BRILL
NIJHOFF

INTERNATIONAL CRIMINAL LAW REVIEW
(2021) 1-25

International
Criminal Law
Review

brill.com/icla

Not such a Retrospective: On the Implementation of the International Anti-Corruption Obligations in Italy

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Abstract

The past thirty years have seen unprecedented international initiatives aimed at combatting corrupt practices. The net effect of such initiatives is that today there exists a sort of "hyper norm" repudiating corruption that transcends national boundaries. Over the same period, Italy has ratified and implemented within its legal system five international anti-corruption treaties, and amended its domestic legislation on different occasions. However, despite considerable efforts, corruption remains a serious challenge in the country. This article examines the main achievements and shortcomings of the implementation of the aforementioned conventions in Italy in light of the outcomes of the monitoring procedures established by the same treaties.

Keywords

international anti-corruption obligations – international supervision – bribery – trading in influence – liability of legal persons – statute of limitations

1 Introduction

While bribery and other forms of corruption have been on the criminal statute books of many countries for decades or centuries, the fight against corruption at the international level has only began as late as the 1990s. An evolving

 | DOI:10.1163/15718123-BJA10067

array of international instruments to combat corruption is now in force, the net effect of which is that there now exists a "hyper norm",[1] *viz*., a global standard repudiating corruption that transcend national boundaries and forms a global consensus on the criminalization of transnational bribery. Regarding this emergence of international legal standards on anti-corruption, the late Dimitri Vlassis, former Chief of Crime Conventions Section of the United Nations Office on Drugs and Crime (UNODC), noted that:

> '[T]he gradual understanding of both the scope and seriousness of the problem of corruption can be seen in the evolution of international action against it, which has progressed from general consideration and declarative statements, to the formulation of practical advice, to the development of binding legal obligations and the emergence of numerous cases in which countries have sought assistance from other countries in investigating and prosecuting corruption and in tracing, freezing, confiscating and recovering proceeds of corruption offences'.[2]

The international anti-corruption framework is indeed quite fragmented and not comprised only of treaties.[3] The international financial institutions have played a catalytic role in promoting multilateral initiatives to fight corruption

1 'Hyper norm' is a concept from business ethics that applies to principles so fundamental that, by definition, they serve to evaluate lower-order norms, reaching to the root of what is ethical for humanity. The first proposition of the concept was made by Donaldson and Dunfee as a part of an integrative social contract model of business ethics. *See* T. Donaldson and T.W. Dunfee, 'When Ethics Travel: The Promise and Peril of Global Business Ethics' 41(4) *California Management Review* (1999) 45–63. For a recent critical account *see* A.G. Scherer, 'Can Hypernorms Be Justified? Insights from A Discourse – Ethical Perspective', 25(4) *Business Ethics Quarterly* (2015) 489–516.

2 D. Vlassis, 'The United Nations Convention against Corruption: A Way of Life', in N. Passas and D. Vlassis (eds), *The United Nations Convention against Corruption as a Way of Life. Selected Papers and Contributions from the International Conference on "The United Nations Convention against Corruption as a Way of Life"* (Courmayeur Mont Blanc, Italy, 2006), pp. 15–31, p.15.

3 *See*, *ex multis*, A. Posadas, 'Combating Corruption under International Law', 10 *Duke Journal of Comparative and International Law* (2000) 345–414; G. Stessens, 'The International Fight against Corruption', 72(3–4) *International Review of Penal Law* (2002) 891–938; G. Sacerdoti (ed.), *Responsabilità d'impresa e strumenti internazionali anti-corruzione. Dalla Convenzione OCSE 1997 al Decreto n. 231/2001* (Egea, Milano, 2003); A. Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, The Hague, 2004); J. Wouters, C. Ryngaert and A.S. Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges', 14(1) *Melbourne Journal of International Law* (2013) 205–280; M. Arnone and L. Borlini, *Corruption. Economic Analysis and International Law* (Edward Elgar, Cheltenham, 2014); A. Del Vecchio and P. Severino (eds), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale* (Cedam, Padova, 2014); J. Hatchard, 'Criminalizing Corruption: The Global Initiatives', in N. Boister and R.J. Currie (eds), *Routledge Handbook of*

and related crimes like money laundering (ML), making public the negative impact of such offences, and stimulating governments to take a more pro-active role in this fight.[4] Moreover, non-binding instruments (mainly sectoral in nature) have also, on occasions, influenced domestic legal systems.[5] Still, comparatively more significant reforms in domestic jurisdictions have lately occurred because of the implementation of international anti-corruption treaty obligations. Italy ratified five of these treaties: the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organisation for Economic Co-operation and Development (OECD Convention);[6] the 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union,[7] which requires Member States to criminalise corrupt conduct involving officials of both the Community and Member States even if the conduct took place in its own territory or was instigated by one of their own nationals;[8] the two regional treaties against corruption adopted by the Council of Europe (CoE) in 1999—the Criminal Law Convention on Corruption (CoECLCC),[9] and the Civil Law Convention on

Transnational Criminal Law (Routledge, 2015), pp. 347–363; G. Ferguson, *Global Corruption. Law, Theory and Practice* (University of Victoria, Melbourne, VIC, 2018); and K. Davis, *Between Impunity and Imperialism; The Regulation of Transnational Bribery Law* (Oxford University Press, Oxford, 2019).

4 *See further* Arnone and Borlini, *supra* note 3, pp. 270–310. *See also* World Bank, *Strengthening World Bank Group Engagement on Governance and Anticorruption. Main Report* (World, Bank, Washington, DC, 2007). For the IMF's tools to improve the legal and institutional frameworks of its members and assisted countries and for improving governance and reducing corruption, *see* D.E. Siegel, 'Governance/Anti-corruption. Legal Issues in the Work of the IMF', in Passas and Vlassis (eds.), *supra* note 2, pp. 47–54, and, more recently, the reference made in the report IMF, 'Progress in Implementing the Framework for Enhanced Fund Engagement on Governance', IMF Policy Paper No. 2020/23, July 15, 2020, available online at www.imf.org/en/Publications/Policy-Papers/Issues/2020/07/15/Progress-In-Implementing-The-Framework-For-Enhanced-Fund-Engagement-On-Governance-49576 (accessed 24 January 2020).

5 *See* C. Rose, *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal Systems* (Oxford University Press, Oxford, 2015), pp. 15–27, 133–175, 177–215.

6 17 December 1997, entered in force 15 February 1999. Ratified by Italy on 15 December 2000.

7 Council Act 97/C OJ 1997 C 195/01.

8 For more in-depth illustrations of the EU efforts against corruption, *see* V. Mitsilegas, 'The Aims and Limits of EU Anti-Corruption Law', in J. Horder and P. Alldridge (eds), *Modern Bribery Law. Comparative Perspectives* (Cambridge University Press, Cambridge, 2013), pp. 160–195; and Arnone and Borlini, *supra* note 3, pp. 229–244.

9 27 January 1999, ETS No. 173, entered into force 1 July 2002. Ratified by Italy on 13 June 2013. The CoECLCC is supplemented by an Additional Protocol (15 May 2003, ETS No. 191, entered into force 1 February 2005), which extends the scope of the Convention to arbitrators in commercial, civil and other matters, as well as to jurors, thus complementing the Convention's provisions aimed at protecting judicial authorities from corruption.

Corruption (CoECivLCC);[10] the United Nations Convention against Corruption (UNCAC).[11] This latter treaty was negotiated by the UN on the heels of the United Nations Convention on Transnational Organized Crime (UNCTOC),[12] which also includes some specific anti-corruption provisions. In the pages that follow, this article first briefly introduces the essential elements of the international anticorruption treaties. By drawing on the the outcomes of the monitoring systems they establish, it then examines their implementation by Italy with a view to assessing adherence of its law to such instruments.

