law no. 146/2006.

Other subjects are obliged to reporting alone: management companies of financial instruments; management companies of regulated markets of financial instruments, etc.

Text of recommendation 6:

6. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

In this respect it must be pointed out that Law 27th December 2002 no. 289 introduced among other things the possibility to settle automatically the business income and income derived from self-employment for previous years by means of self-liquidation (the so-called mass composition) or by means of a supplementary declaration.
If a taxpayer agrees to one of the aforesaid amnesties, considerable effects are produced on the control or assessment activity of internal revenue and in same cases any tax and contributory assessment towards the declarer and his co-obligors is barred as to the periods and the taxes object of the settlement.
That being said, it must be underlined that these inhibitory and preventing effects are produced only at administrative level, so that, as to the offence of bribery of a foreign public official, provided for by Art. 322 bis c.p. there is no limit to any investigative act set out by the criminal procedure provisions in force at present.
In 2004 the *Agenzia delle Entrate* [Inland Revenue], having jurisdiction on tax assessment in Italy, by a circular letter prescribing the operational policies in preventing and fighting against tax evasion, provided for more stringent controls also on the persons who complied with the provisions on settlement set out in Laws no. 289 of 2005 and 350 of 2003.
A similar circular letter was adopted in 2005 in order to carry out a more effective control activity by means of programmatic and operational measures. Furthermore the strengthening of data processing systems was envisaged by organising the flow of data and information which could be used also in view of a fruitful activity of risk analysis.

If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 7.(a):

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

(a) Amend its legislation to exclude the defence of *concussione* from the offence of foreign bribery (Convention, Article 1 and Commentary 1);

Actions taken as of the date of the follow-up report to implement this recommendation:

None (see below).

If no action has been taken to implement recommendation 7.(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

a) the fact that a citizen is not criminally liable for giving "something undue" to the public official in case of "concussione" should be considered not from the viewpoint of the effect of the coercion (i.e. the undue payment as such) but from the viewpoint of the conduct of the public official in his relation to those performed by the citizen. The conduct of the public official in these cases is made up of the three following elements: 1. the p.o. abuses his quality or powers; 2. he forces the citizen; 3. he induces the citizen to give or promise an undue advantage. The law in action and the scholars have specified that :

as to (1), it consists in using the subjective qualification in such a way as to make the citizen foresee as possible and probable the unlawful exercise of powers that damages himself or his legitimate interests (e.g. exercise of powers outside the cases provided for by the law; the non-exercise of powers when they are due; the threat to carry out the first two conducts);
as to (2), coercion means to oblige by force or threats, it means a serious and credible threat of a serious economic loss;
as to (3) inducement means a serious psychological pressure on the victim, who is convinced of the necessity of the undue payment in order to avoid a serious economic loss (sometimes defined as "metus publicae potestatis" in order to point out that there is no intent to influence the p.o. accompanying the corrupt giving something of value, but only the intent to avoid the undue exercise of public powers which probably causes serious and unlawful economic loss unless paid for giving a citizen his due).
Consequently, no defence is prescribed for the bribing conduct; the norm is rather referring to an act incompatible with the existence of the latter: the Supreme Court (Cassazione) has stated that the mere position of supremacy (Cass. 26.08.97, Guida dir. 1997/37, 80) of a public official is no defence; it is

assumed that the citizen seeks to obtain something he is entitled to, as clarified above. And in respect of the behaviour and the intent of the private giving or promising the advantage, the S.C. stated that there is bribery or any form of attempt to it (incitement to bribery) if the citizen accepts the request by the p.o. to his personal advantage: any assessment in terms of balance of advantages and disadvantages/losses, within the context of an unlawful conduct, amounts to bribery (e.g. Cass. 25.02.03 no. 15117, C.E.D. 224375).

b) in this respect, even if other legal systems do not expressly provide for the offence of "concussione", the circumstances it governs are in any case de facto solved in a very similar way, as for example in the US system (the intent to influence is an essential element of the offence of bribery defined in 18 U.S.C. § 201 (b)); the different ways in which the legal systems deal with *the issue of undue payments in case of threatening economic loss unless paying for giving a citizen his due* is irrelevant, because the concrete solution is very similar.

Text of recommendation 7.(b):

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

(b) 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

A bill signed by Massimo Brutti, was submitted on 26 July 2006 to the Senate, by document no. 878/06. This bill covers the repeal of law (ex-Cirielli) no 251 of 5 December 2005 and embodies provisions in the matter of time limitations of offences. The bill has now been assigned to the II Commission to be reviewed on 26 October 2006.

The bill introduces a distinction between "time limitation in respect of the offence" and "time limitation in respect of the proceedings". The first is an institution of substantive law which applies automatically after a given period of time. The second institution is based on "the reasonable duration of the proceedings" and safeguards, on the one hand, the expectations of a defendant to have his trial concluded within a given time span, and the other, the expectation of the prosecuting authority to be able to conclude it without being penalised by anything other than its scarce expedition.

The bill, then, simplifies the identification of the maximum sentence on which to gauge the time limitation range.

Concurrently, the Ministry of Justice has worked out a new bill covering the repeal of the Ex-Cirielli law and the development of new rules on the time limitation of offences. The bill, which is now being reviewed by the Committee for the reform of the Code of Criminal Procedure (chaired by Prof. Riccio) and by the Committee for the reform of the Criminal Code (chaired by Prof. Pisapia) shall be submitted to the Chambers of Parliament in December.

The bill setting forth *"rules for expediting the criminal trial and changing the criminal code and code of criminal procedure"* stands out because, with a view to giving a comprehensive answer to the numerous problems affecting the proper operation of our Justice system, it strongly changes some fundamental criminal – procedural institutions, and in some cases even redefines them. In the matter of recidivism, by overcoming the mechanisms of the so-called "dual track", introduced by law no. 251 of 5 December 2005

(known as *ex-Cirielli*), between "repeat offenders" and "first offenders", the bill aims, in the first place, to overcome the negative effects of the aforesaid ex Cirielli law, with the intent of rebalancing the treatment of repeat and first offenders. In the second place, it aims at redefining the institution itself. In particular, under Article 99 of the criminal code, as set forth by Article 5, paragraph 1 of the bill, the institution of recidivism must be: "compulsory" (to ensure equality of treatment between repeat and first offenders); "specific" (an offender can only be a repeat offender if the repetition concerns an offence of the same nature) and "temporary".

