



# Current Issues related to **Corruption Offenses and Investigation Tools in Italy**

Lucia Parlato – Università degli Studi di Palermo

[lucia.parlato@unipa.it](mailto:lucia.parlato@unipa.it)



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# Summary

- **1) A continuous legislative evolution**
- **2) Multiple criminal offences**
- **3) Investigative tools**
- **4) Reward mechanisms and social control**

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# 1) A continuous legislative evolution

- Several changes over the years
- Legislator's constant purpose: to protect the impartiality and good performance of PA



# 1) A continuous legislative evolution

## Italian criminal code (hereinafter: CC): “Title II”, “Book II”

- Offences by public officials against PA (Articles 314-335 bis CC)
- Offences by private citizens against PA (Articles 336-356 CC)



# 1) A continuous legislative evolution

- ▶ The first relevant reform: **L. no. 86/1990**
- ▶ New provisions into the CC: Art. 316-bis, „embezzlement to the detriment of the State”; Art. 319-ter, „bribery in judicial actions”
  
- ▶ After the 1995 PFI Convention, **L. no 300/2000**
- ▶ The It. legislator introduced new norms into CC:
- ▶ Art. 316-ter, „misappropriation of funds to the detriment of the State” (or other public entities or the EU);
- ▶ Art. 322-bis „international corruption”;
- ▶ Art. 322-ter, a specific rule on confiscation by equivalent for main offences against PA



# 1) A continuous legislative evolution

**L. no. 190/2012** (the so-called „**Severino's reform**”) boosted the fight against corruption through criminal law tools.

The legislator:

- ▶ introduced new bribery offences: „unlawful inducement to give or promise a benefit” ex Article 319 quater and „illicit trafficking of influence” ex Article 346 bis
- ▶ increased the punishment for existing offences and generally expanded the sphere of criminal responsibility for private parties involved in bribery
- ▶ introduced an independent administrative authority – the National anti-corruption authority (**ANAC**) – responsible for coordinating policies, defining guidelines and fighting corruption

# 1) A continuous legislative evolution

- ▶ **L. no. 69/2015**: increasing of the custodial measures length
- ▶ **L.D. no. 38/2017**: extending the reach of private commercial bribery, by implementing the EU Framework Decision 2003/568/JHA on combating corruption in the private sector

**Main reform: L. no. 3/2019** (“spazzacorrotti law”, “Corrupted Wiping Law”)

Purposes:

- ▶ **a)** strengthening the activities of prevention, detection and repression of crimes against PA
- ▶ **b)** adapting national law to the instruments for the fight against corruption given by the European Council (GRECO stressed the lack of implementation of the 1999 EU Conv. on corruption, ratified by Italy in 2012)



# 1) A continuous legislative evolution

- ▶ Lastly, **L. D. no. 75/2020**: implementation of the EU Directive no. 2017/1371 (the so-called PIF Directive) concerning the fight against frauds affecting the Union's financial interests



## 2) Multiple criminal offences: *passive bribery*

- ▶ Bribery offences **related to public officials** are provided for by Articles 318-322 bis of CC.

Several types of offences, depending on the criminal conduct:

- ▶ Article 318 punishes „**improper bribery**” or „bribery for the performance of the function”
- ▶ Article 319 punishes „**proper bribery**” or „bribery for the performance of an act contrary to the duties”
- ▶ Article 319 ter concerns „**bribery in judicial acts**”, including both „improper” and „proper” bribery (“specific intent” is required)



## 2) Multiple criminal offences: *passive bribery*

- ▶ Article 319-quater „**Unlawful inducement** to give or promise anything of value” (introduced by L. no. 190/2012)
- ▶ Article 346-bis, “active or passive **trafficking in influence**” (introduced in 2012) changed by Law no. 3/2019: about this crime, see It. Suprem Court no. 40518/2021

Both with the aim of punishing “*prodromal conducts*” (eg. to commit the crime it is enough to claim to be able to exercise undue influence on a public official)