2 The Anti-Corruption Treaties Ratified by Italy: Essential Elements

International anti-corruption treaties have been widely commented in the literature.[13] Therefore, there is no need to analyse in detail their provisions. It suffices here to recall their essential features. To begin with, the array of provisions dealing with the criminalisation of corruption of foreign public officials and officials of international public organizations, liability of legal persons, and disallowance of tax deductibility of bribes to foreign officials, represents a common patrimony of the main anti-bribery treaties and, what is more, the basis upon which (sometimes rather) innovative national implementing pieces of legislation have been adopted and enforced. Furthermore, all these treaties address international cooperation issues and contain detailed provisions relating to jurisdictional bases, international cooperation in criminal matters and mutual legal assistance,[14] which are particularly important in that

10 4 November 1999, ETS No. 174, entered into force 1 November 2003. Ratified by Italy on 13 June 2013.

11 31 October 2003, entered into force 14 December 2005. Ratified by Italy on 5 October 2009. The UNCAC comprises four operative chapters that reflect the four "pillars" in the fight against corruption: (i) prevention (Chapter II); (ii) criminalisation and law enforcement (Chapter III); (iii) international cooperation (Chapter IV); and (iv) asset recovery (Chapter V). Chapter I contains "General Provisions", whilst Chapter VI addresses technical assistance and information exchange. The scope *ratione materiae* of the UNCAC is the widest among anti-corruption treaties. Not only does it deal with the full gamut of topics—from prevention to civil and criminal enforcement—but it also encompasses a wide range of criminal offences, which only *lato sensu* may be classified as corruption.

12 Adopted by the General Assembly in its resolution 55/25 of 15 November 2000 and opened for signature in Palermo, Italy, from 12 to 15 December 2000. Entered into force 29 September 2003.

13 The studies referred to *supra* note 3 and in the remaining part of this writing are only a minor part of the existing literature.

14 Arnone and Borlini, *supra* note 3, pp. 394–417.

law enforcement is strictly territorial in nature and corruption crimes can be perpetrated on a transnational basis.

Other key findings emerge from the assessment of the anti-corruption treaties ratified by Italy. First, prevention and law enforcement are complements and not alternatives. Preventive policies are vain when they are not backed up with firm action to counter impunity for abuses of official position (which corruption ultimately represents) and the conduct of those who bribe officials.[15] Fighting impunity is crucial for the legitimacy of the political system, and so is a firm preventive approach, an element which is promoted particularly by the UNCAC. This Convention enumerates a wide range of preventive measures directed at both the public and private sector. Keeping in mind that most of the related provisions are phrased in non-mandatory terms, their typology varies considerably. State Parties are called to set up anti-corruption bodies; establish appropriate procurement systems; prevention of ML; strengthen the integrity of the judiciary; take measures to prevent private sector corruption; promote the active participation of civil society; enhance transparency in the financing of election campaigns and political parties; institute a comprehensive regulatory regime for banks and other financial institutions to prevent ML; and disallow the tax deductibility of expenses that constitute bribes, an issue to which the OECD has devoted a specific but non-binding recommendation.[16]

Second, civil remedies well complement criminal prosecution of corruption. Well-known corruption cases such as the *Fininvest v. CIR* saga in Italy, or the outcomes of the *Abacha* case in Switzerland are evidence that civil remedies complement the criminal prosecution of corruption and can even be, on occasions, more effective than penal sanctions.[17] The advantage of the civil law approach is that it makes corruption controls partly self-enforcing by empowering victims to take action on their own initiative. This is mirrored by the CoE's approach that is not limited to criminalisation. Instead, it follows different patterns of regulation, the CoECLCC being complemented by the CoECivLCC, the first attempt to define common international rules in the field

15 *Ibid.*, pp. 526–527.

16 UNCAC, Articles 6–14. While the basic thrust of these provisions is that States Parties "shall" adopt such measures, this requirement is often weakened by adding qualifiers such as "in accordance with the fundamental principles of its domestic law". *See, e.g.*, UNCAC, Article 13(1).

17 In Tribunale Ordinario di Milano, *Cir v. Fininvest,* No. 8537/2015, Sez. X civile, the industrial group CIR, through a civil action, managed to recover almost €0.5 billion in damages resulting from the corruption of a judge by the competitor Fininvest despite the eventual failure of the criminal proceedings. Regarding the Swiss Federal Court, *Abacha case*, No. 1A.215/2004/col, 7 February 2005, by making use of the so-called *parte civile* within the Swiss criminal proceedings, Nigeria recovered a sum in excess of US$ 0.5 billion.

of civil law and compensation for damages due to corruption crimes. Third, a major and recent breakthrough of the international apparatus against corruption is represented by the asset recovery mechanism. With the adoption of the UNCAC binding principle, according to which illicitly acquired assets are to be returned, has been incorporated for the first time into a multilateral level. Accordingly, Chapter V of the Convention is entirely dedicated to the restitution of assets originating from one of the Convention offences.

From yet another perspective, the State Parties to the OECD Convention, the CoE Conventions and the UNCAC have established functioning monitoring and follow-up mechanisms. These represent the main tool to thrust reluctant countries to accurately implement the Conventions themselves. Furthermore, they provide a unique instrument for the supervisory bodies to monitor whether the implementing laws are applied rigorously and consistently and to recommend the reforms being carried out, even when they go beyond what strictly required by the supervised treaty.[18] In particular, monitoring the implementation of both COE's anti-corruption conventions is the responsibility of the Group of States against Corruption (GRECO).[19] In turn, a key feature of the Convention is its effective and systematic monitoring system undertaken by the OECD Working Group on Bribery (WGB).[20] Chapter VII of the UNCAN too sets out "Mechanisms for Implementation" with Article 63 establishing a review process through the Conference of the State Parties to the Convention (COSP) to be convened regularly and assisted by the Implementation Review Group (IRG) set up in 2009. The monitoring mechanism is conceived as a review cycle, focusing on specific parts of the UNCAC. By contrast, there is currently no evaluation and monitoring system in place for the1997 EU Convention. Over the years the EU has broadened its focus though, with the latest step being a comprehensive two-year review process of Member States'

18 *See* L. Borlini, 'Il controllo internazionale tra standardizzazione, coordinamento e 'contaminazione', in A. Annoni, S. Forlati and F. Salerno (eds), *La codificazione nell'ordinamento internazionale ed europeo* (Editoriale Scientifica, Naples, 2019), pp. 591–625, pp. 604–607.

19 To date GRECO has launched five evaluation rounds. GRECO evaluation procedures involve the collection of information through questionnaire(s), on-site country visits enabling evaluation teams to solicit further information during high-level discussions with domestic key players, and drafting of evaluation reports.

20 On the four-phase process for monitoring implementation of the 1997 OECD Convention, *see* N. Bonucci, 'Article 12: Monitoring and Follow Up', in M. Pieth, L. Low and N. Bonucci (eds), *The OECD Convention on Bribery. A Commentary*, 2nd edn (Cambridge University Press, Cambridge, 2013), pp. 534–576.

general anti-corruption achievements, the so-called "EU Anti-Corruption Report" by the Commission.[21]

3 The Italian Anti-Corruption Legislation in Light of the International Commitments

3.1 *An Outlook of Corruption and Recent Legislative Reforms in Italy*

In Italy, for some time corruption has assumed the character, both in its proportions and qualitative features, of a systemic phenomenon[22] that infects vast sectors of administration and public life, not to mention a non-negligible part of business and finance.[23] As emerges from the data provided by the Court of Auditors at the inauguration of the judicial year, the number of judgments pronounced against public employees for corruption-related offences has risen dramatically.[24] Recently, moreover, the Italian press has given great prominence to the last report drafted by the non-governmental organisation

21 Commission Decision of 6 June 2011, COM (2011) 3673 final.

22 In relation to corruption Italy seems an anomaly: different evidence shows that the country's level of corruption is on a par with or worse than that of much less developed countries while being far above the level of similarly developed countries. Some indexes, such as the widely used Transparency International Corruption Perception Index, relies on the opinions of experts and various economic agents, and some scholars question its accuracy. Other sources too, including citizens' reports of their corruption experiences and behavioural experiments, validate these indexes, and their possible flaws, however plausible, are most unlikely to subvert the ranking in any drastic way. A recent insightful illustration and interpretation of such evidence is offered by D. Gambetta, 'Why is Italy Disproportionally Corrupt?: A Conjecture' in K. Basu and T. Cordella (eds), *Institutions, Governance and the Control of Corruption* (Palgrave Macmillan, London, 2018), pp. 133–156, pp. 135–139, to whom I refer the reader.