The Bill also aims at redefining the institution of time limitation. Law no 251/2005 had amended the institution considerably raising many issues of legitimacy before the Constitutional Court which, by judgement of 23 October 2006, declared the constitutional illegitimacy of Article 10, paragraph 3, where the rule provides for the new time limitations not to apply to pending proceedings of first instance if the trial has been started. Furthermore the institution of time limitation, as redefined by the Cirielli law, ends up dwarfing the principle of reasonable duration of the trial, as enshrined by Article 111, paragraph 2 of the Constitution and by Article 6, paragraph 1 of the European Convention of Human Rights and Fundamental Freedoms. Consequently, the Bill aims at redefining the topic by:

1) proportioning the time limitation to the maximum sentence (increased by a half); for cases where the law provides for a sentence of imprisonment and/or a fine for the offence, the time limitation is established only in respect of the sentence of imprisonment;

2) excluding from the calculation the circumstances, except for the so-called circumstances "*ad efficacia reale":* the new text of Article 157 letter b), paragraph 2, provides for keeping account only of the sentence prescribed by the law for the committed or attempted offence and not of the reductions in the sentence due to the mitigating circumstances and increases in the sentence due to aggravating circumstances, except for those circumstances for which the law autonomously establishes a sentence.

3) to provide for a minimum and a maximum limitation period for the offences (less than 5 years for offences and less than 4 years for misdemeanours, even if they are punished by a pecuniary penalty; more than 20 years for offences and more than 10 years for misdemeanours). It has to be stressed that the limitation period does not extinguish offences for which the legislation provides for life imprisonment, even if it results from the application of aggravating circumstances;

4) to provide for different limitation periods according to the nature of sanctions; as a consequence, different limitation periods will be provided for not only as regards offences and misdemeanours, but also as regards sanctions provided for by the code and sanctions of different nature (therefore, when the law provides for sanctions other than imprisonment, the limitation period applied is of 5 years);

5) to provide, as a cause for suspension, for a limitation period applying only to the defendant's appeal (therefore, as a rule, the ultimate limitation period of the offence should begin at the moment of the pronouncement of the judgment of first instance).

A particular attention should be given to the resumption of some provisions existing before the so-called Cirielli, regarding in particular connected offences and continuing offences. On the basis of the choice to provide for a limitation period based on the penalty set forth for each offence, it seems to be necessary, in case of joint charges, to determine a unique commencing day (*dies a quo).*

The examination of the delegated judge and the notice declaring the conclusion of the preliminary investigations are among the causes for the interruption of the

limitation period.

Among the causes providing suspension of the limitation period there are also those cases of "stay of proceedings" caused by the defendant such as:

- the request for recusation of the judge (from the date in which the request is submitted until the date in which the order rejecting the said request is communicated to the competent judge)
- the granting of time for the defence in case of renunciation, withdrawal, conflict and abandonment of defence, for a period corresponding to the granted time;
- the renewal, on request of the defendant, of evidence taken during the trial, in case a new judge is appointed, for the period of time that is necessary for the renewal. This provision does not apply to co-defendants who are not concerned by the request of renewal, in case the separation of the trail is ordered, or when the taking of evidence regards new facts and circumstances;
- the suspension of the proceedings if the defendant has had no knowledge of it.

A proposal provides that, in case of extension of terms as set forth in art. 175, para. 2, of the code of criminal procedure, the limitation period of the offence does not run.

It has to be underlined that Italy, through a policy of case management, is orienting its judicial policy in terms of rapidity of the proceedings. To that purpose we underline:

- the institution of justices of the peace, i.e. lay judges (lawyers, university professors, law graduates) having specific jurisdiction in criminal and civil matters, with the purpose to reduce the case load, also as a consequence of the application of summary proceedings;
- the use of stenotyping during the hearing;
- the electronic service;
- the introduction of deadlines;

the application of alternative procedures quicker than the ordinary proceedings.
All these mechanisms aim at ensuring a higher level of efficiency of justice also as regards organization, without reducing safeguards of individuals.

If no action has been taken to implement recommendation 7.(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 7.(c):

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

(c) 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

It has to be underlined that Italy has promptly implemented provisions regarding the European Arrest Warrant. Furthermore, the Minister of Justice, immediately after he was appointed, has withdrawn reservation to the ratification of provisions regarding the European Evidence Warrant.

In particular, as regards letters of request**s** and extraditions, it has to be stressed that Italy has not particular difficulties in meeting the requests for mutual legal assistance that, notwithstanding the high costs, are more and more frequent among industrialized countries and, in particular, among members States of the European Union.

The General Directorate for Criminal Justice – Office II, often organizes meetings between the officers that are in charge of letters of request from and towards foreign countries, and the requesting judicial authorities (both Italian and foreign), in order to facilitate the exchange of experiences and simplify procedures. Furthermore, the presence of a liaison magistrate has averted the risk of empasse as regards extraditions and letters of request as well as regards possible conflicts.
For the year 2007, the Deputy Minister Maritati will encourage any initiatives of exchange of experiences and collaboration in particular in the field of transnational corruption.

If no action has been taken to implement recommendation 7.(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

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

(a) The effectiveness of the code of conduct of SACE (Italy's export credit agency) in preventing foreign bribery (Revised Recommendation, Paragraph I);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The rules of the "code of conduct" are inserted in all the texts of policy of insurance and guarantee agreements signed by Italian exporters within the transactions of the so-called buyer credit.
In the said policies of insurance the insured person commits himself to comply with the principles of the code of conduct.

Text of issue for follow-up:

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

(b) The application of the offence of *istigazione alla corruzione* and attempts to the foreign bribery offence in particular to verify whether it is committed irrespective of, *inter alia*, the value of the advantage and its results (Convention, Article 1; Commentary 7);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Presently, cases decided by a final sentence in application of the offence of "incitement to corruption" related to foreign public officials are not known, although an indictment has been issued in one case.
Nevertheless, there is no doubt that the judges are aware of the gravity of the offence.
More: the incitement to corruption shall be punished even if the proof of the amount concretely offered does not result in the trial; the failure of the prosecutors to provide the proof of the concrete amount of the advantage is no defence; Cass. 23.1.2004 n. 23018: the mere offer to the public official is such as to constitute an offence (for instance, by asking him "how much he wants" for having committed an act contrary to the duties of office); Cass. 25.2.2004 n. 21095: it is not necessary that the offer has a justification, nor that the utility promised be specified, nor that the amount of money be quantified, being sufficient the presentation by the agent, of the unlawful exchange. The same is stated by Cass. 8.5.2003 n. 28311.
The offence obviously exists even when the agreement is not concluded because the offer or the request are refused: the achievement of a result is therefore irrelevant (e.g. Cass. 21.1.2003, n. 11382).
It is to remark that the Supreme Court **confirmed** the judgements of the low courts in these cases.

