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Italy

BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Italy.

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ITALY

BRIBERY & CORRUPTION



1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

The key Italian bribery and corruption provisions are laid down by the Criminal Code, the Civil Code and Legislative Decree no. 231, dated 8th June 2001. Furthermore, the guidelines issued by the ANAC (National Anti-corruption Authority) on bribery and corruption, although not legally binding, provide for the best practices that private and public companies should follow to ensure that they comply with Italian and EU regulations. Investigations and prosecution of bribery and corruption are carried out by the Public Prosecutor's Office. In addition, the ANAC has some investigative powers.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

Investigations and prosecution of bribery and corruption are carried out by the Public Prosecutor's Office. In addition, the ANAC has some investigative powers.

3. How is 'bribery' (or its equivalent) defined?

There is not a clear legislative definition of bribery. Nevertheless, it is possible to infer it from the relevant bribery-related provisions, for they share the same (or similar) elements. In particular, according to such provisions, it can be deemed to be bribery every act of giving, offering, promising, as well as every act of soliciting, receiving or accepting undue money or any other benefit as reward for some categories of people (e.g. public officials and directors of companies) to perform an improper conduct.

4. Does the law distinguish between

bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

Italian law distinguishes between bribery of a public official and bribery of private persons, in particular: articles from 318 to 322 bis of the Criminal Code regulate bribery offences relating to domestic or foreign public officials and provide for penalties for both such persons and the private persons who bribe (or attempt to bribe); articles 2635 and 2635 bis of the Italian Civil Code regulate the so-called 'private bribery'. Private bribery occurs when a director or a general manager or a manager in charge of preparing the corporate accounting documents or a statutory auditor or a liquidator ask or receive undue money or any other benefit (or accept the promise to be given such money or benefit) in order to perform a conduct in breach of their duties. The said articles provide for penalties for both such persons and the private persons who bribe (or attempt to bribe). The 'public official' is defined by article 357 of the Criminal Code as a person who is in charge of performing a public, legislative, juridical or administrative function. On top of that, article 358 of the Criminal Code defines the 'person in charge of a public service' (which is as well subject to public bribery and corruption provisions) as a person who, for whatever reason, provides a public service.

5. What are the civil consequences of bribery in your jurisdiction?

Even if there are not specific civil consequences of bribery, the act performed by a relevant person who has been bribed in order to do so, might be considered voidable. Moreover, of course, the person who has received the bribe and the person who has provided it are to be considered civilly liable for any damage caused by their misconduct to third parties.

6. What are the criminal consequences of bribery in your jurisdiction?

Breach of the Criminal Code provisions regarding corrupting behaviours may result in the imprisonment of the defendant. With regard to the duration of the sentence that the judge may impose, the Criminal Code lays down a range between two and twenty years of imprisonment (in the most serious cases of judicial corruption), based on the seriousness of the committed crime. In case of conviction for one of the corruption offences (even in case of plea bargaining), the judge might also order: the confiscation of the goods that constitute the price, the product or the profit of the crime, unless they belong to a person extraneous to the crime; or (in case the confiscation of the goods described above is not possible) the confiscation of goods of the offender for an amount equal to the profit of the crime. The law also provides that the offender may incur in ancillary penalties, such as the provisional or permanent disqualification of the defendant from holding public office. The violation of the provisions of the Civil Code regarding private bribery is punished with imprisonment from eight months to three years and might result in the provisional disqualification of the defendant from holding directive functions within companies. Following the entry into force of the Law no. 3, dated 9th January 2019, which has modified the private bribery regulation, also private bribery crimes are now prosecutable ex officio.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?

Although the law does not directly address the topic, both Scholars and Case Law have highlighted that gifts and other benefits related to hospitality can be the object of transactions that may amount to corruption or bribery. In fact, the relevant provisions of the Criminal Code and the Civil Code refer to 'money or other benefits', thus including anything that could provide an advantage to the corrupted party or that could be considered of any value by the latter. Although the legislation does not provide for specific monetary limits, one could take as a point of reference the provisions of the guidelines published by the ANAC (drafted along the lines of the D.P.R. no. 62/2013, which provides the code of conduct of public employees): the said guidelines, where regulating the limit to gifts or other benefits received by public employees, provide that they must be

of modest value, identifying as such "those of a value not exceeding, as a rough guide, 150 euros, even in the form of a discount".