23 Italian scholars are in agreement regarding the structural nature of corruption. *See*, *ex multis*, G. Fiandaca, 'Esigenze e prospettive di riforma dei reati di corruzione e concussione', XLII(3) *Rivista italiana di diritto e procedura penale* (2000) 883–901; G. Colombo, 'Le indagini della magistratura italiana nei reati contro la pubblica amministrazione. Il danno conseguente alla corruzione', 2–3 *Questione Giustizia* (1994) 467–473; G. Forti (ed.), *Il prezzo della tangente. La corruzione come sistema a dieci anni da "mani pulite"* (Vita e Pensiero, Milan, 2003); P. Davigo, *La giubba del re. Intervista sulla corruzione* (Laterza, Bari, 2004); P. Davigo and G. Mannozzi, *La corruzione in Italia, percezione sociale e controllo penale* (Laterza, Bari, 2007); and A. Alessandri, 'I reati di riciclaggio e corruzione nell'ordinamento italiano: linee generali di riforma', 3 *Diritto penale contemporaneo* (2013) 1–25.

24 *See also* the data analysed in the report written by the Attorney General Martino Colella at the *Cerimonia inaugurale dell'anno giudiziario 2016*, 18 February 2016. In his last five annual reports, also the President of the Court of Auditors has invariably reiterated concerns as to the impact of corruption on the national economy.

Transparency International (a global network with headquarters in Berlin of which more than ninety associations are members on a national basis), that every year compiles a ranking of the most corrupt countries based on the so-called corruption perception index. In this ranking, Italy is not only placed in the lower "part of the list", it is also one of the Western countries to have lost most ground in the last two decades.[25] Leaving aside the debated limits of such assessment methodology,[26] it remains the case that the situation in Italy is alarming, above all when one considers that corruption is a phenomenon "with a high degree of concealment" and, hence, difficult to quantify.[27] Also, beyond the mere figures and statistical data, it is easy to see that the recent level of attention to the phenomenon of corruption has grown significantly in Italy, both at the governmental-institutional level and in public opinion.[28] Needless to say, this is also due to the continuity through time of high-profile corruption cases in the country.[29] To name but a few recent examples: the Lombardy region case;[30] "*Expo*";[31] "*Mose*";[32] and "*Mafia*

25 Today Italy is ranked 51 worldwide, having dropped 11 positions since 2005.

26 *See*, *e.g.*, C. Oman and C. Arndt, 'Measuring Governance', 39 *OECD Policy Brief* (2010).

27 On the diffusion of the phenomenon *see also* Autorità Nazionale Anticorruzione, *Relazione Annuale 2020*, Rome, 2 July 2020.

28 For a fine representation of the phenomenon of corruption in Italy *see* A. Vannucci, *Atlante della corruzione* (Ega, Torino, 2012).

29 Information on major recent cases of corruption in Italy are available at: www.anticorruzione.it, accessed 2 October 2020.

30 A major judicial investigation regards top politicians and officers of the Lombardy region for allegedly having facilitated the obtaining of public healthcare funds by certain private hospitals in exchange for money or other patrimonial advantages. On 27 November 2014, the Milan Court of First Instance sentenced, in a separate relevant leg of the proceeding, the alleged intermediary of the bribe to five years imprisonment. This conviction was then confirmed by the Milan Court of Appeal on 15 March 2017. As far as the main proceeding against the former president of the Lombardy region is concerned, on 23 December 2016 the Milan Court of First Instance, Section X, handed down a sentence of six years' imprisonment. On 19 September 2018, the Milan Court of Appeal confirmed the conviction, increasing the sentence to seven years and six months' imprisonment.

31 In May 2014, the Milan prosecutor's office started an investigation in relation to the adjudication of public tenders in the context of the 2015 Universal Exposition of Milan. A relevant leg of the proceeding has already ended with the main defendants accepting a plea bargain granted by the judge of the preliminary hearing. The most severe sentence imposed was three years and four months' imprisonment. In another leg of the proceeding, on 19 July 2016, the Milan Court of First Instance sentenced a relevant public official to two years and two months' imprisonment. Appellate proceedings are currently pending.

32 In 2014, the Venice prosecutor's office started an investigation against top politicians of the Veneto region and businesspeople for corruption relating to public funds used for the 'Mose' project, a huge dam aimed at protecting Venice from the high tide. On 16 October 2014, a

capitale",[33] which has been made quite known abroad by the Netflix series '*Suburra*' (based on the book loosely inspired by some of the facts/actors in the trial).

Against this background and the evidence of inadequacies in the 1990 reforms,[34] the Italian legislator, although not always appropriately, and rarely in an organic fashion, has intervened on several occasions to amend the domestic anti-corruption legislation as regards both repression and, more recently, prevention, with a view to confronting the phenomenon in a more effective manner. This intense legislative activity has also been conducted to facilitate the implementation of the international anti-bribery treaties ratified by Italy,[35] as well as to address the critiques and recommendations made in the context of the CoE, OECD, and the UN monitoring procedures conducted to date and those in the EU Anti-Corruption Report.[36] The reforms under discussion have been grafted onto legislation traditionally leaning towards criminal repression and law enforcement only. As noted by the EU Commission: 'Italy's drivers for anti-corruption measures have for long time been limited to law enforcement, prosecution, the judiciary and, to some extent, the Court of Auditors'.[37]

Yet, the absence of an all-encompassing strategy underscored how a reform limited to penal norms could not represent an effective obstacle to the spread of illegality and corruption. Particularly, with the outbreak of the so-called phenomenon of "*Tangentopoli*" and the resulting wide-ranging judicial inquiry "*Mani pulite*",[38] it appeared clear to most observers that the Criminal Code

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relevant leg of the proceeding ended with 19 defendants accepting a plea bargain granted by the judge of the preliminary hearing. The most severe sentence imposed was two years and 10 months' imprisonment and a €2.6 million confiscation order. In another leg of the proceeding, the trial of first instance started in 2015 and ended on 15 September 2017 with four convictions, substantively upheld on Appeal on 12 July 2019.

33 In 2014, the Rome prosecutor's office started investigations against top politicians of the municipality of Rome and business people for corruption and conspiracy in relation to the adjudication of public tenders concerning assistance services to be carried out by the Rome municipality (in particular, assistance services for immigrants and refugees). In December 2014, 44 people were arrested. The trial started in 2015 and ended on 20 July 2017 with 41 convictions issued by the Rome Court of First Instance. In September 2018, the Rome Court of Appeal confirmed most of the convictions (and it considered the aggravating circumstances relating to mafia to be well-founded).

34 Law No. 86 of 26 April 1990.

35 The national legal framework against corruption includes the relevant provisions of the Criminal Code and Criminal Procedure Code, the Civil Code, as well as specific legislation on the public sector, money-laundering, and liability of legal persons.

36 *See* European Commission, *Annex Italy to the EU Anti-Corruption Report*, 3 February 2014, COM (2014) 38 final, Annex 12.

37 *Ibid.*, p. 3.