Among the Scholars there is great attention to the offences against public administration in general; between 2001 and 2004 various treaties specifically dealing with said subject-matter have been drafted (Romano, Commentario sistematico del codice penale (Systematic Commentary of the criminal code. Offences of public officials against public administration - Reati dei pubblici ufficiali contro la p.a. – Crimes of private persons against public administration, Milano, Giuffrè, 2 voll., Milano, Giuffrè (2002-2006)Fiore (by) Crimes of public officials against public administration, Torino 2004;; Benussi, Crimes against public administration, Padova, Cedam, 2001; Bondi - di Martino - Fornasari, Offences against public administration, Torino, Giappichelli, 2004).

Text of issue for follow-up:

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

(c) With respect to the prosecution of foreign bribery:

(i) Whether conflicts of competence amongst Italian public prosecutors lead to delays and a waste of resources, thereby decreasing the effectiveness of foreign bribery investigations (Revised

Recommendation, Paragraph I);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There are no reasons to believe that the enforcement of rules be hindered by the territorial competences of public prosecutors.
Presently the cases of foreign bribery of which Italy is the protagonist fall under the competence of the Prosecutor Office of Milan, therefore, difficulties of coordination between offices with consequent conflicts of competence do not exist.

Text of issue for follow-up:

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

(c) With respect to the prosecution of foreign bribery:

(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);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There are no obstacles to the mutual legal assistance, because:
a) the crime of foreign bribery involves the responsibility of legal persons;
b) art. 34 of legislative decree 231/2001 provides for the application of the rules of the code of criminal procedure, therefore also those concerning the cooperation with foreign authorities [presently, at the Ministry of Justice – General Directorate for Criminal Justice – some active and passive rogatory letters have been issued. .

Text of issue for follow-up:

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

(c) With respect to the prosecution of foreign bribery:

(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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The Constitutional Court (judgement, ord. n. 289/1989) and the Supreme Court (e.g. Cass. 3.3.2003,n. 19678) does agree in stating that the powers of the M.o.J. are definitely not of political but of technical nature.
This means that it is an act that can be delegated to an administrative officer (and in reality in practice is always delegated, by means of a permanent delegation, usually to the Director General of Criminal Affairs); it is an administrative act subject to the rules of any administrative act:
1) it has always to be motivated (e, as the Constitutional Court stated, his choice is bound to the achievement of purposes, determined by law, of criminal policy);
2) It is subject to the jurisdiction of the administrative judge, in particular in relation to the defects of infringement of law and excess of power.
It is therefore an act on which the jurisdictional control is exercised.

Besides that, it is an act which cannot be revoked (once carried out the request, the criminal proceeding is activated and it cannot be no more interrupted);.

To sum up, the request of the M.o.J. following the the proceeding judge's answer, is mandatory in fact. There is no case-law of refusal of such request.

Text of issue for follow-up:

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

(d) With respect to the liability of legal persons:

(i) Whether Italy can effectively prosecute legal persons in the following cases: 1. in the absence of proceedings against natural persons; 2. where the legal person is a state-owned or state-controlled company; 3. where a foreign legal person bribes a non-Italian official in Italy; and 4. where an Italian legal person uses a non-Italian national to bribe a foreign public official while outside Italy (Convention, Article 2);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

as to 1.
If the crime is committed, and a legal person is involved, it is irrelevant that a natural person who in fact committed the crime cannot be identified (art. 8, d. lgs. 231/2000: the responsibility of the legal person is not excluded if the perpetrator of the crime has not been identified).

as to 2.

Yes. Only the State or a public entity with constitutional powers as such cannot be subject to jurisdiction (e.g., a public territorial body like a Region; a political party)

as to 3.
Yes. There is no exemption from the territoriality principle of the criminal law. The fact, that a legal person is involved, means necessarily that the conduct constituting the crime of bribery is any case carried out by a natural person in the ambit of Italian criminal law [in this sense see also Tribunale di Milano, 27.4.2004, quoted below, under 8 d) ii) answer a) in which the tribunal held that if a foreign company such as the one in question operates in Italy, it doesn't matter if the foreign system does not apply prohibitive sanctions ["sanzioni interdittive"] and does not impose the duty to adopt special compliance programs, as Italian law on the contrary does]. See also point (1) above.

as to 4.
If an Italian legal person «uses» a non-Italian national to bribe a foreign public official while outside Italy, it means that there is a participation of a natural person either in charge or in representation of the legal person to the crime committed outside of Italy. From this statement following consequences shall be drawn:

aa) if a part of the conduct of participation is committed in Italy (e.g., order, charge, instigation given from Italy to the non-Italian; money transfer from Italy to the non-Italian), the crime as a whole is deemed to be committed in Italy; Italy has jurisdiction without any limits and the rules on the responsibility of legal persons can be applied.

bb) if none act is committed in Italy, we have to distinguish:

***i*)** the natural person who "uses" the non-Italian in charge of the Italian legal person, is Italian: in case of presence in Italy and if there is a request of the M.o.J. [see above, 8 c) iii), see also art. 4 d. lgs. 231/2001], Italy has jurisdiction, and the dispositions on the responsibility of legal persons can be applied

***ii*)** the natural person who "uses" the non-Italian is non-Italian; Italy has no jurisdiction (there is no obligation of establishing national jurisdiction under art. 4 Convention). However, there are no obstacles in giving assistance to authorities asserting jurisdiction.

***iii*)** the natural person who "used" the non-Italian is unknown: Italy has no jurisdiction. However, there are no obstacles in giving assistance to authorities asserting jurisdiction.

Text of issue for follow-up:

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

(d) With respect to the liability of legal persons:

(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);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

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a) case law is very strict in assessing the requirement of suitability of the organisational model (compliance program) to prevent crimes.– Tribunale di Milano (Court of Milan), Office of the Judge for Preliminary Investigations, 27.4.2004, in which the Court applies as a precautionary measure towards a company the prohibition to negotiate with the public administration, for one year.

A proceeding at the Court (Tribunale) of Bari, in which the Judge has appointed a panel of experts for the assessment of compliance programs of multinational pharmaceutical companies, accused of corruption, is pending.

The Judges precise that the adoption of a mere ethical code by the legal person is not suitable to prevent offences of the kind that occurred.

Besides that, in the adoption of organisational models, (*i*) it is required that the model specifically keeps into consideration the particular predisposition of the body to the risk of commission of the offence and the fields of activity in which this predisposition is showed (Tribunale di Roma (Court of Rome), 4.4.2003); (*ii*) in itself, the adoption of the model does not break the precautionary requirements.

b) **scholars and doctrinals developments**. The issue of is one of the most focussed and canvassed issues in criminal theory (e.g. "offences and responsibilities of the bodies. Guide to legislative decree 8 June 2001, n. 231", by G. Lattanzi, Milano 2005, a work in which contributions of professors in law, magistrates, experts in company organization come out.).

c) other relevant developments. Italian Manufactures' Association adopted, on 7.3.2002, Guidelines for the construction of organization, management and control models as per legislative decree n. 23172001. These have been updated on 24.5.2004. In the annex to these Guidelines, "case studies" are showed, the first of which concern corruption and bribery.

