

# A critical analysis of corruption and anti-corruption policies in Italy

Anti-  
corruption  
policies

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## Abstract

**Purpose** – This study aims to critically analyse the Law 9 January 2019, n. 3, on “Measures to fight crimes against the public administration and on the transparency of political parties and movements” (so-called bribe-destroyer law).

**Design/methodology/approach** – This paper draws on reports, legal scholarship and other open-source data to examine a legislative innovation for the corruption in Italy in relation to the general guarantees of the trial process and with the controversial paradigm of the national perception index of bribery.

**Findings** – The Italian legislative initiative that will be examined is innovative in nature and goes beyond the constitutional and conventional principles on procedural guarantees. The new initiative needs to be integrated into the international and European action against bribery that targets criminal proceeds, and at the same time, be anchored in respect for human rights during the process.

**Research limitations/implications** – The new initiative needs to be integrated into the international and European action against bribery that targets criminal proceeds, and at the same time, be anchored in respect for human rights during the process.

**Practical implications** – Despite the aggressiveness and lofty proclamations by those who aspire to fight corruption from the highest levels, the goal of rehabilitating Italy from one of the seven “deadly sins” that delay economic growth still seems far off.

**Social implications** – In the absence of public ethics, the increase in criminalisation does not seem sufficient on its own to guarantee the containment of the phenomenon.

**Originality/value** – This study examines the strengths and weaknesses of the important new law, its compatibility with human rights standards and its relationship to international standards of anti-bribery policies. The aggressive legislation critically relies on the pervasive and persistent lack of perception of corruption as a crime. In the confiscation (and now also reparation) of equivalent that normally addresses assets accumulated in a lawful manner, the periculum is even presumed in re ipsa and the classical aims of caution undergo a total torsion revealing an authoritarian face that takes on the meaning of anticipating further sanctioning contents. Finally, the presence of many levels of sanctioning in relation to the same fact poses serious problems of violation of the *ne bis in idem* rule.

**Keywords** Bribery, Confiscation, Interception, Presumption of innocence

**Paper type** Research paper

## 1. The 2019 law in the framework of anti-corruption legislation

With the approval of Law n° 3 of 9 January 2019, Italy further collects requests from the Organisation for Economic Co-operation and Development (OECD) through the activity of the Working Group on Bribery regarding the implementation of the Convention on



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Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997. Similar obligations arise from the Group of States against Corruption (GRECO) established in 1999 by the Council of Europe to monitor States' compliance with anti-corruption organisations[1].

The Italian legal framework for corruption has been extensively amended over the past few years.

Amendment is represented by law n. 190/12, by which Italy confirmed its commitment to the Criminal Law Convention on Corruption (1999) and to the UN Convention against Corruption (2003)[2]. Pursuant to Law 190/2012 ("Severino's Reform"), a few provisions of the Italian Criminal Code concerning Corruption were amended and other new provisions were introduced (e.g. Article 319 of the Criminal Code, governing the undue inducement to give or promise a benefit by public officials). With respect to official misconduct (recommendations 1a and 1b), the Working Group recognised the efforts taken by Italy to amend its Criminal Code with Law n° 190 of 6 November 2012, which narrows the scope of the offence of "concussione" and establishes a new offence of undue inducement.

Decree Law 90/2014 also extended and reinforced the functions of the National Anti-Corruption Authority, whose role is to prevent corruption within the public administration for this purpose; the authority may perform inspections and audits as well as impose sanctions.

Law 69/2015 further amended the Criminal Code, providing for harsher penalties for corruption offences. Legislative Decree 38/2017, implementing Decision 2003/568/GAI of the European Council, reformed the provisions governing private Bribery (i.e. Articles 2635, 2635 – *bis* and 2635 – *ter* of the Italian Civil Code).

Investigations of Bribery and Corruption are carried out by the Public Prosecutor's Office and penalties are imposed by judges of the Italian Courts, Courts of appeal and the Supreme Court. In addition, the National Anti-Corruption Authority (ANAC) has investigative powers. The key Italian anti-corruption provisions regarding individuals are laid down by the Criminal Code. Company liability for corruption and bribery is provided for by Articles 25 and Article 25 – *ter* of Legislative Decree 231/2001, which introduced an administrative liability for companies and legal entities for crimes committed in the interest or to the advantage of companies by directors, executives and their subordinates, agents and other individuals acting on behalf of the legal entity. Moreover, ANAC's guidelines on bribery and corruption, albeit not legally binding, lay down the best practices that private and public companies should follow to ensure that they comply with Italian and EU regulations. Articles 317 to 322 – *bis* of the Criminal Code and Articles 2635 and 2635 – *bis* of the Civil Code provide the main rules concerning the liability of individuals committing bribery and corruption.

In addition, Legislative Decree 231/2001 foresees that legal entities may be held liable for a group of offences (including corruption and bribery) committed in their interest or to their advantage by directors, executives and their subordinates, agents and other individuals acting on behalf of the legal entity. Article 231 of the Criminal Code states that all the penalties provided for the offences of "proper bribery" and "bribery for the performance of the function", as well as the relevant aggravating circumstances, apply to any person who provides or promises money or other benefits to public officials (i.e. active corruption). With regard to foreign companies' administrative liability pursuant to Legislative Decree 231/2001, scholars and recent case law have recognised the possibility to apply the decree to all foreign companies, in relation to unlawful acts committed on the Italian territory by them, under the condition that these companies have operated in Italy. Law 179/2017, which entered into force on 29 December 2017, aims at protecting employees who report crimes (*whistle-blowers*) – including corruption and bribery – and irregularities that occur in the workplace.

The new provisions on whistleblowing apply to both the public sector and all private companies that have implemented an organisational model pursuant to Legislative Decree 231/2001. The latter, in particular, will have to develop internal channels that allow employees to report potential misconducts within the work place, guarantee their confidentiality and shield the whistle-blowers against any retaliation or discrimination.

Breach of Criminal Code provisions regarding corrupting behaviours may result in the imprisonment of the offender.