38 "Mani pulite" (Italian for "clean hands") was a nationwide judicial investigation into political corruption in Italy undertaken in the 1990s. *Mani pulite* led to the demise of the so-called

system resulting from the reforms of 1990 was inadequate to address the emerging morphology of corruption activities. The features of corruption have, in fact, changed considerably over the course of time to the point that today we can hardly speak of side-payments in the traditional sense. Corruption resorts to other instruments of reward, and has metamorphosed, more generally, into a network of exchanges of favours and utility or profit. In the majority of cases, moreover, 'corruption does not have as its object a single action bought or sold, but an entire functioning relationship.'[39]

Notwithstanding the above and the ratification of the first anti-bribery treaties, before the current legislative apparatus settled, on a number of occasions, the Italian Parliament passed or attempted to pass laws hampering a legal framework that would ensure effective processing and finalisation of court proceedings in complex cases. Remarkable pieces of legislation of this sort were prompted in the early 2000s by the centre-right coalition led by former Prime Minister Berlusconi. One example was the radical reform Italy underwent in 2005, which severely shortened the statute of limitations and weakened the framework.[40] Another one is the draft law on a "short statute of limitations period" ("*prescrizione breve*"), which would have increased the risk of dismissing cases involving defendants with no prior convictions.[41]And still another was the law suspending trials against people holding the four most important State offices (namely, the President of the Republic, the Prime Minister, the President of the Senate and the President of the House of Representative),[42] which was later found to be unconstitutional.[43] Decriminalisation of certain offences, such as certain forms of false accounting as established by Legislative Decree 61/2002, could also be mentioned in this context.

"First Republic", resulting in the disappearance of many 'historical' Italian political parties. In some accounts, as many as 5000 public figures fell under suspicion. At one point, more than half of the members of the Italian Parliament were under indictment. More than 400 city and town councils were dissolved because of corruption charges. The corrupt system uncovered by these investigations was usually referred to as "Tangentopoli" (the expression derives from *tangente*, which means kickback and in this context refers to kickbacks given for public works contracts, and from "polis", the ancient Greek word for city).

39 Textually R. Guerrini and D. Guidi, 'Bribery in Italy: An Outlook on Present Law and Perspective of Reforms', in Horder and Alldridge (eds), *supra* note 8, pp. 97–127, p. 114.

40 Law n.251/2005, also known as "Former Cirielli Law", after the name of the member of the Italian Parliament who first introduced the law into Parliament where it was completely modified. He later refused to acknowledge the paternity of the law.

41 Draft Law S. 1880 of 12 November 2009.

42 Law No. 124 of 23 July 2008. The suspension was permitted until the end of the term of office for offences committed prior to or while in office.

43 Corte Costituzionale, 21 October 2009, No. 262.

The subsequent reforms in Italy, partly prompted by the international community, follow three main directions: on the repressive front, (i) the modernisation of sanctions; and (ii) the reorganisation and rationalisation of the offences in the penal code, (especially with regards to the problematic coexistence of the two contiguous criminal offences of corruption and *concussione* and the introduction of the new offence of trading in influence);[44] and, on prevention, (iii) the strengthening of the preventative controls of an administrative nature by aligning the Italian legislation to the UNCAC and the CoECLCC requirements.[45]

The last notable legislative act in this respect is Law No. 3 of 9 January 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". This recent law, commonly referred to as "*legge spazzacorrotti*" ("bribe destroyer"), introduced several measures affecting Italian criminal law—ranging from more severe penalties for bribery pursuant to Section 318 of the Criminal Code to the introduction of 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. Other such measures are the amendment of the rules on the statute of limitations and significant adjustments to Legislative Decree No. 231/2001 with respect to corporate liability—including *inter alia* the extension of the list of predicate crimes to also include trafficking in illicit influence (influence peddling) and the revision of the restraining measures applicable to certain crimes against the public administration for crimes committed by individuals in top management positions, as well as those subject to management's directives.[46]

With a view to identifying its achievements and shortcomings, I shell now weigh the main traits of the Italian legislation resulting from the aggregate of such reforms against the central principles of the international treaties and the indications emerging from the monitoring procedures conducted by their supervisory bodies.

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44 *See, e.g.*, Law No. 69 of 26 May 2015 aimed at strengthening the repressive component of the Italian anti-corruption legal framework. *See further* A. Spena, 'Dalla punizione alla riparazione? Aspirazioni e limiti dell'ennesima riforma anticorruzione (l. 69/2015)', 10 *Studium iuris* (2010) 1115–1124.

45 This overarching goal inspired the systemic reform enacted with Law No 190 of 6 November and 2012, as well as its subsequent amendments. *See* P. Severino, 'La nuova legge anticorruzione', *Diritto penale e processo* (2013) 7–12.

46 For analytical comments, *ex multis*, V. Mongillo, 'La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione', 5 *Diritto penale contemporaneo* (2019) 231–311.

3.2 *The State of the Italian Legislation vis-à-vis the International Anti-Corruption Conventions*

3.2.1 Criminalisation of Corruption Offences

Criminalisation is one of the areas which has been most incisively influenced by the international anti-corruption conventions. The majority of the offences contained in the anti-corruption treaties are today covered by the Italian criminal law.[47]

First, although through a rather fragmented configuration, Articles 317 to 322 of the Italian Criminal Code criminalise the domestic active and passive bribery of public officials envisaged by the international anti-bribery treaties.[48] Participatory conduct and attempts are also duly criminalised.[49] The international dimension of the offence essentially covers active bribery of foreign public officials in international businesses transactions as well as bribery acts committed by EU officials and foreign officials of EU Member States in so far as those acts are committed against the financial interests of the EU.[50] Also, the relevant notions of public official and persons in charge of a public office as established by Articles 357 and 358 of the Criminal Code cover the different categories referred to in the relevant treaty provisions. The Italian jurisprudence, moreover, interprets "public function" to the widest possible extent and may also include employees of public enterprises and companies which have been officially granted licenses to perform public services.[51]

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47 *See* UNODC, *Implementation Review Group, Country Review Report of Italy*, Vienna, 2014, available online at www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html (accessed 8 June 2020). The implementation by Italy of chapters III and IV of the Convention was reviewed in the third year of the first cycle, and the executive summary of that review was published on 19 November 2013 (CAC/COSP/IRG/I/3/1/Add.6).

48 In the Italian penal system, the concept of bribery, far from being identified in a single criminal typology, turns out to be fragmented in several subtypes distinguished on the basis of action bought or sold and the moment in which the corruption pact is stipulated, forming a sort of "unitary mini-system". The expression is from M. Romano, *Commentario sistematico del codice penale. I delitti contro la pubblica amministrazione* (Giuffrè, Milano, 2006), p. 128.

49 These are covered, respectively, by the general provisions contained in Articles 110 and 56 of the Criminal Code.

50 *See* Article322 bis of the Criminal Code introduces by Law 300/2000. Note that para. 5 bis of Article 322 bis, introduced in 2012, criminalising bribery of the judges, public prosecutors, deputy public prosecutors, and officials of the International Criminal Court, addresses GRECO's criticism on the limited scope of Article 322 bis.

51 *See*, *e.g.*, Corte di Cassazione, *Deiogu*, No. 7958/92, Sez. Unite, rv. 191171, 27 March 1992; *Id.*, *Mascia*, No. 1953/99, Sez. VI penale, rv. 213910, 13 January 1999. This is acknowledged, for instance, by OECD, *Working Group of Bribery, Review of the Implementation of the Convention and 1997 Recommendation. Phase 1 Report*, Paris, 2001, p. 8.