Text of issue for follow-up:

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

(e) With respect to sanctions, the level of sanctions applied to natural and legal persons, including the level of fines, application of confiscation, prohibitive sanctions, suspended sentences and the use of *patteggiamento* based on information provided by Italy (Convention, Article 3);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As concerns the offence of bribery of foreign public officials, Italian law provides for the briber the same kind of sanctions provided for national bribery (art. 322 bis II paragraph c.c.); In fact the same sanctions provided for national bribery shall be applied to the corrupted foreign official member of European Community bodies or bodies constituted on the basis of treaties establishing Communities or public official within the other Member States of European Union (art. 322 bis 2° paragraph c.c.).

If bribery has for object the commission of an act of the office, the punishment is imprisonment from six months to three years; if it has as object an act contrary to the duties of office, the punishment is imprisonment from two to five years, if the bribery concerns judicial acts, the punishment is imprisonment from three to eight years, further increased if from the bribery derives the unjust conviction of a person.
Besides that the commission of an offence as per art. 322 bis c.c. can lead to the application to the briber, of some accessory sanctions: disqualification from practising a professional activity, from trade or from the business exercised; disqualification from executive offices of corporations or enterprises; incompetency to contract with Public Administration.
As regards the company, it has to be outlined that in general the responsibility for the administrative unlawful act of the company resulting from the bribery of foreign public officials is the same as that provided for national bribery. In particular the following sanctions shall be imposed:

a) pecuniary sanctions, proportioned to the seriousness of the fact and the conduct of the company

b) prohibitive sanctions consisting in the disqualification from practising a professional activity, in the in the suspension or revocation of the functional authorizations and permits functional to the commission of the unlawful act, in the prohibition to negotiate with Public Administration, in the exclusion from facilitation, in the prohibition to advertise goods and services. Besides that said sanctions can be also applied as precautionary measures or "previously" as far as serious evidence as regards the responsibility of the company for the unlawful act relating to the offence of bribery of public officials for not having adequately supervised on the observance of the organizational model arranged in order to prevent the commission of offences, as well as the existence of the danger of the repetition of the offence. The condition that the company must have drawn by the unlawful act, proceeds of huge entity, or the fact that the offence has been repeated.

c) confiscation.
The confiscation of the proceeds from the crime of bribery is provided for Italian criminal law art. 322 ter c.c., in the case of impossibility to detect said proceeds the forfeiture of the goods of the sentenced person for a value corresponding to the proceeds or price of the crime.
The confiscation towards a corporation of the price or proceeds from the crime of bribery is provided for by Italian law with effects equal to those provided for the confiscation towards a natural person (art. 19 Legislative Decree 231/01). In case of impossibility to detect said proceeds art. 19 provides for the confiscation of money and goods of corporation for a value corresponding to the proceeds from or price of the crime.
It has to be underlined that Law.328 of 9.08.93 concerning ratification and enforcement of the Convention of Strasbourg of 8 November 1990 in matter of money laundering, research, seizure and confiscation of the proceeds from crime, included in the Italian code of criminal procedure, art.735 bis which reads as follows "In case of enforcement of a foreign measure of confiscation, consisting in the imposition of a payment of a sum of money corresponding to the value of the price, the product or the proceeds, the provisions on the enforcement of the pecuniary sanctions shall be applied…etc…" There also is another rule in the code of criminal procedure guaranteeing the effectiveness of an international cooperation in matter of confiscation and seizure, and it is art.. 737 bis c.c.p. according to which "upon request of another country having started a criminal proceeding or a proceeding for purposes of confiscation, each Party adopts the necessary temporary measures, as the freezing or seizure, in order to prevent any trade, transfer or disposal of goods which, in a subsequent moment, could be object of request of confiscation or could satisfy said request"

d) publication of the judgement

As regards plea bargain, it is applicable even to the offence of bribery. It consists in an agreement between Public Prosecutor and accused person, before a third judge and leads to the application of a criminal

sanction against an accused person having requested it. This implies for the latter some benefits: the sanction concretely imposed by the judge is reduced by one third, after five years from the issuing of the judgement in the absence of commission of offence of the same type by he accused person, for which he has negotiated, the offence is extinguished; accessory sanctions are not imposed to the accused person and he is not exempted from the payment of costs.

Text of issue for follow-up:

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

(f) With respect to the power of the *Corte dei Conti* (State Audit Court) to audit public bodies, the application of that power to public or publicly-managed entities (1) involved in international transactions, (2) involved in contracting opportunities with Italian companies through public procurement or development aid, and (3) that are not subject to an external audit requirement (Revised Recommendation, Paragraph V.B.(i)).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report.
Please provide relevant statistics as appropriate:

1) Since 2004 the Court of Cassation has upheld the case law which confirms that the State Audit Court has the jurisdiction to bring liability actions not only against directors of public entities but also against publicly-managed private companies, and in the same way the State Audit Court can also proceed against directors managing companies involved in international transactions.
2) With decision n.9 of 12 January 2004 the Court of Cassation affirmed that it comes under the jurisdiction of the State Audit Court to settle disputes relative to directors' accountability for privatised public welfare entities. These entities, although they have been privatised, continue to perform public functions.
   Under decision n.1378 of 23 January 2006, the Court of Cassation affirmed that the State Audit Court, which had condemned public managers who had engaged private consultants, had not exceeded its jurisdiction; thereby confirming the jurisdiction of the State Audit Court in this type of dispute.
3) The State Audit Court which audits the financial management of publicly funded bodies (art. 100 Cost.), under the most recent decisions of the Court of Cassation, must also audit external entities which are state funded, through the mechanism of the consolidated balance sheet.

The central audit section on the management of the State administration under resolution n. 8/05/G, of 8 January 2005, approved the final report of a specific survey on the "State of implementation of the law-objective (law 21 December 2001, n.443) "included in the control programmes for 2003 and 2004.

The court pointed out that the initial impetus of the programme was not followed up with equally effective planning, both in technical and economic-financial terms, thus resulting in inefficiency and negative effects of indiscriminate financing.

From the survey it emerges how slowly and unevenly the projects are being carried out, the insufficiency of the monitoring and information capacity of the administrations, and of the people involved in carrying out the projects.

Lastly, it was pointed out that investments should be assessed on the basis of how economic, focused, synergetic and integrated they are.