With regard to the duration of the sentence that the judge may impose, the Italian Criminal Code lays down a range between 1 and 12 years of imprisonment, based on the seriousness of the crime. The most severe penalties apply for offences, including:

- “extortion committed by a public official” (Article 317 of the Criminal Code);
- “passive bribery” (Article 319 of the Criminal Code); and
- “bribery in legal proceedings” (Article 319 – *ter* of the Criminal Code).

Article 322 of the Criminal Code provides a reduced penalty for “induction to corruption”.

In case of conviction for one of the corruption offences, the judge will 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 if 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 ancillary penalties, such as the provisional or permanent disqualification from holding public office.

Pursuant to Legislative Decree 231/2001, pecuniary penalties may apply in connection with corruption and bribery. The pecuniary sanction is determined by the judge through a quota-based system.

In determining the pecuniary penalty, the judge has wide discretionary power and will consider elements such as:

- the economic and financial stance of the company;
- the importance of the act/offence committed;
- what the company did to cancel or mitigate the consequences of the act; and
- what ongoing practices the company has in place to prevent the commission of crimes.

In case of more serious offences (e.g. breach of Articles 319, 319 – *ter* (1) and 321 of the Criminal Code), the judge may also apply, for a minimum period of one year, prohibitory penalties such as: restrictions on the business activity of the company; suspension or withdrawal of licences and permits; prohibition of contracting with the state or with governmental agencies; non-eligibility for, or revocation of, funding and subsidies; prohibition against advertising goods and services; total ban on conducting business.

On 31 January 2019, Italy’s new Law No. 3/2019 on “Measures to fight crimes against the public administration as well as on the matter of statute of limitations and transparency of political parties and movements” entered into force. This law introduces important measures affecting Italian criminal law and significantly amends Legislative Decree No. 231/2001 with respect to corporate liability.

The explanatory report of the 9 January 2019 law, n. 3, (so-called bribe-destroyer law) expresses the purpose of “strengthening the activity of prevention, detection and repression of crimes against the public administration”[3].

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The criminal political emphasis placed on the attack on corruption is accompanied by many criminal and procedural innovations. The Italian legislator can be compared to a Valkyrie, the mythological figure who decides from above who can die or survive!

The reform as a whole reveals the increasingly closer connection between the anti-corruption rules and the differentiated model to fight organised crime because of its endemic characteristics and distortions of corruption in our country. We will try to highlight the most relevant aspects of the reform.

With respect to Italian criminal law, the new law will make the following changes, thus increasing the penalties applicable to certain crimes against the public administration:

- increasing the penalties for corruption pursuant to Art. 318 of the Criminal Code. The minimum penalty will increase from one to three years of imprisonment, and the maximum will increase from six to eight years;
- introducing a life-long prohibition on dealing with public administrations and a life-long disqualification from holding public office for individuals sentenced for corruption-related crimes, except for sentences of imprisonment not exceeding two years or where an attenuating circumstance provided for by Art. 323-*bis* of the Criminal Code applies (in which case the duration of the above-mentioned penalties is temporary);
- amending the rules on the statute of limitations. The new law provides that the statute of limitations is suspended from the judgement of first instance (regardless of whether a conviction or an acquittal) until the final judgement becomes enforceable and that, with regard to continuing crimes, the statute of limitations will start to run from the date on which the ongoing crime ceased. It should be noted that this amendment will enter into force on 31 January 2020 and that, therefore, the new statute of limitations rules will not apply to crimes committed before that date;
- extending the prohibition on dealing with public administrations to crimes of embezzlement, corruption in judicial proceedings and trafficking in illegal influence (influence peddling), as amended by Law No. 3/2019;
- amending Art. s 9 and 10 of the Criminal Code by removing the need for a Ministry of Justice request or the victim's complaint to prosecute certain crimes against the public administration committed abroad by an Italian citizen or by a foreign citizen against the Italian state or an Italian citizen; and
- introducing reductions in penalties and a special exemption from liability in cases of voluntary self-disclosure and for individuals providing useful information to obtain evidence of a crime and to identify the offender.

Law No. 3/2019 also significantly amends the Italian Civil Code by introducing the possibility of prosecuting *ex officio* private-to-private corruption (Art. 2635 of the Civil Code) and incitement of private-to-private corruption (Art. 2635-*bis* of the Civil Code).

With respect to Legislative Decree No. 231/2001, the most significant amendments include:

- extending the list of predicate crimes provided for under Art. 25 to also include trafficking in illegal influence (influence peddling), referred to under Section 346-*bis* of the Italian Criminal Code, as amended;
- increasing the restraining measures applicable to certain crimes against the public administration whose duration shall not be less than four years and not exceed seven years, for crimes committed by individuals in top management positions, and

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not less than two years and not exceeding four years for crimes committed by individuals subject to management's directives;

- introducing reduced restraining measures for extortion, improper inducement to give or promise money or other benefits and corruption where, before the judgement of first instance, the company effectively attempted to stop the illegal activity, cooperated with authorities in obtaining evidence of the crime and remediated the organisational failures that caused the crime by adopting and implementing an organisational model suitable for preventing repetition of the crime; and
- amending the duration of precautionary measures, which, according to the new law, shall not exceed one year, if applied before the judgement of first instance, or one year and four months, when applied after the conviction judgement of first instance.

Among the various legislative changes introduced by Law No. 3/2019, the most relevant for companies doing business in Italy are those increasing the duration of restraining measures (e.g. suspension of the company's business, prohibition from dealing with the public administration, suspension of licenses, permits and authorisations that have been instrumental in committing the crime, etc.) applicable to certain crimes against the public administration and those introducing a leniency programme for companies attempting to effectively reduce the negative consequences resulting from the commission of these crimes. Finally, given the inclusion of the new crime of trafficking in illegal influence among those, which may trigger corporate liability, companies should update their organisational, managerial and control models to ensure conformity with the amendments made to Legislative Decree No. 231/2001 and take advantage of the safe harbour. To this end, companies should conduct a thorough assessment to identify which business areas are exposed to the risk of committing this crime and should adopt appropriate preventive controls.