Second, the Italian criminal legislation also covers the other corruption offences prohibited by the UNCAC.[52] Moreover, Article 346 bis introduced in the Criminal Code by Law 190/2012, contemplates the new criminal typology of "traffic of illicit influences" directed at punishing the conduct of subjects that propose themselves as intermediaries in the settlement of matters of corruption, alongside those who seek out collaboration. Without entering into the domestic debate regarding the final formulation and the implications of such provision, I note that the novelty is appropriate in order to adapt the outline of the doctrine to the recent changes in the corruption phenomenon.[53] The offence indeed targets not the public official/decision-maker, but those persons who are in the neighbourhood of power and who try to obtain advantages from their situation by influencing the public official decision-maker and, hence, addresses the so-called "background corruption".[54]

Third, Italy considered but decided not to criminalise the offence of illicit enrichment due to incompatibility with the fundamental principles of its legal system.[55] In this respect, however, as the COSP also observes, Italy provides for mandatory confiscation of assets where a person who has been convicted for a number of serious offences (including corruption offences) cannot justify their origin. There are also specific rules imposing patrimonial disclosure obligations on elected officials and top public officials, and stipulating sanctions for non-disclosure.[56]

Finally, the COSP appreciated the "all-crime" approach[57] taken with regard to predicate offences for ML.[58] Repression of ML is indeed of great importance in the fight against corruption. The two crimes are often interlinked. Corruption

52 *See* UNODC, *supra* note 47, pp. 34–36, 40–42, 52–54.

53 The same position is voiced, for instance, by Guerrini and Guidi, *supra* note 39, p. 124.

54 Council of Europe, *Criminal Law Convention on Corruption: Explanatory Report*, ETS no. 173, Strasbourg. 27 January 1999, paras 64–66.

55 *See* UNODC, *supra* note 47, p. 37. On the legal issues surrounding the introduction of illicit enrichment in the UNCAC Parties' legal systems see further Arnone and Borlini, *supra* note 3, 261–264; O. Landweher, 'Article 20. Illicit Enrichment', in C. Rose, M. Kubiciel and O. Landweher (eds), *The United Nations against Corruption. A Commentary* (Oxford University Press, Oxford, 2019) 219–237, pp. 231–236.

56 *See* UNODC, *supra* note 47, p. 37.

57 As is widely known, there are three main models for identifying predicate crimes of ML. A first system may encompass all crimes as predicate crimes of ML (so-called "all crimes approach"). Another way is defining ML as a crime related to a specific list of offences (so-called "list approach"). Finally, ML can be defined in relation to "serious crime", that is all offences punishable by a sanction beyond a certain threshold (so called "threshold-approach").

58 UNODC, *supra* note 47, pp. 47–52. The controversial introduction of self-laundering in the new Article 348 ter of the Criminal Code too goes in the direction indicated by the

offences are normally committed for the purpose of obtaining private gains; by laundering the proceeds of corruption offences, such illicit gains can be enjoyed without fear of being confiscated. On the other hand, the illicit proceeds generated by corruption breed illicit financial flows, the proceeds of corruption being among the largest sources of laundered funds.[59] Further, the perpetration of a ML offence frequently includes a transnational element, which can favour the prosecution of launderers and their "allies" in foreign States in cases where a criminal prosecution for corruption in their home State is improbable. The case of James Ibori, mentioned by Hatchard, Daniel, and Maton,[60] is most telling in this respect: seemingly because of considerable ongoing domestic political support, the former Governor of Delta State in Nigeria was not prosecuted successfully in Nigeria although there was substantial evidence of corrupt practices on his part. However, in 2012 he was convicted in a London court of conspiracy to defraud and money laundering involving sums totalling almost £50 million.[61] Hence, an effective anti-corruption legislation must also prohibit such activities, which is a consolidated principle in the anti-bribery conventions,[62] as well as in the Italian legislation.

By contrast, few but significant challenges for the implementation of the provisions on criminalisation of the international treaties endure and have been duly underscored by the international monitoring systems. Apart from the complex and fragmented configuration of bribery offences, the major shortcomings of the Italian legislation concern the problematic coexistence of the contiguous criminal typologies of corruption and *concussione*, and certain persisting limits on the prosecution of the offence of bribery between private persons.

As to the former issue, I note that the crime of *concussione* is peculiar to the Italian Criminal Code. It represents an extortion committed by civil servants in two ways: by constriction and by induction. To date the distinction between the criminal typologies of *corruzione* and *concussione* seems to have

international anti-bribery monitoring systems. *See, e.g.,* OECD, *Report on Implementing the OECD Anti-Bribery Convention in Italy*, Paris, 2011, p. 33.

59 *See, ex multis*, N. Kyriakos-Saad, G. Esposito and N. Schwarz, 'The Incestuous Relationship between Corruption and Money Laundering', 83(1–2) *Revue Internationale de Droit Pénal* (2012) 161–172.

60 Hatchard, *supra* note 3, p. 358; and T. Daniel and J. Maton, 'Is the UNCAC an Effective Deterrent to Grand Corruption', in Horder and Alldridge (eds.), *supra* note 8, pp. 293–327, pp. 306–309.

61 *R v Ibori* [2013] EWCA Crim 815, [2014] 1 Cr App Rep (S) 73.

62 *See* OECD Convention, Article 7; CoECLCC, Articles 6(1)–(2) and 13; UNCAC, Articles 2(h) and 23.

produced more failures than advantages in relation to both trial and evidence. Furthermore, above all due to its uncertain contours, the crime of *concussione* could represent an improper shield for bribe-givers. It can be indeed used as *de facto* defence for an individual if a public official abuses his/her functions or power to oblige or induce the individual to unduly give or promise money or other assets to the official or a third party. In this respect, the WGB has reiterated concerns as to the nebulous scope of *concussione.*[63] Noting that the defence was inconsistent with the OECD Convention as interpreted in light of its Commentary 7, the WGB recommended that Italy amend 'its legislation to exclude the defence of *concussione* from the offence of foreign bribery.'[64] However, after the amendment to the Criminal Code introduced by Law 190/2012,[65] the WGB recognised the efforts taken in narrowing the scope of the offence under discussion and establishing a new offence of undue inducement.[66] The WGB, thus, decided to follow-up on the implementation of the redefined offence of *concussione* and the scope and impact of the new offence of undue inducement as the case law develops.[67]

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63 OECD, *"Italy: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation On Combating Bribery"*, Paris, 2004, pp. 33–35, noted also that the definition of *concussione* is further blurred by the concept of *concussione ambientale*, and that magistrates may be tempted to characterise a case as *concussione* rather than bribery, so that the private individual faces no proceedings and may thus be encouraged to offer testimony against the public official.

64 *Ibid.*, Recommendation 7(a).

65 Article 319-quater of the Italian Criminal Code now provides that is criminally liable the public officer or the person in charge of a public service who, abusing his/her capacity or power, induce someone to give or promise unjustly to him/her or a third person, money or other benefits. Symmetrically, pursuant to the amended Article 25 (of Legislative Decree 231/2001) the entrepreneur, induced by the abuse of power of a public officer to give or promise to the latter money or other utilities, will be punished as a participant to the offense of the public officer. In such case, the company can be also liable and sanctioned with a fine approximately up to €1 600 000. Additionally, the company could be also sanctioned with disqualification measures for not less than one year, consisting of suspension of business activity and/or ban to do business with public administration.

66 According to the WGB, 'the offence of *concussione* now restricts the defence to situations where the will of the person who pays the bribe has been "radically limited"', whilst the separate offence of undue inducement 'cannot be used as a defence but provides for lower sanctions for the briber and hence a shorter period of limitation'. *See* OECD, *Italy: Follow-up to the Phase 3 Report & Recommendations*, Paris, 2014, p. 4.

67 To the same extent *see* GRECO, *Third Evaluation Round. Compliance Report on Italy, "Incrimination (ETS 173 and 191, GPC 2)". Transparency of Public Funding,* GRECO- RC III (2014) 9E, Strasbourg, 2014, Recommendation viii, p. 9.