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## 2) Multiple criminal offences: *active bribery*

- ▶ A briber is «whoever gives or promises money or other benefits to the public official or person in charge of a public service»
- ▶ Article 321 CC, „punishment against the briber”
- ▶ Article 322 CC, punishes „Aiding and abetting bribery”



## 2) Multiple criminal offences: *foreign bribery*

- ▶ Article 322 bis CC (§§ 1 and 2): bribery offences originally applicable for domestic public officials are extended to public officials of EU institutions and EU Member States, and to the private briber too
- ▶ Its application has been extended to bribery offences committed by public officials of foreign states and international organisations (following several reforms, lastly Law no. 3/2019)
- ▶ Limitations: **a)** only active corruption and **b)** only the private briber are punished (foreign public officials will be punished according to the laws of their countries)



## 2) Multiple criminal offences: *private bribery*

### **Art. 2635 of the Italian Civil Code:**

- ▶ It punishes managers, general directors, executive officers, auditors and official receivers who – upon receiving or accepting money/the promise of money/other advantage – perform or omit to perform acts, in breach of the obligations inherent to their office and duties of loyalty, thereby causing a harm to the company (imprisonment from one to three years)
- ▶ It was introduced in 2002 and extended by L. no. 190/2012 and by L.D. no. 38/2017 (implementing EU Framework Decision 2003/568/JHA on combating corruption in the private sector)

### 3) Investigative tools

Italian Criminal Procedure Code (CPC)

- ▶ **Prosecution ex officio:** regardless of the injury of third parties and therefore regardless of the report of the injured party
- ▶ **Whistle-blowing:** provisions concerning the protection of whistle-blowers are set out in Article 54-bis of Legislative Decree no. 165 of 30 March 2001 for the public sector; in Article 6 of Legislative Decree no. 231/2001 for the private sector
- ▶ The only „incentive” offered to whistle-blowers is a sort of „protection” provided by Article 3 of Law no. 179/2017



## 3) Investigative tools

### Specific investigative measures

- ▶ As with other serious crimes (“double track”), a range of investigative techniques is available for investigating corruption cases, including:
  - ▶ - wiretappings
  - ▶ - video surveillance
  - ▶ - undercover investigation



## 3) Investigative tools

### Interception of communication

Less stringent conditions are required for the “double track” crimes (organised crime offences, terrorism cases):

- ▶ Sufficient grounds (sufficienti indizi) are needed, instead of serious ones;
- ▶ The wiretapping has to be “necessary” (rather than indispensable) for investigative purposes;
- ▶ Audio surveillance in the house, or in any other private places, are allowed even if there is no reasonable ground to believe that any criminal activity is actually taking place there

### 3) Investigative tools

- ▶ **Joint Sessions of the Supreme Court (2016, “case Scurato”**, on the using of trojans to carry out electronic audio surveillance through the installation of a **trojan** on portable electronic devices (smartphones, tablets or laptops) ...even in private dwellings, albeit not separately identified and even if no criminal activity is undertaken inside them.
- ▶ Distinguishing **„online searches”** and **„online surveillance”** (i.e. „real time wiretapping”). For the latter the Supreme Court ruled that it could be allowed „exclusively for proceedings relating to offences of organised crimes” (namely mafia and terrorism related crimes) under Article 51, § 3-bis and 3-quater CPC
- ▶ the identification of the places controlled by audio surveillance, in the authorisation judicial decree, does not constitute an indefectible condition for the legitimacy and usability of conversations/communications recorded by the employment of trojan technologies
- ▶ **L. no. 70/2020 on wiretappings; L. no. 3/2019**