## **2. The extension of the trojans to questions of corruption and the reversal of the rule-exception relationship**

In the wake of the Orlando's Reform L. No. 103/2017, the instruments of investigation called trojan virus has been further expanded, equating the legislation to that of mafia crimes. Trojan malware is a computer virus that, remotely activated, is capable of transforming an electronic device, be it a smartphone or a computer, into a video-ponic bug. The joint Sections of the Italian Cassazione in the judgement Scurato[4], made it clear that it "is independent of the reference to the place, since it is an environmental interception by nature itinerant". Hence its exceptional character. The judgement Scurato reserved it only for mafia and terrorism trials. The "trojan horse" is today the instrument with the greatest investigative invasiveness! There is a particular discipline on the trojan authorisation regime, contained in the legislative decree n. 216 of 2017, requested by the then Minister Andrea Orlando, whose entry into force was postponed until 2020.

At the same time, however, the law n. 3 of 2019, better known as "Spazzacorrotti" (bribe-destroyer law), in force since last 31 January, has extended the use of the virus to corruption crimes with a time differentiation. There is a lot of confusion and uncertainty in practice and the result of this uncomfortable situation is that the public prosecutor and the preliminary investigations judge sometimes grant the use of the trojan, and sometimes they deny it[5].

Moreover, in terms of motivational burden, the anti-bribery law associates corruption crimes to the ones related to organised crime and terrorism, providing for these criminal categories an exception to the rule of necessary predetermination of space and time in which activation of the microphone of the malware is allowed.

Basically, the legislator has extended the use of these tools to corruption investigations and has equated their social alarm with terrorist phenomena and organised crime. In this way, what should be an exception has become the general rule. The use of the trojan poses a clear trade-off problem between investigative efficiency and respect for guarantees. Especially with Art. 14 of the Italian Constitution, which protects the inviolability of the home residence. Already, telephone wiretaps pose vertiginous problems of balancing, for the suspect and for the third parties involved, with constitutional freedoms (expressly foreseen by Art. 15 of the Constitution, according to which freedom and secrecy of every form of communication are inviolable), and they are all questions amplified today by the multiplication of communication tools (messaging, written and vocal, etc.).

### 3. Undercover operations

Undercover operations in which the undercover agent purchases illegal materials, usually drugs, from a suspect and cover agents immediately follow with an on-scene arrest has been changed. Among the most important interventions, in terms of investigative tools, is the extension to some crimes against the public administration of the regulation of undercover operations provided for by the Art. 9 l. 16 March 2006, n. 146. With the new law n. 3 of 2019, an investigative tool first circumscribed to the investigation of crimes related to organised and mafia-type crimes, as well as to the sexual exploitation of minors, can also be used to ascertain bribery crimes (referring to under Art. 317 of the Criminal Code), corruption (in the various forms referred to Articles 318, 319, 319-*bis*, 319-*ter*, 320, 322-*bis* of the Criminal Code), undue induction to give or promise benefits (319-*quater* of the criminal code, first paragraph), incitement to corruption (322 of the Italian Criminal Code), trafficking in illegal influence (influence peddling) (346-*bis* of the Italian Criminal Code), freedom violation in public trade (353 Criminal Code). These are crimes characterised by appreciable seriousness, widespread in practice and difficult to ascertain – especially with regard to bilateral crimes, such as corruption, undue induction or the traffic of influences – because they are characterised by the strict commonality of illicit interests of the subjects involved and the bond of silence (*omertà*) that protects them. The *ratio* for the legislative amendment is to make the assessment of corrupt conduct more effective. However, undercover operations carry a heavy risk: that the legitimate aim of acquiring evidence in relation to certain crimes, through infiltration, results in a real incitement to commit a crime, with an intolerable sacrifice of freedom and the citizen's right to self-determination on the altar of an alleged "hyper effectiveness" of criminal law. ECtHR gave a strong impetus to the development of the distinction between undercover agent and provocateur. The first is limited to the observation and collection of evidence in relation to the realisation of certain criminal conduct, the second exercises a causal influence on the subjects with whom it comes into contact, so as to determine them for the commission of a crime, which, otherwise, they would not have realised. In the event that it ascertains that the undercover operation resulted in provocative activity (so-called *entrapment*), the Court declares violated the art. 6 of the ECHR on the right to a fair trial and the evidence obtained through provocation unusable<sup>[6]</sup>. To check whether the agent's conduct has had a causal relevance with respect to the realisation of the crime fact, the EDU Court carries out what in the Anglo-Saxon language is defined as a but-for test of causation, aimed at detecting whether the agents have simply given the opportunity for the plaintiff to commit a crime that he/she would have committed anyway or if they exercised a decisive influence, instilling in the mind of the applicant a previously non-existent criminal purpose. In the leading case *Ramanauskas vs Lithuania*, the ECtHR Court found a violation of art. 6 of the ECHR in connection with a sentence handed down by the Lithuanian courts because it is based exclusively on evidence obtained

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through provocation[7]. In that case agent AZ approached magistrate Ramanauskas, believing that he had already been bribed in the past, and offered him a bribe of US\$3,000 in exchange for acquiring a third party. Ramanauskas initially refused, then agreed: the prosecutor therefore opened the investigation, which led to arrest and conviction for corruption. With regard to crimes of latent sensitivities, the prevalent index used by the EDU Court to determine whether there was an entrapment or not, is the time when the police act with respect to the *notitia criminis*: for the undercover activity to be legitimate, it is necessary that the judicial police act when the criminal activity is already underway (negotiation phase, without agreement). From this point of view, it seems particularly relevant that the first contact with the public official is made by a private citizen, not a police officer. In the case Miliniene vs Lithuania, a private citizen realises that a public official asks for bribes and warns the police[8]. The risk of undercover operations turning into provocative activity is sharpened today in relation to crimes against the public administration. With the phenomena of corruption, it is difficult to understand who proposes and who accepts, who launches the bait and who bites it. The existence of suspicions in the hands of the corrupt or the corrupter – one of the main criteria that the EDU Court uses to establish whether or not there was a provocation by the agents – is much more difficult to demonstrate in an environment of apparent respect of the rules. Furthermore, corruption investigations often involve politicians and prominent administrators and there is a risk that they will be exploited. Therefore, an entrapment should not be realised!