In the resolution on the law-objective, the Court, in its auxiliary function to Parliament, made some observations: the contractual institutions and the organisational systems adopted, should be supported by more feasibility studies, with regard to their concrete adoption in each individual operation.

The Court felt it necessary to introduce detailed provisions in order to illustrate, in accountancy terms, the total costs of public works.

Finally, the Court once again emphasised that it would be advisable to set the expiration date of those public contracts which are likely to be financed totally with public funds.

The central section on the auditing of the management of the State administration, under resolution n. 16/04/G of 9 June 2004, approved the report on the survey regarding the management of works classified under art.33 of the law of 14 February 1994, n. 109 and subsequent amendments and integrations.

In this regard it should be noted that:

It has emerged that in the administrations there are still different programmes which, based on the premise that "the declaration of secrecy" of the works falls under "governmental functions", assign the classification of the works to the directors and not to the Ministry. In this regard the Court has confirmed the policy, which has by now been consolidated, of assigning the task to the highest authorities.

It was reaffirmed, in the section report, that the classification of the works must be carried out in advance, in the planning stage, and not in another phase of the procedure.

A widespread pathology, pointed out by the Court, concerns the artificial subdivision of contracts, above all in the field of the extraordinary maintenance of buildings

SUPPLEMENTARY ANSWERS PROVIDED BY ITALY

Supplementary Responses to Recommendation 1a:

- ***With regard to the Financial Police, please specify whether there have been new courses specifically on foreign bribery included in basic and advanced training and/or seminars, etc. since the adoption of the Phase 2 Report in 2004. How often are these courses provided, and are they mandatory?***

The issue in question is dealt with within the framework of a wider rage of subjects at the Training Institutes of the Financial Police.

- In order to promote awareness of this subject, the Inspectorate for Education Institutes was involved in 2005 in relation to the organization of ad hoc conferences and/or seminars for both basic training and advanced training. As a result of this, last year, the following seminars took place:
  - "Fighting bribery: National and International Prevention Strategies", at the Academy – Corsi di Applicazione e Speciali in Castelpoziano (Rome), on April 27, 2006;
  - "OECD Working Group on International Bribery", at Scuola Ispettori e Sovrintendenti in L'Aquila, on March 27, 2006;
  - "Bribery of Officials in International Public Transactions", at the Scuola Nautica of the Financial Police in Gaeta, for financial police officers working in the Navy (first semester of 2006).

- ***Have any training courses been provided to the Carabinieri which specifically target the bribery of foreign public officials? If so, how often have these courses been provided, and are they mandatory?***

Every basic course in the Carabinieri Schools and Academies deals with the bribery of foreign public officials, as it is an offence provided by art. 322-bis of the Italian Penal Code since September 2000.

The attendance to a basic course is mandatory in order to be admitted in active service in the Carabinieri Corps.

Moreover, the matter of penal protection of the EU interests, with specific reference to extortion, corruption and bribery of public officials, is dealt with during the Specialisation Course, which is mandatory to be admitted to the Master for the formation of experts in problems of International Cooperation and Security. The Course can be attended by Officers of the Carabinieri Corps promoted to the rank of the Major during the year referred to.

- ***With regard to SACE, to what extent does the SACE "organisational model for the prevention of offences", including foreign bribery, and training courses, deal with the course of action for SACE staff to follow upon discovering that a client or applicant may be involved in foreign bribery? Please specify whether the training has included training to detect and report foreign bribery where the offence has been committed by clients of***

<u>SACE</u> (and not by SACE employees, as seems to be the focus of the organisational model mentioned).

In compliance to the issue of 2006 Action Statement by OECD Export Credit Group, by the beginning of January SACE is going to introduce a new procedure to deal with transactions affected by bribery.

First of all SACE modified application forms, requiring applicants / exporters to declare if they have been convicted for crimes of bribery or if they have been banned by international financial institutions for the same crimes.

In case applicants declare that have been convicted or banned in the last five years in other transactions than the one which the cover is asked for, SACE staff is obliged to perform a due diligence procedure in order to ascertain that applicants took corrective measures to prevent the commission of a new offence.

The new procedure, for which clarification and information is given to all SACE Staff, will be also published on intranet web site by the beginning of January".

- ***To what extent do the tasks of the "High Commissioner for the Fight against Corruption" include foreign bribery?***

The tasks of the "High Commissioner for the Fight against Corruption" does not include foreign bribery. The Head of Delegation means to promote the inclusion in charge of the Departments of the Premier who have the supervision of the "High Commissioner for the Fight against Corruption"

Supplementary Responses to Recommendation 1b:

- ***How are public officials who carry out commercial transactions within the framework of foreign trade made aware of the obligation to report an offence under article 331 of the Code of Criminal Procedure? Have there been specific incidences of such reporting since the Phase 2 examination of Italy?***

Supplementary Responses to Recommendation 1c:

- ***Please explain what is meant by "economic operators".***

Economic operator means any Italian subject residing abroad (business men and companies, etc) carrying out business activities (in the instance) with foreign countries and Italian subjects doing business with foreign countries.

- ***Please indicate who is responsible for carrying out the monitoring of activities undertaken by Embassies, what the results of this monitoring have shown, and whether action has been taken if/where Embassies have not taken due steps.***

The activities undertaken by Italian Embassies abroad are monitored and reviewed through exchange of information between the Ministry of Foreign Affairs – Directorate for economic, financial and multilateral cooperation (where is active an OECD desk where a magistrate is attached with the specific task of monitoring the OECD Convention) and the Italian diplomatic and consular network .

Until now no case of corruption concerning the OECD Convention has been monitored through the said channels.

Supplementary Responses to Recommendation 2:

- ***The response provided focuses on witness protection. The Recommendation, on the other hand, was concerned about whistleblower protection, i.e. the issue of, notably, employees of companies which report, in good faith, suspected offences committed by/within their company, and the protection afforded to them against retaliatory action. Please indicate whether anything has been done in this regard, and whether the Law No. 45/2001 specifically addresses whistleblower -- i.e. labour law (not witness) -- protection.***

The law in force (Article 203 of the Code of Criminal Procedure) forbids the use of statements made by police informers if they are not heard as persons who can report information about the facts or heard as witnesses. Even if they are heard by the judicial authority, their statements cannot be used if they are about common rumors and do not pertain to circumstances directly perceived or detected (Article 194 of the Code of Criminal Procedure).