8. Are political contributions regulated? If so, please provide details.

Political contributions are regulated by specific legislation (Law Decree no. 149, dated 28th December 2013), by means of which the so-called 'public financing for parties' has been abolished. Said legislation allows for private funding for parties and regulates it according to principles of transparency and adequacy.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

Facilitation payments in favour of a public official (or of a person in charge of a public service) are prohibited as they might fall under the offence of 'bribery for the performance of the function' pursuant to article 318 of the Criminal Code. Such crime occurs when a public official (or a person in charge of a public service) unduly receives (or accepts the promise to be given), for himself or herself or for a third party, money or other benefits to perform his/her functions or powers (i.e. to do something that the public person was anyway supposed to do).

10. Are there any defences available to the bribery and corruption offences in your jurisdiction?

For instance, the private person who is accused of having bribed might try to affirm that the crime which has taken place was not that of bribery but that of 'extortion by a public official or a person in charge of a public service', for sometimes there is a very thin line between the two offences (and, of course, the offence of extortion cannot result in the punishment of the private person who has been forced to provide the undue money or benefit).

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

Compliance programs (to the extent that they are adopted according to article 6 of Legislative Decree no. 231, dated 8th June 2001) are indeed a mitigating factor to reduce or eliminate liability of companies whose directors or employees have performed bribery crimes.

In particular, a company might be exempted from liability if it proves that: prior to the commission of the crime, the board of directors has adopted and put into effect a compliance program suitable to prevent crimes of the kind of the committed one; the task of monitoring the observance of the compliance program and its effectiveness, as well as its updating, has been entrusted to an internal body with independent powers of control, the so-called 'Vigilance Body'; those who committed the crime acted by fraudulently eluding the compliance program; the above-mentioned Vigilance Body did not fail to monitor nor was such monitoring insufficient. In case a company has failed to perform the said activities and one of its directors or employees has committed a bribery crime, a mitigating factor (which can lead to a reduction of the imposed penalties) might consist in the adoption and implementation - before the opening of the trial - of a compliance program suitable to prevent crimes of the kind of the committed one. With particular regard to bribery offences, article 25, par. 5 bis of Legislative Decree no. 231, dated 8th June 2001, as amended by the Law no. 3, dated 9th January 2019, introduces some leniency provisions, ensuring a reduced duration of the disqualifying measures if the company, before the first-instance verdict, has effectively taken action to: prevent the criminal activity from being brought to further consequences; secure the evidence of the offences and to identify the persons who committed the same; ensure the seizure of the transferred money (or other benefits); eliminate the organisational inadequacies that led to the crime by means of the adoption and implementation of a compliance program suitable for preventing crimes of the kind of the committed one. Some guidance indicating the features a compliance program is supposed to have is provided by the ANAC as well as by private organizations and trade associations, also with the involvement of the Ministry of Justice. On a general level, it can be said that the key elements of an effective corporate compliance program regard the segregation of duties, the separation between decision-making and control functions, the traceability and documentation of the relationship with the public administration, the correct allocation of powers (which has to be consistent with the roles of the individuals entrusted with such powers), as well as the presence of an effective sanctions system, the performing of a thorough training activity of personnel, etc.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

According to articles 25 and 25 ter of Legislative Decree no. 231, dated 8th June 2001, also the corporate entities might be held responsible for bribery (public or private) crimes committed in their interest or to their advantage

by directors, executives and their subordinates, agents and other individuals acting on behalf of the legal entities. In order to prevent the commission of said crimes (as well as of the other ones provided for by the said Legislative Decree), and in order to be entitled to seek for an exemption from liability, a company is required to adopt and put in place the above-mentioned compliance programs.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction?

As mentioned above, there are guidelines published by the ANAC and by other private organizations and trade associations. Among the guidelines published by trade associations, very important are those issued by Confindustria (an association representing manufacturing and service companies in Italy) which were published in an updated version in June 2021.

14. Does the law in your jurisdiction provide protection to whistle-blowers?

Italian law provides for protection for whistle-blowers both in the public sector and in the private one. Very recently, the relevant regulation has been significantly updated by the Legislative Decree no. 24 dated 10 March 2023, by means of which Italy has implemented the Directive (EU) no. 2019/1937 on the protection of persons who report breaches of Union law. In particular, whistle-blowers who report misconduct (or specific violations of the compliance programs adopted by the companies or other violations indicated by the said Legislative Decree) are ensured the confidentiality of their identity and granted a shield against retaliation or discrimination. Moreover, the Legislative Decree no. 231, dated 8th June 2001, on corporate criminal liability, provides now that corporate compliance programs, to be effective, shall provide for the prohibition of retaliation, a particular disciplinary system and specific channels which allow the potential whistle-blower to file any report in confidentiality, all in accordance with the Legislative Decree no. 24/2023.