## 3) Investigative tools

### Undercover operations

- By Law no. 3/2019, the legislator has:
- - amended Article 9 of legislative decree no. 146 of March 16, 2006 (extending the use of undercover investigators also to investigate corruption offences): ...
- - expanded the list of offences for which special technique are admitted
- - widened the activities that the agent can perform
- **Risks:** the wide range of liberties agents enjoy may become a cause of indiscriminate impunity for all the activities performed by them
- **Distinction:** between the undercover agent and the agent provocateur
- Explanatory Report: non-punishable conduct remains confined to those necessary for the acquisition of evidence relating to illegal activities already in progress
- Undercover operations have been used since they were introduced by Law no. 3/2019



## 3) Investigative tools

### Undercover operation

- Undercover agent: a police officer belonging to specialised structures, with the possibility to rely on agents, auxiliaries and intermediaries, who enjoy the exemption clause upon authorisation by the public prosecutor
- ...for the sole „purpose of acquiring evidence”
- They can not be used for purely preventive purposes: this operation should take place only after the acquisition of a *notitia criminis*, in the framework of already existing criminal proceedings
- Lack of specialized structures



## 4) Reward mechanisms and social control in many contexts...

### In the frame of plea bargaining in corruption proceedings

- ▶ The request for plea bargain proceedings is subject to the full restitution of the price or the profit related to the offence (Art. 444 § 1 ter CPC)
- ▶ Upon a positive assessment on this condition, the Court delivers the plea bargain sentence, the plea bargain request is rejected
- ▶ A judgment (JPI Bologna, 2020) allowed the plea bargain requested by a private defendant with regard to the undue inducement, even without the full restitution of the price
- ▶ L. no. 3/2019 added § 3-bis to Article 444 CPC: ...PB is allowed only if the judge states to exclude or suspend the accessory penalties (banning from public offices/prohibition from public officers on contracting with the public administration)

## 4) Reward mechanisms and social control

### In the frame of mitigating circumstances

- ...if the perpetrator made **any effective efforts to: prevent consequences of the criminal activity; provide evidence of criminal offences and identify other perpetrators; or allow the seizure of the profits** (introduced by Law no. 69/2015)
- The It. Cassation Court (n. 9512/2020) specified that the above described cooperation conducts are required by law alternatively (not cumulatively)
- “Conduct aimed at providing evidence of crimes”: it is necessary that the conduct itself is relevant for the collection of new evidence (and not only for the already collected evidence)
- The penalty is reduced from 1/3 to 2/3

## 4) Reward mechanisms and social control

In the frame of **non-punishment clauses** (*cause di non punibilità*)

Art. 323 ter CC: special rewarding mechanism (introduced by L. no. 3/2019), inspired by the legislation on „collaborators of justice” in the field of mafia-type organisations

- ...if who committed a bribery offence, **voluntarily discloses it and provides useful and concrete information to secure the evidence of the crime and to identify other offenders involved...**

It works under some conditions:

- before the offender becomes aware of the investigation being carried out with regards to the committed offence
- not later than four months from the date of the offence
- Self-reporting must be satisfactory in terms of evidence



## 4) Reward mechanisms and social control

### In the frame of penitentiary regime

- ▶ A more severe regime is provided for in the frame of the rehabilitation of the convicted offender (Article 4-bis § 1 of Law no. 354 of 24 July 1975, modified by Law no. 3/2019)
- ▶ The main criminal conducts against PA have been included in the list of “obstructing crimes” (reati ostativi): the convicted offender can not access to penitentiary benefits such as alternative measures to imprisonment (as rewarding permissions and working outside the prison)
- ▶ The only way to access these benefits: cooperation with the justice system (It. Const. Court, n. 253/2019, n. 32/2020; ECtHR case Viola)



# Final remarks

- Currently, the core of criminal policies on corruption involves private individuals
- They are rewarded/They are the new objects of incriminating norms!
- What type of criminal policy: punish them or reward them?
- **In search of new balances**
- **Punishing** also them means losing them as witnesses against "big shots" (recognizing the accused's right to silence)
- **Rewarding** them, on the contrary, can mean weakening the punitive response and general preventive purposes

***Thank you for your kind attention!***