Several authors[9] have highlighted the risk that, as formulated, the new conduct considered for crimes against p.a. and the provocation on the part of the police forces is clear. In addition to the letter of the law – sometimes ambiguous – this concern also arises in relation to some statements by members of the government or the parliamentary majority who called for the introduction of the agent provocateur to combat crimes against the public administration. Following the many criticisms received, the government changed course – at least formally – and stated that it wanted to introduce not an anti-corruption agent but an infiltrated agent. The Explanatory Report to l. 3/2019 tries to dispel any doubts about the provocative scope of the behaviours introduced, stating that “non-punishable conduct remains confined to those necessary for the acquisition of evidence relating to illegal activities already in progress and that do not instigate or provoke the criminal conduct, but they are indirectly or purely instrumental in the execution of others illegal activity”[10]. The doubts remain, however, and the scepticism of the doctrine has focused in particular on the behaviours that are allowed to the “simulated corrupt” (there is indeed a discrepancy between the conduits allowed to the latter and those allowed to the undercover agent who pretends to be a private corrupt). In the case of the private simulated briber, the legislation has prepared a limited and well-defined series of behaviours (utility payments “in the execution of an unlawful agreement already concluded by others, or the promise or service of ‘requested’ or ‘requested’ utilities” by third parties), suitable for maintaining distance with respect to cases of incitement. On one hand, the legislation seems to regulate the practice of controlled deliveries, already widely used in the field of crimes against the public administration and in accordance with case law of the ECtHR; on the other, it allows the undercover agent to pretend to be a private individual and check if the investigated public official requests a bribe. Therefore, the conduct of an undercover agent who introduces him/herself into an administrative office by offering a bribe to the public official, without verifiable suspicions against him/her, does not appear to be compatible with the legislative decree: the legislation seems to have excluded, therefore, that the integrity tests against public officials can be considered lawful methods of detecting crimes. The legislation was,

instead, less precise with regard to the activities that the infiltrator can perform as a simulated corrupt public official: to buy and receive “money or other benefits” as a “price for committing the crime” or accepting the promise are actually actions compatible with an independent initiative of the undercover agent. In particular, the choice made by the legislation not to refer in this second case to an “agreement already concluded by others” is not clear. This vagueness in outlining the specific conduct is even more worrying if one takes into account the fact that the art. 9 paragraph 1, in closing, still mentions the “prodromal and instrumental” conduct among those whose punishment is excluded: there is, therefore, the concrete danger that this exonerating becomes a cause of indiscriminate impunity for all the activities performed by the undercover agents.

If the undercover agent pretends to be a public official and asks for the private individual payment of a bribe, he/she becomes an integrity test, aimed at prodding the civic sense of citizens in refusing to pay the bribes requested by public officials. In some environments of widespread corruption at all levels, this would mean punishing citizens for their compliance and for becoming addicted to abusive power management mechanisms. Such legislation is also potentially applicable to micro-corruption cases.

Existing procedural requirements in art. 9 should in any case guarantee that the operations take place in such a way as to fit into an *iter criminis* already in progress. The fact that the operations must be arranged by top law enforcement agencies, after authorisation by the public prosecutor, and that they can only be performed by officers belonging to specialised structures, makes for the “creation” of a crime by the undercover agent. Furthermore, the requirement that undercover operations should be arranged for the sole “purpose of acquiring evidence” in relation to the crimes listed seems to elevate the institution under examination to the ranks of proof-seeking. The undercover operations could not, therefore, be used for purely preventive purposes and should take place only after the acquisition of a *notitia criminis*, in the framework of a criminal proceeding already established[11].

Although it has not been fully exploited,[12] this clause is fundamental, as it is one of the main guarantees provided for by the legislation against potential provocative activities.

The same ECtHR believes that one of the criteria for determining whether an undercover operation has had provocative implications or not is the verification of the existence of well-founded suspicions prior to the operation, as well as controls by the judicial authority. Autonomous provocative conduct by the police should be excluded. The problem that emerged even before the new legislation concerns the possibility that in practice the agents set up provocative behaviours, in contravention of the discipline of art. 91. 146/2006.

Despite the commendable efforts of the Illustrative Report aimed at removing the sphere of provocation, the absolute exclusion of possible provocative conduct – that is, the risk of abuse – seems a mirage, as all the behaviours that have the effect of completing a crime are potentially provocative. A police officer, pretending to be an entrepreneur, contacts the administrative manager of a call for tenders (without previous suspicions against him/her) and offers him/her an exorbitant amount to get the contract, insisting after the initial reticence of the public employee. In this case, not only the agent would have contravened the discipline referred to in art. 91. 146/2006, but it would not even be justifiably pursuant to art. 51 of Criminal Code, in the interpretation given by the law in action. The law 3/2019 has moreover avoided the possibility that any provocative conduct remains non-punishable due to the instrumental application of the new art. 323-ter of Criminal Code (cause of non-punishment of those who have committed a crime against the Public Administration for the case of voluntary, timely and effective collaboration). The last paragraph of the Art. 323-ter of Criminal Code specifies, in fact, that the non-punishable cause envisaged therein “does not

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apply in favour of the undercover agent who acted in violation of the provisions of article 9 of the law of 16 March 2006, n. 146”.

Further, this clause as declared in its vagueness represents a clear symptom of the recent developments in Italy regarding the growing demand, in the criminal area, of “criminal populism”.

Recent developments in the criminal climate in Italy reveal a growing demand for punitiveness.

#### 4. New rules about additional penalties

The real novelty of the approach to contrasting crimes with a greater negative weight amongst those that offend the p.a. is the system of additional sanctions, as well as “prevention” tools.

In the previous system, the Art. 317-*bis* of Criminal Code instituted a perpetual interdiction sanction from public offices consequent to the condemnation for crimes of Art. 314, 317, 319 and 319-*ter* of Criminal Code reduced to a temporary sanction for the hypothesis of conviction to imprisonment for less than three years.