The domestic provisions on bribery between private persons as resulting from the reform of 2012[68] also seem not to be consistent with the offences defined by Article 21 of the UNCAC and Articles 7 and 8 of the CoECLCC. The fact that, originally, the offence was not prosecuted *ex officio* but only upon complaint, except for the cases where it leads to distortions of competition in the procurement of goods and services, was criticized by both GRECO and COSP.[69] For similar reasons, the EU Commission remarked that Italy has not yet fully transposed the Framework Decision 2003/568/JHA on combatting corruption in the private sector in that the new provisions introduced with the 2012 anti-corruption law still do not address all the deficiencies related to the scope of corruption offences in the private sector and to the sanctioning regime.[70] However, Legislative Decree No. 38/2017 has extended the reach of private commercial bribery by implementing the EU Framework Decision 2003/568/JHA on combating corruption in the private sector. And Law No. 3/2019 has arguably made up for the remaining flaws in that it amended the Italian Civil Code by introducing the possibility of prosecuting *ex officio* private-to-private corruption (Section 2635 of the Civil Code) and incitement of private-to-private corruption (Section 2635-bis of the Civil Code).

3.2.2 Accounting Offences

Regarding accounting offences, GRECO noted that the accounting system in Italy does not comply with the CoECLCC. This was evident in particular as regards the thresholds for liability, the limited scope of accounting requirements (i.e. applicable only to listed companies, State-owned\ companies and insurance companies), the setting of penalties and the scope of false accounting offences.[71] Such remarks were reiterated before the adoption of Italian Law

68 This is a species placed outside the Criminal Code, but included within the range of the so-called "corporate crimes" in Title XI, Book V of the Civil Code (Penal dispositions in the matter of companies and consortia). *See* Article 2635 of the Civil Code, so-called "private corruption". This crime punishes with up to three years' imprisonment the administrators, general manager, managers at the head of the company's accounting records, mayors and liquidators who, as a result of payment or promise of profit, perform or omit actions in violation of the obligations inherent in their office causing damage to the company. The same penalty is applied, based on a paragraph of the same Article 2635 c.c., to one who gives or promises the profit, confirming that this form of corruption is configured as a single crime involving agreement.

69 *See* UNODC, *supra* note 47, p. 9. *See also* European Commission, *supra* note 36, p. 14, and GRECO, *Council of Europe, Joint First and Second Evaluation Rounds. Evaluation Report on Italy*, GRECO Eval I/II (2008) 2E, p. 5.

70 *See* European Commission, *supra* note 36, p. 14.

71 *See, e.g.*, GRECO, *Council of Europe, Joint First and Second Evaluation Rounds. Addendum to the Compliance Report on Italy*, GRECO RC-I/II (2011) 1E Addendum, Strasbourg, 2013, p. 13. *See also* European Commission, *supra* note 36, p. 13.

69/2015 reforming crimes against the public administration, mafia-type associations, and false accounting.[72] Although it did not meet the expectations of those who called for a comprehensive redefinition of such crimes, this law, taking up part of GRECO's recommendation, at least raises the sanctioning response.

3.2.3 Sanctions and Liability of Legal Persons

Corruption offences are generally regarded as serious offences with correspondingly proportionate punishment, aggravating circumstances, and possible additional sanctions like disqualification. In principle, therefore, the Italian sanctioning regime has been considered in line with the basic tenets of the anti-corruption treaties.[73] This comes as no surprise when considering that the treaty-approach regarding criminalisation has unquestionably contributed to calibrating the national responses and to the design of innovative sanctions such as value-based confiscation[74] and the promotion, for the first time in the Italian legal system, of forms of *ex crimine* liability for legal entities, formulating them *ex novo*.[75]

The sanctioning regime for corruption offences has been recently strengthened by Law 69/2015, which, *inter alia*, provides for a general increase of the duration of imprisonment (with positive effects also on the statute of limitations), and an increase in the duration of the prohibition on participating in public tenders (up to five years) for any entrepreneur found guilty of such crimes. Remarkably, with a view to stimulating the individual propensity towards denunciation,[76] it also introduced a strategy of rewards, that is, a reduction of sanctions for the individual offenders who *post delictum* effectively strive to avoid corruption activities, or to prevent the production of further illicit effects or to those who effectively cooperate in gathering evidence and identifying other offenders.[77]

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72 Such offences are now governed by Articles 2621, 2621 bis, 2621 ter, and 2622 of the Civil Code.

73 *See*, for example, UNODC, *supra* note 47, pp. 5 and 9.

74 This sanction, introduced with Law 300/2000, which ratified the EU and OECD anti-bribery conventions, is governed by Art. 322 ter of the Criminal Code and complements the provisions on confiscation contained in Articles 240, 322, 325, and 355, as well as in D.Lgs. 395/1992, and Law No. 97/2001.

75 It was only with Law 300/2000 and D.Lgs. 231/2001 (as amended by D.Lgs. 146/2006 and, subsequently, Laws 190/2012; 69/2015 and 3/2019) that Italy introduced an organic system of sanctions for legal entities.

76 Such strategy is advocated by, among others, P. Davigo and G. Mannozzi, *supra* note 23, pp. 286–287; and B. Mattarella and M. Pellissero, *La legge anticorruzione. Prevenzione e repressione* (Giappichelli, Torino, 2013), pp. 351–353.

77 *See* Section 1 of Law 69/2014, and Article 323 bis of the Italian Criminal Code.

Still, certain remarkable flaws remain. Criticism is made regarding the deterrence of pecuniary sanctions on legal persons, which appear relatively low, especially for large companies to which they may be "fairly insignificant" (whereas the arsenal of disqualifying sanctions is recognised as far more dissuasive);[78] and the absence of financial sanctions alongside imprisonment for individuals, which may constitute a useful additional deterrent.[79]

3.2.4 Statute of Limitations

The most serious concern, however, is unanimously thought (and pointedly documented) to be the effectiveness of the sanctions and, especially, their enforcement in practice: the effective, proportionate, and dissuasive character of sanctions based on conviction becomes highly theoretical when a large proportion of cases never reach a conviction, due to the expiry of the limitation periods.[80] The WGB Phase 3 Report, for instance, remarked that, although sixty defendants had been prosecuted and nine cases were under investigation at that time, final sanctions were imposed only against three legal persons and nine individuals in all cases through "*patteggiamento*" (a sort of plea bargain). Cases against numerous other legal persons and individuals had been dismissed, mostly, as time-barred under Italy's statute of limitations, which includes all stages of a trial through to appeals.[81]

GRECO advanced virtually identical concerns, claiming that the combination of the calculation method for the statute of limitations and other factors (such as delays, an overload in criminal justice, the length of criminal proceedings, the late discovery of several crimes, and complexity of investigation for corruption cases) increase the risk that corruption cases become

78 *See* OECD, *supra* note 66, p. 20, and pp. 22–23, adding that 'in the very rare instances where a fine was imposed on legal persons in a foreign bribery case, the level of the fine was far from the maximum available under the law (EUR 900000 or EUR 300000),' this being of particular concern as 'comparable statutory maximum fines were deemed too low by the Working Group in other G8 countries.'

79 *Ibid.*, p. 19.

80 *See* GRECO, *supra* note 71, pp. 30–35; OECD, *supra* note 66, pp. 20–32; UNODC, *supra* note 47, pp. 6–7, 9; European Commission, *supra* note 36, pp. 8–9.

81 *See* Articles 157–161 of the Italian Criminal Code. The inadequacy of Italy's statute of limitation regime for bribery offences is also authoritatively voiced, *ex multis*, by D. Pulitanò, 'La novella in materia di corruzione', *Cassazione Penale* (2012) (Supplement 11), p. 15. *et seq.*; and Alessandri, *supra* note 23, p. 13. The OECD has recently underlined the necessity of modifying such regime with a view of impeding delaying tactics. *See* OECD, *Economic Survey: Italy 2013* (OECD, Paris, 2013), pp. 36–38.

time-barred.[82] In this regard, it is worth stressing that under Italian law, defendants are typically entitled to two appeals, which must be resolved before they begin serving their sentences (with a handful of exceptions). Furthermore, up till the entry into force of the very last reform on the issue (see *infra*) the statute of limitations clock normally kept ticking while these appeals were in process. As a result, the statute of limitations could run out before a case made its way through Italy's glacial judicial system—where criminal trials can last an average of four to five years in the court of first instance alone, and the appeals can add an extra three years to the process.