The provisions of decree-law no. 8/91, as modified by law no. 45/01, make express reference (Article 16quater, para.6) to the abovementioned procedural rule as being the condition for the application of the program for the protection of «witnesses of justice». So, although Article 16 bis of decree-law 8/91 (which sets out the cases in which the special protection measures may be granted to witnesses of justice) could – in abstract terms - be applicable to all the cases of statements made by police informers in that the categories of "victim, or person who can report information about the facts, or witness" are listed under para.1, the restrictions set out in Article 16 quater prevent it from being practically extended to cases in which the statements cannot subsequently be considered as testimony usable in criminal proceedings. As a matter of fact, only those who are able to report circumstances they have directly heard of (also by hearsay, if necessary, but in this case only in relation to the circumstance of having heard the information from a given person) will be granted the protection measures.

The objective limitation in applying decree-law 8/91 concerning the type of offence which is the subject of the criminal proceedings (Article 9, para.2) is expressly overcome by para. 2 of Article 16 which rules as follows: "The statements made by witnesses of justice may also lack the characteristics set out in Art. 9, para. 3 - provided that they are reliable - and refer to offences other than those listed under para. 2 of the same Article".

Supplementary Responses to Recommendation 3:

- ***Please provide an English translation of the amendments to Law No. 262, dated 28.12.2005, published in the Official Gazette, Ordinary Supplement No. 208, dated 28.12.2005, No. 208.***

Article 2621 (False corporate notices)

Without prejudice to Article 2622, any director, general manager, auditor or liquidator who, for the purpose of deceiving members and the public and for the purpose of deriving an unjust profit for himself or others, states - in the balance sheets, corporate reports or other corporate notices provided for by law, addressed to members or public - material facts not responding to the truth even though subject to evaluation or omit information whose dissemination is prescribed by law, in respect of the economic, property and financial situation of the company or of the financial group it belongs to, in such a way so as to lead the receivers into error as to the relevant situation, shall be punished by arrest for up to one year and six months.

The punishment shall also apply in case of information regarding properties possessed or administrated by the company on behalf of third parties.

The punishment shall be excluded if the falsities or omissions do not alter significantly the economic, property or financial situation of the company or the group it belongs to. The punishment is anyhow excluded if the false statements or omissions cause a variation in the operating results before tax not exceeding 5% or a variation in the net property assets not exceeding 1%.

In any case, the fact shall not be punishable if it is a consequence of estimates that, on a separate basis, differ from the correct prospects to an extent not exceeding 10%.

The amendments 31,32, 33, 34, 35 of the Law no. 262/2005 regard similar previsions.

- ***Para (a), please indicate what is the monetary sanction in euro terms (rather than "quotas").***

Monetary sanction for the infraction's actor:

considering that one "quota" can amount from a minimum of € 258 to a maximum of € 1549, it results:

i) the minimum ranges from € 2580,00 to 15490,00;

ii) the maximum from € 25800,00 to € 154900,00

We must point out that there are the sanctions for the person held responsible. If the legal person is responsible, the quotas range broadly from 200 up to 800 (for details see the table below).

APPLICABLE SANCTIONS (LEGAL PERSON)

False accounting not causing damages to shareholders or creditors (civil code, art. 2621)

from 200 up to 300 quotas:

i) minimum ranging from € 51600.00 to 77400.00

ii) maximum ranging from € 309800.00 to 464700.00

False accounting causing damages to shareholders or creditors (civil code, art. 2622)

a. Involving non-listed companies

from 300 to 660 quotas:

i) minimum ranging from 77400.00 to 170280.00

ii) maximum ranging from 464700.00 to 1,022340.00

b. Involving listed companies

from 400 to 800 quotas:

i) minimum ranging from 103200.00 206400.00

ii) maximum ranging from 619600.00 to 1,239200.00

- ***Para (c)(3), please specify what is meant by "shall adopt": is this a certainty? Or will a bill be prepared and submitted to Parliament?***

It is a certainty; the adoption regards, in fact, the ministerial decrees in execution of the L.262/05, not needing to be submitted to the Parliament.

- ***Does the false accounting offence continue to require that the false information or omission "appreciably distort the trading, balance sheet or financial situation of the company"?***

Not exactly. The false accounting must appreciably distort "the representation" of the financial situation of the company. It means, even if the false accounting does not distort the economic or financial situation from a "quantitative" point of view, it is forbidden if – hiding e.g. bribes or other activities against the fair trading, and so on - it results in a false portrayal of the company's activities ("qualitative" point of view). This has to be understood in the sense explained by the landmark decision of the Gup Tribunal of Turin 9.4.1997, confirmed by Court of Appeals of Turin, confirmed by the Italian Supreme Court (Corte di Cassazione, sez. V, 19.10.2000) in re Romiti (former C.E.O. of auto industry FIAT), adopting a qualitative point of view: "a small amount, even in percentage terms, shall NOT mean that it is immaterial … Money is a factor which is in modern societies not only motive for actions but it can be used as a mean for committing crimes … Thus, a statement is material … because of his importance in order to understand the net of social and economic relationships … the identity of a company" (see S.C., judgment, at point D) § 4).

- ***Must the false accounting pertain to the "economic or financial situation of the company"?***

False statements in general must pertain to the economic or financial situation of a company. This is especially important for written or oral statements related to the situation of the company; as to the false accounting stricto sensu, conversely, the requirement is not really material, because the false accounting is always considered as pertaining to the economic and financial situation of the company.

- ***Does the new legislation continue to require that the offender must intend to deceive shareholders or the public (as was planned in the proposed amendment to the false accounting offences -- see discussions under para. 189 of the Phase 2 Report)?***

Yes, it does.

Supplementary Responses to Recommendation 4:

- ***What steps have been taken to ensure that the term "facts deemed censurable" in article 155(2) of Decree 58/1998 include the offence of bribing a foreign public official?***

As mentioned in past exchanges, the term "facts deemed censurable" already includes the offence of bribing a foreign public official, therefore the recommendation does not need to be further transposed in Italy.

Nevertheless, in order to further strengthen the external auditors' detection of offences and fraudulent behaviours (including bribery of a foreign public official), Consob has very recently endorsed a new auditing rule: Document no. 240 on the auditor's responsibility of assessing frauds in performing the audit of the financial accounts (see Consob Resolution no. 15665 of 6 December 2006). Document no. 240, which transposes the IFAC international auditing principle no. 240 on the auditor's responsibility to consider fraud in an audit of financial statement, provides rules and guidelines to identify possible frauds when discharging the auditing on the companies' accounts (see par. 1 of Doc. 240). In this context, fraud is broadly defined (see par. 6 of Doc. 240) as an intentional act fraudulently carried out by one or more personnel of the company, which is aimed at obtaining an unjust or illicit advantage and which causes a

material mistake in the financial accounts (i.e.: a false financial information and/or an illicit appropriation). The auditors shall engage in a dialogue with the management and other personnel of the company in order to investigate possible commission of frauds (see par. 33 ff.), shall adopt suitable procedures and consider any risk factors (par. 48 and ff.), including incentives to commit fraudulent activities. The Document contains also a list of risky factors to be taken into account (appendix 1), the auditing procedures to be adopted (appendix 2) and possible circumstances signalling fraud (appendix 3). As you may appreciate from the above, Document 240 is a very detailed auditing rule having a general application and which certainly improves the ability to combat foreign bribery.