The new Art. 317-*bis* of Criminal Code is the subject of a heavy restyling. First of all, the list of offenses to which the accessory sanction of a ban from public offices is amplified (now including crimes carried by the following articles: 318, 319-*bis*, 319-*quater*, § I, 320, 321, 322, 322-*bis* and 346-*bis* of the Criminal Code) and the sanction is identified in the prohibition from public offices and the impossibility of contracting with the public administration (except for access to public services)[13]. The new legislation has also affected Art. 32-*quater* of Criminal Code and inserts the articles 319-*ter*, 346-*bis* of the Criminal Code and 452-*quaterdecies* among the crimes whose conviction results in the inability to negotiate with the public administration. Secondly, due to the hypothesis of conviction for one of the aforesaid offenses of imprisonment not exceeding two years (therefore, the “basket” of perpetual interdictions is consequently expanded) or in the hypothesis of recognition of the extenuating circumstance referred to in art 323-*bis* § I of Criminal Code (in particular minorities), the accessory sanction referred to in the new Art. 317-*bis* of Criminal Code is predetermined in a time ranging from five to seven years, while for the recognition of extenuating circumstance referred to in paragraph II of the Art. 323-*bis* of Criminal Code (industrious reparation) it fluctuates in a time ranging from one to five years: in other words, the accessory penalty can also extend considerably beyond the main penalty. This is a clearly incisive regime aimed at definitively severing ties between the condemned and the public administration.

The previously mentioned provisions are inextricably linked to the regulation of the suspension of the sentence pursuant to Art. 166-*bis* of the Criminal Code whose regime encompassed both the main and accessory punishment. In other words: suspension does not extend its effects to the accessory penalties of the interdiction from public offices and of the inability to contract with the p.a.

With the novella, in fact, the judge (“the judge can”) has the faculty to order that the suspension does not extend its effects to the accessory penalties of the interdiction from public offices and of the inability to contract with the p.a. The concluding incisiveness of the discipline is the provision contained in the last paragraph of Art. 179 of Criminal Code according to which the rehabilitation granted does not produce effects on perpetual ancillary penalties and is extinguished after a period of seven years from rehabilitation, but only if the convicted has given actual and constant proof of good conduct. *Ratio of discipline*, therefore, is to contrast the possibility that those condemned for certain crimes against the p.a. can reoperate in the public administration, reducing the risk of recidivism.

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From a procedural point of view, the competence to decide on the extinction of the perpetual ancillary penalty is based on the Tribunale di sorveglianza.

### **5. Plea bargaining, accessory punishment, time bar of the offence**

In Article 444 of Criminal Procedure Code, paragraph 3-*bis* has been added and establishes that in the crimes provided for by sect-324, first paragraph, 317, 318, 319, 319-ter, 319-*quater*, first paragraph, 320, 321, 322, 322-*bis* and 346-*bis* of the criminal, the accused and public prosecutor may subordinate the request to exemption from accessory penalties provided for in Art. 317-*bis* or to the extension of the effects of conditional suspension also for these accessory penalties. Where the judge deems that he/she does not accept the request for additional penalties, the same plea bargaining request would be rejected (“if the judge considers that he applies the additional penalties or considers that the extension of the probationary sentence cannot be granted, he rejects the request”). The new rules have an impact on plea bargaining. The legislation lacked – nevertheless – coordinating the figure with the deflationary *ratio* that is the basis of the alternative sentencing. It appears more concerned with upholding an appearance of effectiveness of the law of contrast while disregarding its efficiency. The incidence of the novella on the time bar of the offence (prescription) is to be noted because it does not enter into force immediately. Still, as proof of the discipline set by the Orlando’s Reform, another corrective then tries to stem the risk of the “axe” of reasonable time. In this way, the goal of counteracting the lengthy process is totally neglected. In Art. 445 Criminal Procedure Code, a provision has been introduced (paragraph 1b) in which the sentence of application of the penalty by the judge “can” in any case apply to the accessory sanctions referred to in Art. 317-*bis* of Criminal Code.

This is heavy and stark news! It means factoring into the agreement alternative penalties with an unavoidable widening of discretionary power. The inherent risk in this context, however, is that the defendant does not favourably consider the plea agreement. In other words, the legislation, worried about identifying sources of contrast to some crimes that offend the public administration, has lost the deflationary function of the alternative trial (*plea bargaining*) that could be, in fact, not attractive. With the consequence that precisely where there is a strong demand for a rapid definition of the procedure, it is better to access ordinary processes, with an increase in the length of the trial and, mirror-like, delay in cutting the contacts between the public official and the offended administration. Likewise, it also excluded perpetual ancillary penalties from the extinction of the penal effects of the conviction resulting from the alternative expiation measure to detention. The provision will create issues of constitutionality because there is risk of contrasting the rehabilitative purpose of the penalty, which seems to have been forgotten by the legislation. The incisiveness of the discipline includes the provision found in the last paragraph of Art. 179 of Criminal Code, according to which, the rehabilitation granted does not produce effects on perpetual ancillary penalties and is extinguished after a period of seven years from rehabilitation, but only if the convict has given actual and constant proof of good conduct. *Ratio* of discipline, therefore, is to deeply contrast the possibility that the condemned for some crimes against the p.a. can re-operate in the public administration, reducing the risk of recidivism.

### **6. Cooperating witnesses**

Law No. 3 of 2019 also regulates the “cooperation witness” of some crimes against the p.a., although the figure is surrounded by so many stakes it is hard to encourage collaboration. For example, in the US system, cooperating witnesses are viewed suspiciously in the demonstration

of white-collar crimes. Through a systematic approach, we can see some criticisms. On first look, in fact, it appears to establish an *ad hoc* discipline of the “cooperating witness in a crime against the public administration” less advantageous than that of the “crown witness” of mafia crimes. Strict requirements are necessary for the cause of non-punishment to be achieved. In Art. 323-ter of Criminal Code, we have a new exclusion from punishability that contains some questionable issues. Someone is not punishable whom, before hearing the news that investigations are being carried out in relation to these facts and in any case within four months from the commission of the fact, voluntarily reports it and provides useful and concrete indications to ensure evidence of the crime and to identify the others responsible. It is also necessary, to take advantage of the cause of non-punishment of the collaborator, the “voluntariness” of the complaint (but this concept is not easy to define, evidently clashing with the “threat” to declaim the facts), the utility and concreteness of the indications provided both to collect the evidence of the crime (the conjunction “e” occurs) and to identify other responsible persons. These are concepts that imply a good deal of discretion by the judge and that, certainly, also lend themselves to criticism in this sense. Lawyers will dispute this discretionary assessment as it will lead, in fact, to the possibility of making the “cooperated” a “pure witness” rather than a co-defendant (consider the possibility, which seems implicit in the identification of a cause of non-punishment instead of a mitigating circumstance award, that the judgement on the collaborator is defined before the main judgement, probably, in the investigation phase). The second paragraph of the provision in question subordinates the not-punishability of the complaint to the restorative possibility to be achieved through “making available” the utility perceived by the same (an expression that recalls the real offer of civil law vocation), or an equivalent sum or still of indications that allow the recovery aliunde (all within the term indicated in paragraph I).