Anecdotal evidence of criminal trials dismissed by Italian courts for the expiration of the statute of limitations abounds. Just to mention some intriguingly famous cases that captivated the public attention, in 2015, a Naples court found former Italian Prime Minister Silvio Berlusconi guilty of paying a senator €3 million to support Berlusconi's Forza Italia party and sentenced him to three years in prison for this crime.[83] Mr. Berlusconi did not serve a day because, after he appealed, his case was dismissed as time-barred under Italy's statute of limitations. This was not the first time Berlusconi had benefitted from Italy's slow judicial proceedings.[84] Nor was he the first politician to do so. In 2004, former Prime Minister Giulio Andreotti famously escaped punishment for mafia association in part due to the statute of limitations.[85]

In short, lengthy proceedings and the current statute of limitations remain highly controversial issues in Italy. More so, in light of the anti-corruption treaties (which also stipulate provisions in this respect)[86] and other international obligations in contiguous fields. The domestic statute of limitations, indeed, has been violently shaken by the EU Court of Justice (ECJ) in the *Taricco* case,[87] referred by the Court of Cuneo. In this case the ECJ issued a landmark (and

82 The assessment of the adequacy of a given statute of limitations is not based on an absolute benchmark, but rather on the basis of its application in practice. For instance, a five-year statute of limitations period could be regarded as appropriate if suspensions are possible under various circumstances, and result in sufficiently long period in practice.

83 *See* Tribunale di Napoli, *Criminal proceedings against Berlusconi and Lavitola*, No 11917/2015, Sez. I penale, 8 July 2015.

84 For an informed brief on the impact of the statute of limitations on other seven trials against him see Transparency International Italia, 'Impact of Statutes of Limitations in Corruption Cases Affecting EU Financial Interests. A Comparative Report', December 2016, available online at www.transparency.it/informati/pubblicazioni/impact-of-statutes-of-limitations-in-corruption-cases-affecting-eu-financial-interests (accessed 20 March 2021), pp. 6–7.

85 *See*, *e.g.*, R. Graham, 'Giulio Andreotti, Italian Statesman', *Financial Times*, 6 May 2013.

86 *See, for example*, OECD Convention Article 6; and UNCAC Article 29.

87 *Criminal proceedings against Taricco and others*, No. C-105/14, 8 September 2015, esp. paras 34–58. For an assessement of the ruling *see* F. Viganò, 'Disapplicare le norme vigenti sulla

debated)[88] judgment on the parallel issue of whether the domestic provisions on limitation periods can be considered as an impediment to the effective fight against VAT fraud[89] and other illegal activities affecting the financial interests of the EU, as provided by Article 325(1) and (2) of the Treaty on the Functioning of the European Union (TFEU), and, in the affirmative, whether they should be disregarded by national courts in order to give EU law its full effect.

Given the complexity of investigations on cases such as this, the ECJ agreed that the rules constraining the maximum period of limitation, even in the presence of procedural acts which interrupt the course of the term, can be considered contrary to the obligations deriving from Article 325 TFEU. Accordingly, even if the national court considers that the limitation period has expired under national law, it should be obliged to give EU law its full effect by setting aside the provisions of national law which conflict with Article 325 TFEU (*in casu*, the last paragraph of Article 160(3), read in conjunction with Article 161(2), of the Italian Criminal Code) and thus deny the possibility for the defendant to be acquitted as a result of the domestic rules on limitation periods. It is of note that, given the very wording of Article 325(1) TFEU ('other illegal activities affecting […]'), the far-reaching consequences of the ruling cover also corruption offences affecting the financial interests of the EU.

Despite such and other remarks made by international institutions,[90] it was only Law 3/2019 that modified the statute of limitations systemically. The new

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prescrizione nelle frodi in materia di IVA? Primato del diritto UE e *nullum crimen sine lege* in una importante sentenza della Corte di giustizia (sent. 8 settembre 2015 (Grande Sezione), Taricco, causa C-105/14)', *Diritto penale contemporaneo* (2015) 1–16.

88 Although the Italian Supreme Court upheld the jurisprudence of the ECJ (Corte di Cassazione (Sez. III penale), *Criminal proceedings against Pennacchini*, 17 September 2015, No. 12999/2015), the Court of Appeal of Milano, the day after, on 18 September 2015, raised a question of constitutional validity of Law No. 130/2008 which ratified and implemented the Lisbon Treaty, with a view to stimulating the application, for the first time in Italian constitutional history, of the "counter-limits" doctrine as applied to EU law. The question submitted to the Constitutional Court assumed the substantive nature of statutes of limitations and refers to a possible breach by the ECJ jurisprudence of the principle *nullum crimen sine lege* and, specifically, its corollary of the prohibition of retroactive application of penal law. *See* Corte di Appello di Milano, *Criminal proceedings against De Bortoli and others*, No. 6421/2014, Sez. II penale, 18 September 2015. On the s.c. Taricco saga *see*, *ex multis*, C. Amalfitano and O. Pollicino, 'Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note', *VerfBlog* (2018), available online at www.verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note (accessed 8 March 2020).

89 It must be recalled that a small percentage of VAT revenues collected by Member States accrues to the EU budget.

90 *See*, *e.g.*, Council of Europe, *European Commission for the Efficiency of Justice, "European Judicial Systems. Efficiency and Quality of justice"*, 26 CEPEJ Studies, 2018 edition, available

law provides that the statute of limitation is suspended from the judgment of first instance (regardless of whether a conviction or an acquittal) until the final judgment becomes enforceable and that, as regards continuing crimes, the statute of limitations will start to run from the date on which the ongoing crime ceased. This amendment has entered into force only on 31 January 2020 and, of course, the rules do not apply retroactively.

3.2.5 Consequences of Acts of Corruption. Compensation for Damage

The system of sanctions, the severity of which has increased with the recent reforms introduced in 2012, 2015 and 2019, is complemented by the provisions on civil and other non-criminal consequences. Article 1418 of the Italian Civil Code establishes a general provision on the nullity of contracts. Article 135 of Legislative Decree No. 163/2006 containing the Code of Public Contracts and amendments introduced by the 2012 law foresees the termination of a contract or withdrawal of qualification where the contractor has been convicted of corruption offences. The National Anti-Corruption Authority for Evaluation and Transparency of Public Administrations (ANAC) is tasked with transmitting the relevant case files to competent judicial authorities and can impose administrative sanctions. The Criminal Code contains general provisions on compensation for damage under Articles 185 and 186, and entitlement to civil claims are foreseen in Articles 74 and 75 of the Criminal Procedure Code. These provisions are complemented by the civil law rules on the validity of contracts. Overall, such legal framework is consistent with the relevant provisions of the UNCAC and the CoECivLCC, whereby damages have to be determined according to the loss sustained by the victim/claimant in the particular case, and the parties to a contract whose consent has been undermined by an act of corruption are to be granted the right to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.[91] No specific criticism is indeed advanced by the respective monitoring mechanisms in these regards.

3.2.6 The Recent Focus on Prevention

It is only with Law 190/2012 on the prevention and repression of corruption and illegal activities in the public administration that Italy has implemented

online at www.rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c (accessed 3 April 2020).

