

Anti-Corruption Climate in Turkey: A Quick Guide for Multinational Companies

Article prepared by Gönenç Gürkaynak Esq., Ceren Yıldız and Nazlı Gürün for the 12th International Conference on Anti-Corruption London held on June 27 and 28, 2018

The Current Legal Landscape and Major Areas of Risk Exposure Based on Practical Experience

As an emerging market, Turkey is rightly considered to be a business and commercial hub for the EMEA region, as well as an important market for many multinational companies. In 2017, Turkey received a score of 40 points in Transparency International's Corruption Perceptions Index, on a scale of 0 ("highly corrupt") to 100 ("very clean"). As this score is relatively closer to the lower end of the scale and since Turkey's anti-corruption efforts are an ongoing progress and its related legislation is continuously evolving, multinational companies that are currently active in Turkey (or will be in the future) should keep themselves well-informed about the local anti-corruption climate and strive to stay up-to-date about any new developments. This will enable multinationals to take precautionary measures that could mitigate their liabilities under extraterritorial legislative anti-corruption regimes, such as the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (UKBA), as well as relevant domestic laws in Turkey.

Firstly, in order to keep pace with the recent international developments in this field, Turkey has passed up-to-date anti-corruption legislation and it has also signed and ratified all territorially applicable international treaties regarding anti-corruption, including the OECD Anti-Bribery Convention. The main domestic legislation that is applicable to acts of corruption is the Turkish Criminal Code No. 5237 (Criminal Code), which prohibits bribery, malversation, malfeasance and embezzlement. Apart from the Criminal Code, there are also a few other legislative regulations dealing with the prevention of corruption, such as the Turkish Criminal Procedure Law No. 5271, the Law No. 657 on Public Officials, and the Law No. 5326 on Misdemeanors. Furthermore, in 2016, Turkey finally ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Additionally, to bolster the fight against corruption, the Turkish Prime Minister published Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight Against Corruption in 2016, following the expiration of the Strategy on Increasing Transparency and the Strengthening of the Fight Against Corruption. This Circular sets forth a number of precautions aimed at increasing prevention, as well as certain precautions aimed at strengthening the enforcement of sanctions. Moreover, the Circular introduces various provisions that focus on enhancing social awareness. Overall, the Circular's directives and precautions mainly seek to regulate the rules of ethical behavior for public officials and attempt to remove the obstacles to their adjudication.

Turkey also participated in several international anti-corruption initiatives through its membership in the Group of States against Corruption, which oversees the compliance of these states with the anti-corruption standards put forth by the Council of Europe. As a result, Turkey's anti-corruption legislation was amended to bring it in line with international standards in this regard. Consequently, Turkey has since (i) increased sentences for the crime of bribery; (ii) criminalized offering, promising, or requesting bribes, directly or indirectly; (iii) criminalized bribery of foreign public officials; (iv) broadened the scope of the definition of "foreign public officials"; and (v) imposed administrative liabilities on corporations whose representatives or persons acting on their behalf commit the offence of bribery.

Currently, only real persons are considered to be the main perpetrators of a crime under the Criminal Code, as Article 20 of the Criminal Code plainly states that criminal liability is personal and further declares that criminal sanctions may not be imposed against legal persons. In other words, the Criminal Code accepts the principle of "personal criminal liability," which has been challenged and debated over the years, although any relevant amendments are yet to be enacted. Moreover, it should be noted that the Turkish legal system does not accommodate non-prosecution or deferred prosecution agreements, nor does it allow compliance programmes to serve as mitigating factors.

However, this is not to suggest that companies are entirely off the hook when it comes to anti-corruption. As mentioned above, under Turkish law, companies can be held civilly or administratively liable. Accordingly, the Law No. 5326 on Misdemeanors foresees and sets forth administrative fines against firms whose corporate organs or representatives commit the crimes of bribery or bid-rigging (among other prohibited acts listed under the relevant article) for the benefit of the corporation while they were acting within the scope of the activities of the corporation. Furthermore, various security measures can also be imposed upon corporations, such as (i) invalidation of a license granted by a public authority, (ii) seizure of goods used in the omission of (or that result from) a crime committed by the representatives of the legal entity, or (iii) seizure of pecuniary/financial benefits arising from (or provided for) the commission of the crime.

Schemes Multinationals May Consider to Prevent or Mitigate Corporate Risk

Turkey is a sensitive region for conducting business when it comes to compliance issues. It is important to note that there is no specific government agency that is tasked with and responsible for enforcing anti-corruption laws in Turkey; therefore, the judiciary has full and exclusive powers to apply the provisions stipulated under the relevant laws in relation to anti-corruption laws and regulations.