Ultimately, it appears that the conditions set by the Art. 323-ter of Criminal Code, are such as to make the collaboration appear disadvantageous, rather than a real incentive, necessary to contrast the corruptive phenomenon that the law proposes. They also appear, as already observed by some, impractical for mono-subjective crimes that contain unjustified foreclosure and different treatment. It takes on a new character with regard to contrasting the most serious crimes against the p.a., the regime of access, and foreclosure of penitentiary benefits[14].

The legislation, in fact, even in this case, brings the discipline closer to that of mafia crimes. If, on the one hand, it has intended to reward collaboration in relation to the recognition of the Article 323-bis of Criminal Code, on the other, it has included in the Art. 4-bis of the Penitentiary Regulations some crime against public administration. (314 § I, 317, 318, 319, 319-bis, 319-ter, 319-quarter § 1, 320, 321, 322, 322-bis of the Criminal Code) as offenses against access to penitentiary benefits and alternative measures to detention, except in cases of cooperation with justice. Moreover, the lack of provision by inter-temporal regulation determines the direct application of the provisions in question, which will therefore heavily affect the ongoing proceedings, thus causing prejudicial effects that cannot be determined.

It is worth highlighting here that the precautionary provision of the temporary prohibition of negotiating with the p.a. was introduced with the Article 289-bis of Criminal procedure code, and consists of the temporary interdiction of the accused to stipulate contracts with the p.a., except to obtain the performance of a public service. The provision specifies that, in the event of a crime against the p.a., the measure may be ordered outside the penalty limits set forth in Art. 287 Criminal Procedure Code.

## 7. Confiscation of assets

Within the unitary genus of the confiscation, different macro-species were identified in Italy: confiscation – security measure (Article 240 of the Criminal Code), the confiscation –

sanction (Article 416-*bis* paragraph 7 and article 12-sexies of decree 306 of 1992 for the physical person and articles 19 and 24-*ter* paragraph 1 of legislative decree 231 of 2001 for juridical persons and not convicted based confiscation (*misure di prevenzione*: Art. 24 of legislative decree 159 of 2011, as amended by law 17 October 2017 n. 161).

The nature *ante* or *praeter delictum* does not presuppose in this last case any conviction (sentence of condemnation) or application of punishment upon request by the parties, requiring instead, simply that the procedure be “established”. Confiscation taken in the absence of a conviction and directed against an asset of illicit origin. It covers cases where a criminal conviction is not possible, because the suspect has become ill or fled the jurisdiction, has died, lacks legal capacity or has immunity from prosecution, etc., but also cases where action is taken against the asset itself (in rem proceedings, generally civil proceedings) regardless of the person in possession of the property. We also have New EU Regulation (EU) 2018/1805 of the European Parliament and of the council of the 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. There are many plots between confiscation and fundamental rights across criminal and non-criminal assessment contexts. The “Antimafia Code” (in the Article 24 paragraph 1), as modified from the l. 17 October 2017 n. 161 follows the confiscation of the impossibility of demonstrating the legitimate origin of the asset with an inevitable overturning of the constitutional principles regarding the presumption of innocence and evidentiary charges, which is disguised through the argumentative expedience according to which it is not an evidentiary burden<sup>[15]</sup>. The new Antimafia Code has extended the preventive measures (*misure di prevenzione*) to the suspects of crimes against the Public Administration. Law n. 161/2017 and its amendments to Legislative Decree n. 159/2011 concerning the application of patrimonial prevention measures to suspects of conspiracy aimed at embezzlement, proper and improper corruption, corruption in judicial proceedings, extortion and improper induction and stalking. The confiscatory measure, therefore, applies to suspects of crimes against the public administration, even if through anchorage to the conspiracy target offence. There is a risk of undue expansion of the measures. The reform released the measures from the anti-mafia label and also included the different sector of crimes against the public administration. In this sector, we not only find unfaithful public officials but also the private individuals who facilitate them with their activity. The doctrine has earned some criticisms. According to the doctrine, preventive confiscation was introduced in 1982 to strike suspects belonging to mafia-type organised crime on the basis of a reasonable presumption of danger corroborated by a historical, empirical and criminological assumption, according to which the cliques accumulate assets thanks to repeated illegal activities that last over time. Today it is extended to, without any logic, those who are suspected of having committed a single episode of corruption or whose unlawful conduct has stopped at the threshold of mere promise of money, and without it being demonstrated, as was required in the system in force before the recent reform, as a professional attitude of the proposed subject or his habitual dedication to carrying out crimes of that nature, from which proceeds were derived upon which to live, at least in part. Many experts have criticised the reform because of the low probative levels sufficient today to apply very afflictive measures. Furthermore, any reasonable proportionality with respect to the hypothesised offenses appears to be violated.

### **8. Seizure and confiscation of equivalent**

Confiscation of equivalent assets, aimed at depriving the offender of the advantages derived from his/her criminal activity, operates when the direct confiscation of the assets is no longer possible because the assets have been hidden or consumed or are no longer identifiable. The object of the confiscation for equivalent purposes under Art. 322 - *ter* of Criminal Code has been remodelled by Article 1 paragraph 75 o) l. 6 November 2012, n. 190,

in addition to the “price” (foreseen as the only possible object of the confiscation for equivalent in the previous text of article 322-ter) also of the “profit”, to avoid the application inconsistency consequent to the previous literal tenor of the rule.