91 *See* A. Mariani, 'L'adesione dell'Italia alla Convenzione civile del Consiglio d'Europa sulla corruzione: la tutela privatistica dei diritti lesi da pratiche corruttive', 27(2) *Diritto del commercio internazionale* (2013) 453–472.

the anti-corruption treaties' provisions on prevention. This Law constitutes the reference point for Italian policies in this area and puts into effect a complex institutional and organisational design that refers to models based on prevention which have been advocated by international organisations for years.[92] Essentially, it comprises a twofold strategy.

First, addressing the concerns expressed by several international organisations, it includes provisions on ethics (i.e. the adoption of a code of conduct for all public officials, the infringement of which may entail disciplinary action), conflicts of interest and the receipt of gifts for all public officials within public administration (including managers and consultants), whistleblowing protection for public servants and *pantouflage*, and transparency of public administration processes (e.g., information on public administration activities and budgets, and details on public tenders and contractors).[93]

With a view to implementing Article 6 of the UNCAC and Articles 20 and 21 of the CoECLCC, the second part of the strategy articulates an institutional framework for monitoring, coordinating and assessing the effectiveness of the anti-corruption measures developed by each administration at central and local levels, which is today centred around ANAC. Accordingly, ANAC's main functions are the following: to approve the National Anti-Corruption Plan;[94] to analyse the causes and factors of corruption and identify measures to prevent it; to monitor the implementation and effectiveness of public administration's anti-corruption plans and compliance with transparency rules.

Such reforms bring Italy closer to the models designed by the anti-corruption treaties. According to the UNODC Implementation Review Group, Italy has now a constitutional, legal and regulatory framework that addresses all the prevention provisions of the UNCAC. To the extent those policies establish programmes or measures for public officials, however, they do not always apply fully across the board to all public officials as defined by the Convention.[95] Furthermore, as also remarked by the GRECO, the OECD and the EU, there is still work to be

92 *See also* subsequent changes introduced by D.Lgs No. 33 and No. 39 of 2013; D.Lgs No. 50 of 2016 and No. 56 of 2017.

93 *See*, more extensively, Mattarella and Pellissero, *supra* note 76.

94 According to Law 190/2012, each entity operating in the public sector is expected to identify areas vulnerable to corruption risk and formulate annually a (rolling) three-year corruption prevention plan. It applies to both central and local governments.

95 *See* UNODC, *Country Review Report of Italy Review by the United States of America and Sierra Leone of the implementation by Italy of Chapter II* (*articles 5–14*) *and Chapter V* (*articles 51–59*) *of the United Nations Convention against Corruption for the review cycle 2016–2021*, available online at hwww.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2019_11_22_Italy_Final_Country_Report.pdf (accessed 20 January 2021).

done in key sectors, for example, regarding financing of political parties,[96] and, especially, the regulation of conflict of interests.[97]

4 Conclusions

The fight against corruption and the crimes closely related to it has been among the priorities at international and European levels for the past thirty years now. As a result of the emergence of such international rules and standards, several States have reformed their domestic laws. The case of Italy is most telling. Except for certain phases of plain asynchrony between the international and domestic normative initiatives, the anti-corruption treaties Italy has ratified have stimulated remarkable innovations in its legal system, first in the field of criminal repression and, eventually, on prevention. Moreover, the international monitoring mechanisms they set up have been thoroughly scrutinising Italy's implementation of these treaties. On the one hand, such mechanisms have acknowledged the steps made by Italy in its anti-corruption actions and also underscored a range of already-existing good practices such as in the area of international cooperation and mutual legal assistance.[98] On the other hand, more importantly, they have repeatedly revealed where the Italian legal framework fails to meet the international standards and evidenced the legal main obstacles for an effective fight against corruption.

Yet, there is something more to be said about this. Having in mind the ultimate goal of the international treaties at issue (i.e., the promotion of more *effective* instruments to tackle corruption and, hence, a significant containment of this crime), the assessment of their implementation by Italy, where corruption has become an endemic pathology, turns out to be an extremely difficult exercise. Contrary to what over-simplistic accounts happen to report, international criminal law cannot bring an end to impunity. And we can safely go further than that: Law *in general*, no matter how well conceived, cannot make it all. Especially in fields such complex as anticorruption policy. Legal

96 *See* OECD, *supra* note 66, pp. 46–47; and EU Commission, *supra* note 36, pp. 7, 11–12.

97 GRECO, *Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, GrecoRC4(2018)13*, 13 December 2018, Recommendation ii, paras 13–15.

98 For instance, UNODC, *supra* note 47, pp. 11–12, commends Italy for its participation to a range of bilateral treaties on extradition and mutual legal assistance; its continuing efforts to conclude treaties with other States to that effect; its participation to law enforcement cooperation networks (like Europol and INTERPOL) and a large number of bilateral agreements on police cooperation.

reforms and a sound administration of justice remains key ingredients in this area. But messianic expectations on legal innovations alone are misplaced here. Equally important are policies addressing the institutional, economic and social causes,[99] as well as the cultural roots of corruption[100]—elements which are widely overlooked not only in Italy.

Furthermore, without consideration of more comprehensive reforms, the restless pursuit of international standards through piecemeal domestic legislation may have unintended side-effects. In the area of anti-corruption law, Italy looks, in fact, like a "permanent construction site". Even leaving aside that, despite the many pieces of legislation adopted over the past twenty-five years, the diffusion of corruption is roughly unchanged in the country, a superior understanding of the crime and its channels of perpetration has inspired only few domestic reforms.[101] In such a context, legislative hyper-activism can effectively conceal the absence of far-reaching visions. Take, for instance, Law 3/2019. It certainly contains important changes to the Italian criminal law. That said, more than the outcome of systemic considerations about the roots of corruption in Italy, the vast political-criminal program introduced with this law responds to the "emergency management model" of social problems through criminal law,[102] a pattern already pursued in addressing different serious forms of crime. The judgement issued on 26 February 2020 by the Italian

99 In response to the many facets of corruption, scholars have produced interdisciplinary research from both the theoretical and empirical perspective, shedding light, for example, on the dynamics of corruption, its incentive structure, causes and effects. Such research includes insights from, among others, the fields of economics, psychology, and criminology. With reference to the Italian case, *see*, *e.g.*, G. Barbieri and F. Giavazzi, *Corruzione a norma di legge. La lobby delle grandi opere che affonda l'Italia* (Rizzoli, Milan, 2014); Gambetta, *supra* note 22.

100 *Just as an example*, R. Cerqueti, R. Coppier and G. Piga, 'Corruption, Growth and Ethnic Fractionalization: A Theoretical Model', 106(2) *Journal of Economics* (2012) 153–181, analyse the existing relationship between ethnic fractionalization, corruption and the growth rate of a country and show, *inter alia*, that a nonlinear relationship between fractionalization and corruption exists: corruption is high in homogeneous or very fragmented countries, but low where fractionalization is intermediate. From a different perspective, C. North, W.H. Orman and C. Gwin. 'Religion, Corruption, and the Rule of Law', 45(5) *Journal of Money, Credit and Banking* (2013) 757–779, who analyse a 207-country sample, finding that rule of law and corruption are both associated with a country's religious heritage.

101 The introduction of the offence of 'international bribery' and, although not without flaws, the rules on the liability of legal persons are two cases in point.

102 *See*, among others, the reasoned criticism voiced by Raffaele Cantone, 'Ddl Bonafede: rischi e opportunità per la lotta alla corruzione', 10 *Giurisprudenza Penale Web* (2018), available online at www.giurisprudenzapenale.com/wp-content/uploads/2018/10/Cantone_ddl_gp_2018_10 (accessed 2 October 2020).

Constitutional Court—declaring that, in conformity with the fundamental tenet *nulla poena sine lege praevia*, the provision of Law 3/2019, as interpreted by established case law as applicable also to persons convicted of offences that have been committed before its entry into force, is unconstitutional[103]—seems to confirm this assessment.

103 *Corte Costituzionale*, 26 February 2020, No. 32/2020.