Under Turkish law, companies are not required to set up compliance programmes and the existence of a compliance programme is not considered to be a mitigating factor. However, keeping Turkey's distinctive cultural context in mind, maintaining such a programme would always be prudent and considered an asset for a multinational company. As such, companies

are advised to adapt their compliance programmes to the Turkish jurisdiction, as it is critical to understand that the culture, as well as the business environment, of the relevant jurisdiction plays a significant role in determining the shape of its anti-corruption scene. For example, there is a long-standing and widespread culture of hospitality and gift-giving in Turkey and this culture cannot be changed or transformed by merely instructing employees not to engage in such acts when doing business. Rather, a company that seeks to prevent such gift-giving would need to lay down written rules on the subject, carefully train its employees, conduct comprehensive audits and enforce disciplinary measures when the applicable rules are broken, in order to foster a culture of compliance. In this respect, it is highly advisable to use the local language in the employee training sessions, as what employees could consider to be cultural practices (*i.e.*, gift-giving and paying for entertainment expenses) may constitute corruption under the relevant laws and it is important to avoid any language-related misunderstandings in this regard. Acquiring companies should also carefully review the gift-giving, travel and meal expenses that are incurred in relation to third parties and dig deeper to uncover the exact nature of such expenses where necessary. (*This is particularly important since the Criminal Code does not differentiate in any way between facilitating payments and bribes. Accordingly, any gifts, travel expenses, or payments for meals or entertainment could potentially be deemed as bribery under Turkish laws.*)

Therefore, multinational companies (especially acquiring companies) are encouraged to devise and implement compliance programmes aimed at detecting and preventing possible unlawful acts, which will raise awareness among employees about combating corruption. Moreover, such companies should bear in mind that one of the biggest mistakes they can make is to simply adopt and incorporate a global compliance programme without adapting it first to the particular needs and characteristics of the local compliance climate in which the company operates. As a result, the global compliance programme may fail to serve as a sufficient robust deterrent against corruption or as an adequate tool for detecting and preventing such corrupt activities. Another crucial step towards securing a corruption-free business environment, which goes hand-in-hand with the compliance programme, is proper employee training. Employee training should include a clear definition of what constitutes corruption, explain the risks and consequences of corrupt acts, and incorporate real-life examples to deter employees from engaging in such acts. Finally, employee training programmes should also inform employees about the various requests and offers that they might receive from third parties (*i.e.*, bribes, gifts, kickbacks, etc.) and how to deal with such requests and offers, which they should ignore/decline and also consider reporting to their supervisors, where appropriate.

Companies would also be well-advised to set up control and monitoring mechanisms to supervise the implementation of their anti-corruption policies. Periodic audits and implementing whistleblower protection procedures are some of the methods that can be used to control/monitor whether anti-corruption policies are being carried out in an effective

manner. It is also advisable that corporate guidelines clearly indicate how and whom to approach in case of a suspected act of corruption.

Currently, there is no legislation or guideline in Turkish law that mandates self-disclosure as a mitigating factor for either real persons or legal persons. Thus, whether or not a judicial authority should consider the voluntary disclosure of facts as a mitigating factor is left entirely to the discretion of the judge adjudicating the case file. Companies should also keep in mind that self-disclosure itself carries the risk of “spillover” to other jurisdictions where the disclosure may pose certain legal hazards. Therefore, companies should take utmost care when transmitting such sensitive information to the public authorities. Having said that, it should be noted that the Turkish criminal system does provide a leniency mechanism, which allows and incentivizes companies to self-disclose violations in exchange for reduced penalties. For the crime of bribery, the Turkish criminal system suggests that a person who gives or receives a bribe, but who then informs the investigating authorities about the bribe before an investigation has been launched, should not be punished for the crime of bribery. However, this rule does not apply to persons who offer a bribe to a foreign public official.

Case Studies: Recent Anti-corruption Cases and Decisions

Within the past year, a number of anti-corruption cases and investigations have been initiated against individuals rather than private companies. In one case relating to the charge of bribing public officials, a total of 46 people (including 15 public officials) were taken into custody due to bribery allegations. According to the allegations, the suspects had paid bribes between the amounts of 200 Turkish Lira (approx. 40 EUR) and 10,000 Turkish Lira (approx. 2,000 EUR) in order to facilitate the processing of their requests at the Title Deed Directorate (the Turkish equivalent of the Land Registry). The suspects used coded phrases such as “I brought the fig” and “I left your goods at the bakery” to signal and indicate the bribe payments. 14 people, including six public officials, were subsequently arrested in connection with the case.

In another investigation, an inspector at the Istanbul Provincial Directorate of the Social Security Administration was arrested on the grounds of requesting bribes from a shoe manufacturing company. Upon inspecting the shoe factory and finding a number of violations, the inspector had allegedly offered to cover up (*i.e.*, not to report) these violations in exchange for a bribe of 2,000 EUR. Furthermore, the inspector had allegedly proposed to provide the company with monthly consulting services for the same payment amount. After the owner of the company notified the Public Security Branch Office of these events, the authorities arrested the inspector in question, after verifying that he had received the bribe money on his second visit to the factory.

A different investigation involved bribery allegations against public officials at the Istanbul Courthouse Execution Offices. The investigation was also conducted by using hidden cameras and it was determined that certain individuals had offered cash payments varying between 100 Turkish Lira (approx. 20 EUR) and 10,000 Turkish Lira (approx. 2,000 EUR) by using



envelopes placed inside the case files. Accordingly, a criminal case was initiated against 34 suspects regarding bribery and misconduct charges.

In October 2017, a network of public servants who were allegedly engaged in corrupt activities has been uncovered at the Turkish Standards Institute (TSI), as a result of a letter that was received by the Ankara Police Department from certain TSI employees, notifying the authorities about the corrupt activities taking place inside the TSI. Allegedly, this group was receiving bribes in the form of cash, valuable gifts, scholarships for relatives and paid off holiday expenses, in exchange for providing certain documents to companies. Upon receipt of the notification letter, the Ankara Police Department monitored the suspects by using technical and physical methods, gathered evidence and substantiated the allegations, and 12 people were taken into custody shortly thereafter.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com