15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?

Government authority investigations into allegations of

bribery are not very common in Italy, as almost all the aspects related to bribery conducts fall under the jurisdiction of the criminal Courts (and the Public Prosecutor's Offices established before the same).

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any ongoing impact and, if so, what?

The level of attention by the Public Prosecutor's Offices in relation to bribery crimes is always high, even if nowadays there are not as many proceedings as there used to be in the mid-nineties, when important scandals related to public bribery at both a local and a national level came to light. It has to be pointed out that, in any case, because of the principle of compulsory prosecution, which applies in Italy, every time a Public Prosecutor is informed of the alleged commission of a crime, he/she has no choice but to investigate it and – in case he/she deems that there is enough ground to try the case in Court – to seek for the committal to trial of the defendant. Although the health emergency caused by the Covid-19 pandemic has not had direct impacts on the investigations and the enforcement of the crimes at stake, it has certainly slowed down the activity of the Courts in general: the consequences of this can still be felt today.

17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.

According to Italian law there are more possible processes of review for challenging Government Authorities' actions and decisions, the most important of which is the judicial review. In fact, a party who believes to have been penalized by an action or decision of the public authority may appeal to the courts (in particular, the administrative courts), in order to obtain the annulment (even in the form of provisional annulment, after an expedite procedure) of the measure in question.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

Although at the moment there is not a substantial reform project which addresses the issue at a global level and is likely to see the light in the very near future, it has to be

noted that the quite recent Law no. 3, dated 9th January 2019 has brought significant modifications to the regulation on bribery and corruption. As mentioned above, the said law provided for a general toughening of penalties (duration of imprisonment and disqualifying measures, economic amount of the fines) for bribery offences and introduced measures to strengthen the fight against corruption, also with regard to criminal investigations. For instance, the discipline of police undercover operations has been extended to certain bribery offences; in proceedings for crimes committed against the public administration, the use of wiretapping is always permitted, also by means of electronic (and software) devices. Among the measures to tackle bribery, a ground for exemption has also been introduced for those who collaborate with the justice system, provided that there is a spontaneous confession by the involved person before he/she is informed of the investigations against him/her and in any case within four months of the commission of the crime. Besides, some relevant provisions of the Criminal Code have been modified to provide for the possibility of prosecuting Italian or foreign citizens who commit certain bribery offences abroad, without the need for a request from the Minister of Justice, or in the absence of a report filed by a third party. Furthermore, the reform modified also the Legislative Decree no. 231, dated 8th June 2001: increasing the duration of the disqualifying measures for the corporation in case of commission of bribery and corruption offences; introducing some leniency provisions with regard to bribery and corruption offences; adding to the catalogue of relevant crimes for corporations the offence of 'undue influence peddling', set forth by art. 346 bis of the Criminal Code (the offence of undue influence peddling provides for the punishment with imprisonment from one to four years and six months anyone who, exploiting or boasting existing or alleged relationships with a public official, unduly causes money or other benefits to be given or promised to him/her or others as the price of his/her own illicit mediation with a public official or to remunerate the latter in relation to the exercise of his/her functions or powers).

19. To which international anti-corruption conventions is your country party?

Italy is party to the following relevant anti-corruption conventions: the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Criminal Law Convention on Corruption (Treaty 173 of the Council of Europe); the 1999 Civil Law Convention on Corruption (Treaty 174 of the Council of Europe); the 2003 UN Convention Against Corruption.

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Italian legal system provides for several rules that regulate legal privilege and that can to some extent apply also to lawyer-led investigations. Article 200 of the Criminal Procedure Code, for example, states that the lawyer is one of the persons who cannot be obliged to testify on what they have known by reason of their ministry, office or profession, except in cases where they are obliged to report to the judicial authority. Article 103 of the Criminal Procedure Code aims to broaden the protection of the defensive activity, guaranteeing to the defendant's counsel a very high protection against the possibility for the Public Prosecutor to perform dawn raids and inspection at the lawyer's office, seize documentation, eavesdrop phone calls, etc. Furthermore, articles 391 bis and following of the Criminal Procedure Code provide for the regulation of the so-called 'defensive investigations'. The lawyers who perform such investigations are entitled with powers similar to those of a Public Prosecutor (they can question possible witnesses, ask them to release statements, etc.).