The regulatory intervention has implemented obligations deriving from the UN Convention against Corruption of 31 October 2003 (the Merida Convention) and from the Criminal Convention on Corruption of the Council of Europe of 27 January 1999 (Strasbourg Convention), thus remedying the failure of implementation by the respective ratification laws (l. 3 August 2009, n. 116 and l. 28 June 2012, n. 110). Consequently, starting from the entry into force of the law n. 190 of 2012, the confiscability for equivalent is also consented for profits obtained from the commission of one of the crimes against the P.A. provided for in articles 314 to 320 of Criminal Code.

Similar concerns are recorded with regard to the rules on seizure. Regarding capital precautionary measures, there is an abrupt decrease in adequacy standards as well as an emptying of the *fumus boni iuris*.

In confiscation of equivalent that normally addresses assets accumulated in a lawful manner, the *periculum* is even presumed *in re ipsa* and the classical aims of caution undergo a total torsion revealing an authoritarian face that adopts the intention of anticipating further sanctioning contents<sup>[16]</sup>.

### 9. Reparation for equivalent and septies in idem

The law from 27 May 2015, n. 69 has inserted into the Italian penal code the Art. 322-*quater*.

It provides that with the conviction sentence for crimes against the public administration the payment of a sum equal to the amount unduly received by the public official or by the person in charge of a public service as a pecuniary repair in favour of the administration to which the public official or public service officer belongs, without prejudice to the right to compensation for damage.

The effectiveness of the law was reinforced by the further indication that granting conditional suspension of the penalty for embezzlement, bribery, corruption and undue induction crimes is subject to the payment of a sum equivalent to the profit of the crime or to the amount unduly received by the intraneus by way of pecuniary reparation.

A “non-compensatory” form of compulsory reparation was thus “designed” (without prejudice to compensation for damages), not entrusted to the voluntary initiative of the offender and not even subordinate to an express request of the injured person, with direct consequences on the obtainment of a suspended sentence. Article 1, subparagraph 1, *q*) of the Law. 3 of 2019 has intervened, regarding the matter of pecuniary reparation, by modifying Article 322-*quater*, whose scope of application was extended to include, among the crimes already indicated, the one referred to in Art. 321 of the Criminal Code.

Today, it is mandatory to convict the private person to pecuniary reparation in concert with the committed corruption crimes that are mentioned in this last article. The obligation to pay the amount as a pecuniary reparation has also been extended to the private briber (Article 321 Criminal Procedure Code), and reference has also been made to what was unduly received by the public official (or by the public service representative); finally, it was envisaged that the sum to be paid by the convicted person as monetary reparation in favour of the PA injured by the unlawful conduct is the equivalent to the price or profit of the crime.

The pecuniary repair will take on the value of a “sum equivalent to the price or profit of the crime” in favour of the administration affected by the conduct of the public official or person in charge of a public service. Compared to the previous text, which recalled, “a sum equal to the amount unduly received by the public official or by a public service officer”, the expansion of the quantum is quite evident: we have an increase in the amount repayable.

The “new” concept of “equivalent” repair will also include all the outcomes of corruption: pecuniary services, travel, sexual services, jobs, etc. There are many coordination problems between the Art. 322-*quater* of Criminal Code and the confiscation of the price or profit of the crime regulated in the Art. 322-*ter* of Criminal Code: both measures are linked to a substantive vision of justice directed against an asset of illicit origin. The only concrete difference is of a procedural nature and is linked to the possibility of advancing confiscation as a precautionary measure through seizure. For these reasons, a cumulative imposition of confiscation and reparation leads to a patent violation of the *ne bis in idem* sanctions and the principle of reasonableness (Article 3 of the Constitution). Apart from nominal differences, the sum of the two measures will give rise to a patrimonial penalty, formally unexpressed, quantified in twice the illicit advantage. There is concrete danger of a doubling of the penalty. In Italy, corruption offenses are sanctioned multiple times. The punitive crescendo is already anticipated as a precautionary measure against the disqualification measures, is consolidated after the first-degree conviction and continues with additional disciplinary outcomes to the main penalty, with ancillary penalties and incapacitations of various sign (reliability, forfeiture of elective offices), with the confiscation for equivalent, with civil or accounting compensation, with compulsory pecuniary reparation pursuant to Art. 322-*quater* of the civil code, with the confiscation of assets in the context of prevention.

### 10. Perception of illegality and the criminal justice response

At the same time, paradoxically, the perception of the illegality of corruption is missing in the collective consciousness. This year’s Corruption Perceptions Index reveals that the continued failure of most countries to significantly control corruption is contributing to a crisis in democracy around the world[17]. In Europe, Italy is ranked 25th out of 31 Countries. The index, which ranks 180 countries and territories by their perceived levels of public sector Corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean.

This data justifies the repressive criminal reform. However, the numbers cannot be considered in an isolated way. Corruption has many causes and many effects. The majority of the data interpreters report the danger of the loss of “accessibility” of the criminal system with effects on the trial and proof. The Court of Cassation has critically highlighted the possibility that proof of the facts of bribery derives from mere presumed data “or unreliable automatism” in the verification of the accusatory hypothesis[18].

In fact, when the description of the “crime” relies on ambiguous elements and nuanced and unstable notes of illegality (the qualifications of special illegality: “unjust”, “unduly”), or is based on subjectivist marks (the mere abuse of quality), even the *thema probandum* contracts dangerously, through presumptive shortcuts, or even through “intuitionistic” reconstructions.

In this framework, ultimately, the “right to defend oneself by proving” and the debate dialectic appear to be increasingly compromised, and one can slip into a logical short circuit between “object” and “test means”. The ascertainment of the criminally relevant fact is affected by the demands of social defence and the criminal law becomes a question of “public ethics”.

It is, therefore, unthinkable that the concrete downsizing of corruption can only depend on raising the tone of the criminal response. I would like to conclude by quoting a great Italian writer Giacomo Leopardi: “Everyone knows with Orazio that laws without customs are not enough”.

In the absence of public ethics, an exclusively repressive response aggravates the fractures to the principle guarantees of the criminal system, appearing at the same time highly myopic and ineffective.