Moreover, as a further step to broaden the scope of application of art. 155(2) of Decree 58/1998, Law no. 262/2005 has established that the provisions on external auditing set forth under Decree 58/1998, including art. 155(2), applies not only with respect to the auditing of listed companies, companies controlled by them and companies whose securities are widely distributed - as already provided in the previous regime - but shall also apply to the auditing of companies controlling listed companies and those subject to common control with the latter (see art. 165 bis of Decree 58/1998).

In addition, it is worth recalling that the external auditors' duty of reporting provided for under Article 155(2) of Decree 58/1998 is intended to establish an effective source of information in order for Consob and the board of internal auditors of the company (collegio sindacale) to carry out their supervisory function. The very general tenor of the wording "facts deemed censurable" can be explained precisely in the light of the opportunity to leave the concept as broad as possible and ensure the widest monitoring, including in connection with the offence of bribing a foreign public official, as well as any other offence established by the law. In fact, the external auditors shall report to Consob and the board of internal auditors any type of violations whatsoever it may become aware of, or suspect, when carrying out its auditing on the company.

The above is confirmed by the Communications that Consob has issued in the subject matter since 1993. It is worth mentioning, inter alia, Communication No. SOC/RM/93002422 of 31 March 1993, whereby Consob has specified that "facts deemed censurable" shall be intended as "any irregular or illicit facts committed by persons or boards of the company arising from violations of any laws and regulations or rules established in the company's by-laws which may have a material effect on the accounting".

In this respect, it should be also noted that the auditing rule ISA 250 on consideration of laws and regulations in an audit of financial statement, endorsed by Consob Resolution no. 13809 of 30 October 2002, imposes that auditors shall be responsible to verify that the company is compliant with the laws and regulations applicable to it. This rule also dictates specific procedures that the auditors shall put in place in order to detect violations which may have an impact on the accounting. It also specifies a list of events which should alert the auditor that a violation may have been committed. The list includes the cases of payments for unspecified services, or unusual payments in cash or into anonymous accounts, unusual transactions involving off-shore centres, non-authorised transactions, etc.

Supplementary Responses to Recommendation 5:

- ***In taking the decision to not establish criminal responsibility for money laundering by the person responsible for the predicate offence, on the basis of the ne bis in idem principle, how will Italy be able to effectively address cases where the predicate foreign bribery offence cannot be punished in Italy (e.g., due to the non-application of extra-territorial jurisdiction) but the person who committed the predicate offence laundered the proceeds of the offence in Italy?***

Italy is able to address such cases. The money-laundering offense is applicable "even if the person responsible for the predicate offense is not liable [because of age or mental diseases] or not punishable or the case cannot come to trial because of lack of the preliminary conditions for the latter [condizioni di

procedibilità, Prozessvoraussetzungen]". Under the "condizioni di procedibilità" is also meant the lack of extra-territorial jurisdiction (art. 7-10 criminal code; art. 341, 342 code of criminal procedure).

Supplementary Responses to Recommendation 6:

- ***Please explain more fully the controls that have been put in place to ensure that persons who participate in tax amnesty programmes do not misuse such programmes for the purpose of dissimulating bribes, in particular regarding the tax amnesty programme introduced by Law 409/2001 (i.e., the one discussed in the Phase 2 Report on Italy).***

The provisions on external auditing set forth under Decree 58/1998 and relevant implementing rules, including the principles no. 240 and 250 mentioned above, apply both to listed companies and to the following non-listed companies:

1. companies whose securities are widely distributed among the public (see art. 116(2) of Decree 58/1998); this category shall include the following types of non-listed Italian companies:

(A) companies which satisfy the following two conditions:

(i) the non-controlling shareholders are more than 200 and own at least 5% of the paid-up capital, and

(ii) are not eligible to draw up simplified annual financial statements according to Art. 2435-bis of the Italian Civil Code (which provides certain turnover and dimensional thresholds); and

(B) companies which satisfy the following two conditions:

(i) the net assets are not lower than five million euros and

(ii) the number of bondholders exceeds 200;

2. companies (i) controlled (see art. 165(1) of Decree 58/1998), (ii) controlling and (iii) subject to common control with a listed company (see art. 165bis(1) of Decree 58/1998, introduced by Law no. 262/2005).

Finally, it should be noted that the auditing of any other type of non-listed companies shall nevertheless be subject to the provisions set forth under the Italian Civil Code, particularly articles 2409 bis and ff, which reserve such activity to audit professionals (which may be an audit firm or a statutory auditor) registered with the Ministry of Justice. The Civil Code provides that the auditors shall satisfy certain independency requirements from the members of the board of directors and from any persons linked to company or to the companies belonging to the same group. In addition, the auditors shall be appointed by the general shareholders' meeting for three years; before expiration, the appointment may be revoked only for just cause and provided that the Court has (i) heard the relevant auditor and (ii) given its consent to the revocation. Furthermore, the Civil Code contemplates that the auditors and the board of the internal auditing of the company promptly exchange any information which may be useful to perform their respective functions. Therefore, should the audit firm or the statutory auditor of such non-listed company be aware of any violation of the law, including bribing a foreign public official, it shall immediately inform the board of the internal auditing of the company. The board, in its turn, report the violation to the Court which may investigate and eventually remove the members of the board of directors.

Though the phase II Report placed emphasis on the issue of tax amnesty, in fact:

- this measure was exceptional and temporary in nature;
- it has elapsed and exhausted its effects;
- in any event, recourse to it did not suspend the operation of criminal law provisions, including the conduct of criminal investigations and the prosecution of crimes (such as the bribery of foreign public officials);

- the government in office has adopted policies which mark clear signs of discontinuity with it.

1. A certain number of legislative provisions adopted over the past few months, while not directly aimed at sanctioning corruption, may be instrumental to countering this phenomenon.