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

In the latest years the legislation regarding bribery and anti-corruption has been revised many times: new criminal offences have been included in the Criminal Code and in the Civil Code, the ANAC has been entitled with further powers, etc. Italian Parliament has by and large shown a particular attention to the revision and updating of legislative provisions regarding bribery and anti-corruption: namely, after a complex and broad reform of the matter occurred in 2012, two important interventions occurred in 2017 (the former with the provision of the new criminal offence of 'attempt to commit private bribery' and the amendment of the 'private bribery' crime structure, the latter related to the regulation of whistle-blowing schemes) and another one occurred with the entry into force of the abovementioned Law no. 3, dated 9th January 2019, which brought significant modifications to the regulation on bribery and corruption. Now, it is likely that the Italian Parliament will keep doing so in the next years. At a

general level, we think that the Italian jurisdiction approach to anti-bribery and corruption has made significant progress in the latest years, and that the sometimes low results of the enforcement are due to some weaknesses of the Italian judicial system at a general level.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

Nowadays Italian companies (as well as foreign companies which operate also in Italy) seem to be very serious about preventing bribery and corruption. This is mainly a result of the legislation on criminal liability of corporations, provided by Legislative Decree no. 231, dated 8th June 2001. In fact, the failure to comply with said legislation (e.g. the commission of a bribery crime) may result in the imposition of very high fines and disqualifying measures (such as the suspension or revocation of licenses and concessions, the prohibition to contract with government and public agencies, the suspension of business activities, the exclusion or revocation of loans or contributions and the prohibition from advertising goods and services).

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

Perhaps the biggest challenges that enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in Italian jurisdiction are those related to the limited traceability of money flows, as a consequence of an historical preference in some areas of Italy for the use of cash payments instead of other (more easily traceable) payment methods. Of course, this characteristic has sometimes led to the formation of large quantities of money of unknown origin which could be used as a bribe. On top of that, the proceedings related to bribery and corruption crimes share the same problems which affect all the other criminal proceedings, such as the overloading of the judiciary system (which is due by several reasons, among which the "compulsory prosecution" principle). On the other hand, it has to be pointed out that in the last years very relevant reforms have entered into force that addressed, inter alia, what was one of the main peculiarities of the Italian system, i.e. the regulation of the statute of limitations (which used to elapse sooner than in other Countries, causing many trials to end without any conviction, even in

presence of strong evidence of guiltiness).

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Investigating bribery and corruption issues is always difficult for businesses, not least because those who engage in such misconducts usually take care to avoid leaving any trace of their conduct. For instance, they might use their own financial resources, meet with the persons to be bribed outside of company premises and office hours, so making it very difficult to detect what is happening. For this reason, businesses should always pay attention to even the smallest details and oddities (such as, for example, a sudden change in the attitude of public officials during an inspection or a sudden release of a bureaucratic process that had been held up for long time, etc.), which could indicate that something is amiss.

25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

In the next months, at a general level, companies will have to adopt (and/or keep updating their) compliance programs aiming at providing the most effective behavioural rules and tools suitable for preventing the commission of crimes in the context of companies: first and foremost, the companies will have to update their whistleblowing schemes, in order to become more effective and compliant with the above-described new

legislation on the topic. On top of that, one of the topics we deem important that the companies focus on in the near future is the counterparty risk, for it is an aspect that – if well managed – can provide good protection to the companies against the risk of commission not only of bribery crimes but also of anti-money laundering, conspiracy, and terrorism financing crimes.

26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

The above-mentioned legislation on criminal liability of corporation is quite effective, but still not binding: that means that even a very big company might decide not to adopt and implement a compliance program. The failure to adopt and effectively implement a compliance program by a company is likely to mean, on the one hand, that the people who work in the said company might not be well aware in some cases of the nuances between an illicit conduct and a licit one, and, on the other hand, that the said company has not in place procedures and policies regulating sensitive areas of risk (e.g. a policy regulating gifts and sponsoring). On top of that, we think that a thorough rethinking of the criminal law system (which might also imply a significant reform not only of the Criminal Procedure Code, but also of the Criminal Code) is really called for, and that, as a result of the same, the enforcement – also as regards bribery and corruption crimes – could be much more effective and both the Authorities, the companies and the individuals will benefit from that.

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