## 11. Conclusion

An analysis of the most recent Italian legislative manoeuvre on the subject of fighting corruption must be placed in a wider context that considers anti-corruption manoeuvres over recent decades and pressure from international bodies. In addition to criminal responsibility of individuals, company liability for corruption and bribery is provided for by Articles 25 and 25-ter of Legislative Decree 231/2001 and introduced an administrative liability for companies and legal entities for crimes committed in the interest or to the advantage of companies by directors, executives and their subordinates, agents and other individuals acting on behalf of the legal entity.

Although the legislation is increasingly aggressive, it fails to consider the pervasive and persistent lack of perception of corruption as a crime. The L. n. 3 of 2019 shows many weak spots. Starting with the extension of trojans to matters of corruption and the reversal of the rule-exception relationship, which essentially equate the legislation to that of mafia crimes. In terms of investigative tools, the regulated employment of undercover operations provided for by the Art. 91. 16 March 2006, n. 146 has been extended to some crimes against the public administration. However, undercover operations carry a heavy risk; mainly that the legitimate aim of acquiring evidence in relation to certain crimes, through infiltration, results in a real incitement to commit a crime, with an intolerable sacrifice of freedom and the citizen's right to self-determination on the altar of an alleged "hyper effectiveness" of criminal law. The real novelties of the approach to contrast crimes that hold a greater negative weight among those that offend the p.a. is the system of additional sanctions, as well as "prevention" tools. This means including into the agreement alternative penalties that result in an unavoidable widening of discretionary power. The inherent risk in this context, however, is that the defendant does not favourably consider the plea agreement.

Law n° 3 of 2019 also regulates "cooperation witnesses" of some crimes against the p.a., but the figure is consequently surrounded by so many stakes it renders collaboration difficult to incentivise.

Ultimately, it appears that the conditions set by the Art. 323-ter of Criminal Code are such as to make the collaboration appear disadvantageous, rather than a valid incentive, necessary to contrast the corruptive phenomenon that the law proposes. Besides appearing, as already observed by some, impractical for mono-subjective crimes within unjustified foreclosure and different treatment.

In the confiscation (and also in reparation) of equivalent that normally addresses assets accumulated in a lawful manner, the *operculum* is even presumed *in re ipsa* and the classical aims of caution undergo a total torsion showing an authoritarian face that takes on the meaning of anticipating further sanctioning contents. The presence of many levels of sanctioning in relation to the same fact finally poses serious problems of violation of the *ne bis in idem* rule. Despite the aggressiveness and lofty proclamations by those who aspire to combat corruption from the highest levels, the goal of rehabilitating Italy from one of the seven "deadly sins" that delay economic growth still seems far off.

## Notes

1. Council of Europe, GRECO, Third Evaluation Round Addendum to the Second Compliance Report on Italy "Incriminations (ETS 173 and 191, GPC 2)" "Transparency of Party Funding", Adoption: 22 June 2018 – Public Publication: 29 June 2018 GrecoRC3(2018)8.
2. International conventions must be ratified by the Italian Parliament to be enforceable in Italy (Convention on Combating Bribery of Foreign Public Officials in International Business

Transactions of the Organisation for Economic Cooperation and Development 1997; the Criminal Law Convention on Corruption 1999; and the UN Convention Against Corruption 2003).

3. Explanatory report to the legislative decree n. 1189/2018 is available at [www.documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.1189.18PDL0029490.pdf](http://www.documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.1189.18PDL0029490.pdf), pp. 1 ss.
4. Italian Supreme Court, Joint Sect., 28 April 2016, n. 26889, Scurato.
5. Favourable: Italian Supreme Court, Sect. V, 30 May 2017, n. 48370, Occhionero.  
Doubts were instead expressed by the authority for the protection of personal data through a report to the Parliament and the Government (available at: [www.giurisprudenzapenale.com/](http://www.giurisprudenzapenale.com/) 6 May 2019).
6. See ECHR, case of Teixeira de Castro v. Portugal, Application n. 25829/94, 9 June 1998; Case Furcht v. Germany, Application n. 54648/09, 23 October 2014; Pătrașcu c. Romania, Application n. 7600/09, 14 February 2017.
7. ECHR, case of Ramanauskas vs Lithuania, Application n. 74420/01, 5 February 2008.
8. ECHR, case of Miliniene v. Lithuania, Application No. 74355/01, 24 June 2008.
9. Critical expert hearings are available at: [www.camera.it/leg18/1132?shadow\\_primapagina=8112](http://www.camera.it/leg18/1132?shadow_primapagina=8112). See also, Comments on the decree on “Measures to combat crimes against the public administration and on the transparency of political parties and movements” (document filed in the hearing of 15 October 2018, p. 5).
10. Explanatory Report Law to the legislative decree n. 1189/2018 is available at: [www.documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.1189.18PDL0029490.pdf](http://www.documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.1189.18PDL0029490.pdf), pp.44
11. Directive of Drug control services 5 September 1995.
12. Italian Supreme Court, Sect. II, 28 May 2008, n. 38488, states that covert operations that result in incitement or inducement to the crime of the investigated subject are not lawful.
13. Subjectively, a plurality of criminal offenses provided for in Chapter I, Title II of Book II of the Criminal Code is extended to conduct attributable to the public official and the public service officer in a foreign public administration, as well as to international and European institutions, consequently producing similar effects of expansion of the application area of certain private crimes contemplated in Chapter II.
14. Tribunal of Napoli, 28 February 2019 (dep. 1 March 2019); Judge of preliminary investigation, Como, 8 March 2019, both available on [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it).
15. As, rather, of mere burden of allegation Italian Supreme Court, Sect. VI, 10 April 2018, n. 21347, Salanito; Italian Supreme Court, Sect. II, 13 March 2018, n. 14165, Alma.
16. Italian Supreme Court, Sect. I, 30 January 2018, n. 18491, Armeli; Italian Supreme Court, Sect. II, 22 April 2016, n. 18331, Iommi.
17. Italy – Score: 52/100 (Rank 53/180). The results are available at: [www.transparency.org](http://www.transparency.org).
18. Cass., Joint Sect., 24 October 2013, n. 12228, Maldera, § 22.

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