Supplementary Responses to Recommendation 7b:

- ***The issue in Phase 2 was not so much the "base limitation period" (as phrased in the Phase 2 report, para 146 et seq.), but the ultimate limitation period which, currently, can never go beyond seven and a half years (or ten years for the most serious forms of bribery), no matter what the suspensions or interruptions may be. Thus, please clarify, specifically for foreign bribery, whether the proposed bill will in any way extend and/or remove the ultimate limitation period beyond the current seven and half years.***

The bill provides:

a) that the time period necessary for the offence to be time-barred be equal to the maximum sentence provided for by the law, increased by a half;

b) a minimum limitation period of 5 years;

c) the suspension of the limitation period at the moment of the pronouncement of the 1st instance judgment;

d) the possibility to increase the limitation period by an additional half compared with the time limits under paras a) and b);

e) a maximum limitation period of 20 years which cannot be exceeded.

An example concerning bribery (for the performance of acts in breach of official duties) :

the maximum sentence provided for by the law is 5 years; ordinary limitation period: 7 years and a half; maximum limitation period: 11 years and 3 months. Within the said period of time, only the judgment of 1st instance must be rendered. After the 1st instance judgment, the limitation period resumes only if the Public Prosecutor lodges an appeal against the judgment, but it doesn't if the appeal is lodged by the defendant, and when the Court of Cassation quashes and remands [annullamento con rinvio] to the 1st instance judge, except for the proportion of the sentence, the presence of circumstances and the evaluation of the balance of the said circumstances.

Supplementary Responses to Recommendation 7c:

- ***The responses mention that "the General Directorate for Criminal Justice […] often organises meetings between...". Please specify whether these are new measures put in place since the Phase 2 Report in 2004, and/or whether there has been an increase in these regular meetings, or encouragements to work more closely between law enforcement authorities and MLA officials.***

The Directorate for Criminal Justice provides to encourage to work more closely between law enforcement authorities and MLA officials. There are daily contacts and a very strong cooperation.

Supplementary Responses to Follow-up 8b:

- ***Although the cases involving the offence of istigazione alla corruzione have not yet been decided "by a final sentence", please indicate if any cases have been acquitted or are under appeal, and if so, how the court applied the offence.***

As regards the offense of "istigazione alla corruzione" not related to FPOs, quite all trials in front of the Supreme Court (Corte di cassazione) ended with conviction of the defendant.

As regards to the offense of "istigazione alla corruzione" related to FPOs, there is no-case law. A recent judgment of the Tribunale del Riesame of Milan ("appeal" Court for reviewing arrest, search and seizure warrants in pre-trial stage) regarding the request of seizure of goods in pre-trial stage, stated that the accusation was too confused and did not allow that seizure.

- ***Please indicate whether the law of attempts has been applied to cases where an offer, promise, or gift made to a public official was (1) received by a public official but neither accepted nor rejected by the official; or (2) not received by the public official?***

1. As regards the first case, there is no need to apply the law of attempts. The structure of the offense of "istigazione alla corruzione" is one of attempt, which is punished yet as it were an accomplished crime (in the German literature this phenomenon is known as Vorfeldkriminalisierung). Only a diminished sanction is provided, given the fact, that here a mere attempt is criminalized.

Therefore, offering, promising etc. something to a public official who neither accepts nor rejects the offer is always a crime under the provision of art. 322.

2. As regards the second case specifically, if we understand correctly the practical situation you are referring to, it seems to be very academic: e.g., the gift was not "received" because it got lost; the promise was not heard, or a letter containing a written promise or offer was not received. It has to be pointed out that it seems very difficult to prove that something constitutes a bribe if the offer or promise of it was not "received" by the p.o. That is probably the reason for the fact that there is no relevant case-law in the last 20 years on such a situation. However, three decisions of the Supreme Court are to be mentioned:

i) S.C., sec. II, 4.3.1992 n. 5518, Bigoni, stated explicitly that "the crime … is a crime that need a conduct but no result, thus, it is not required that the promise … is received by the counterpart" (italics added)

ii) Similar position held S.C., sec. VI, 26.11.1985, n. 2891, Fevarello.

iii) For the case that a gift was not accepted, but it was found in the house/office of the defendant, there is no problem in applying art. 322 (see specifically S.C., sec. VI, 26.1.1995 n. 3596, Ruffinato).

Some scholars think that criminal law principles do not allow the criminalization of the "attempt of an attempt". Some other scholars admit that in such a case (e.g. when a letter containing a promise was stopped by Police) the law of attempts is applicable.

Supplementary Responses to Follow-up 8c(iii):

- ***Please indicate whether guidelines or directives have been issued regarding the exercise of discretion by the Minister of Justice (or person with delegated authority) in deciding whether to apply nationality jurisdiction to offences of bribing a foreign public official?***

Concerning the art.3 co. II of the penal code, no one guide line has been adopted; the decision is taken case by case

- ***When deciding on whether to apply nationality jurisdiction, is the Minister of Justice (or person with delegated authority) required to provide reasons in***

writing for his/her decision to interested parties, including the prosecution, police and victim(s)?

When deciding on whether to apply nationality jurisdiction, the Minister of Justice is required to provide reasons in writing for his decision to interested parties, including the prosecution, police and victims.

Supplementary Responses to Follow-up 8d(ii):

- ***Have the courts decided any cases where the defence of "organisational models" was raised regarding an organisational model that had been pre-approved by the Minister of Justice? If so, did the courts look at the model to asses its adequacy, or was the approval of the Minister of Justice considered conclusive proof?***

At this moment we have no further information about case law regarding an "organizational model" that had been pre-approved by the Minister of Justice.

- ***Has the defence of "organisational models" been raised in any case? If so, please indicate if it was accepted/rejected, as well as whether it had been pre-approved by the Minister of Justice.***

There has not been a case in which one "organizational model" has been accepted.

In proceedings as per Article 324 of the Code of Criminal Procedure, nos. 385/06+398/06, instituted in the interest of COGEP s.r.l. against the order of preventive seizure [sequestro preventivo] issued by the Judge for Preliminary Investigation of the Court of Milan on Nov. 3rd, 2006, the preventive seizure order of the GIP [Judge for Preliminary Investigation] of Milan has been declared void and null because of formal reasons, concerning the suitability of the grounds of the order which has been challenged and the sufficiency of documents for the proceedings for review.

The same goes for proceedings no. 381/06.

In proceedings no. 379/06, instituted as per Article 324 of the Code of Criminal Procedure by NGR OILS s.r.l. against the preventive seizure order issued by the Judge for Preliminary Investigation of the Court of Milan on Nov. 3rd, 2006, the request for review has been declared inadmissible because the necessary formalities for the standard institution of the proceedings for review were not complied with (lack of special power of attorney to the defense counsel).

Supplementary Responses to Follow-up 8e:

- ***Responses provided focus on sanctions available in law. Please provide information on sanctions, including fines, confiscation and prohibitive measures, imposed in practice.***

The Statistic Department is not able in this moment to provide information on sanctions, including fines, confiscation and prohibitive measures imposed in practice