

# Bribery & Corruption

First Edition

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# Turkey

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## **Brief overview of the law and enforcement regime**

The legislation on combating bribery and corruption in Turkey is as follows:

- Turkish Criminal Code No. 5237 (Criminal Code);
- Turkish Criminal Procedure Law No. 5271;
- Law No. 657 on Public Officers (Law No. 657);
- Law No. 3628 on Declaration of Property and Fight Against Bribery and Corruption;
- Law No. 5326 on Misdemeanours;
- Regulation No. 90/748 on Declaration of Property; and
- Regulation on Ethical Principles for Public Officers and Procedures and Principles for Application (Regulation on Ethical Principles).

The main legislation criminalising acts of corruption is the Criminal Code, which prohibits acts of bribery, fraud, embezzlement, malversation, malfeasance and bid-rigging. Importantly, under Turkish law, anti-corruption issues are dealt with under the criminal law and there is no civil enforcement. Also of significance, as a result of the “*nulla poena sine culpa*” (no crime and punishment without fault) principle, Turkish criminal law does not recognise strict liability as a form of liability. Therefore, the relevant criminal acts are not punishable unless the perpetrators are proven to have some degree of fault or negligence.

The enforcement of the bribery and corruption legislation is undertaken by the judiciary. So far, no special agencies with regard to the prosecution of the relevant crimes have been established. Once the judicial proceedings establish that a person is guilty, the perpetrator may be punished by: (i) four to twelve years of imprisonment for bribery; (ii) one to five years of imprisonment and a judiciary fine of up to five thousand days for fraud, or two to seven years of imprisonment and a judiciary fine of up to five thousand days for qualified fraud; (iii) five to twelve years of imprisonment for embezzlement; or (iv) five to ten years of imprisonment for malversation. The amount of the penalty depends on the type of malfeasance, as stipulated under the Criminal Code (Articles 255, 257, 259, 260, 261 *et seq.* of the Criminal Code). As per Article 52 of the Criminal Code, the amount of the judiciary fine is determined by taking into account the economic and personal circumstances of the perpetrator, with the lower limit for the daily amount being TL 20, and the upper limit being TL 100.

Turkish criminal enforcement does not allow for any dispute resolution mechanism other than through litigation.

## **Overview of enforcement activity and policy during the past two years**

As seen from the examples below, in recent years the Turkish enforcement of bribery and corruption legislation has focused on bid-rigging:

- In an on-going trial against the former members of the Public Procurement Authority, it was alleged that at least 40 tenders were rigged, including the Ankara–Konya highway construction tender and the Ortaköy sewage system tender.
- A lawsuit, which was initiated in 2009 against the former presidents of three philanthropic foundations, found the suspects guilty of having rigged the tender held for the immolation of

- animal sacrifices. All three were sentenced to imprisonment terms ranging from two to ten years.
- Siemens AG and its Turkish subsidiary Siemens Sanayi ve Ticaret A.S. paid a fine of US\$800 million to the SEC and the US Department of Justice, and €395 million to the German Ministry of Justice for the bribes given in order to win international tenders in December 2008. These two companies have also been the subject of another investigation which was opened in early 2011 by the Turkish Prime Ministry Inspection Board. The Under-Secretariat of Foreign Trade has also reportedly initiated an investigation into the matter, which has turned into a prosecution.
  - On the policy side, the National Anti-Corruption Strategy was adopted in 2010 by a cabinet decree, involving several institutions such as the Parliament, the Public Prosecutor, the Ministry of Interior, customs and administrative bodies as well as the Ministry of Finance. An Action Plan was adopted subsequently to support its implementation. The main components of the strategy include preventive measures, law enforcement measures and measures to raise awareness.

### **Law and policy relating to issues such as facilitation payments and hospitality**

The Criminal Code does not provide an exception for facilitation payments, as the definition of bribery includes all benefits provided to a public official for the performance by the public official of their duties. Therefore, facilitation, or grease payments, would constitute a crime in Turkey, in contrast with the US Foreign Corrupt Practices Act (FCPA).

Acceptance of gifts by public officials, on the other hand, is prohibited by Law No. 657 and the details of the prohibition are set out in the Regulation on Ethical Principles. According to Article 29 of Law No. 657, public officials are prohibited from accepting or requesting gifts directly or indirectly, and from accepting gifts or borrowing money from business owners with the purpose of providing benefits, even while they are off-duty. The Public Officials Council of Ethics is authorised: (i) to determine the scope of the prohibition to accept gifts; and (ii) to request a list of gifts received by public officials who are at least at the general director level or an equivalent high-level official at the end of each calendar year.

Article 15 of the Regulation on Ethical Principles sets out that the scope of the prohibition on accepting gifts includes travel and accommodation expenses, as well as scholarships, which may be deemed as hospitality payments, received from those who have an interest relationship with the institution in which the public official is on duty. Accordingly, in 2009, the Council of Ethics found that it was a breach of the prohibition when companies paid the accommodation expenses of public officials who were to attend the companies' meetings. Accordingly, the hospitality of commercial partners or government officials could be deemed to breach the prohibition of acceptance of gifts by public officials as put forward in Article 29 of the Law No. 657.

### **Key issues relating to investigation, decision making and enforcement procedures**

Turkish criminal enforcement does not allow for any dispute resolution mechanism other than through litigation. This being said, as per Article 254 of the Criminal Code, under certain conditions, the perpetrators of the crime of bribery may be exempt from punishment. Accordingly, if the person who has accepted a bribe informs the competent authority about the particular act of bribery before the relevant authority becomes aware of the situation, then that person will not be punished for bribery. The same is true for the person: (i) who has agreed with someone to accept bribery; (ii) who has bribed the public official or agreed with the public official on the bribe; and (iii) who has been complicit in the crime and who informs the competent authority before the relevant authority learns about the situation. However, this rule is not applicable to the person who gives a bribe to foreign public officials (Article 254/4).

### **Overview of cross-border issues**

Turkey is a signatory to and/or has ratified the following European and international anti-corruption conventions.

### Council of Europe

- Council of Europe Criminal Law Convention on Corruption of 27 January 1999 (signed on 27 September 2001; ratified on 29 March 2004);
- Council of Europe Civil Law Convention on Corruption of 4 November 1999 (signed on 27 September 2001; ratified on 17 September 2003); and
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 8 November 1990 (signed on 28 March 2007).

### International

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 (including OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions) (signed on 17 December 1997; ratified on 26 July 2000) (OECD Convention on Bribery);
- the United Nations Convention against Transnational Organized Crime, 15 November 2000 (signed on 13 December 2000; ratified on 25 March 2003); and
- the United Nations Convention against Corruption, 31 October 2003 (signed on 10 December 2003; ratified on 9 November 2006).

In addition to multilateral treaties, Turkey has also been a member of the Group of States against Corruption (GRECO) since 1 January 2004, the Financial Action Task Force since 1991 and the OECD Working Group on Bribery. The extraterritorial reach of the foregoing conventions require Turkish companies and foreign companies operating in Turkey to comply with local laws in order to avoid being charged and investigated with criminal charges for transacting irregularly. Therefore, Turkey is obliged to cooperate with foreign and international authorities in corruption investigations, in compliance with its obligations under the said conventions.

Among the abovementioned conventions, the OECD Convention on Bribery's open-ended, peer-driven monitoring mechanism has allowed Turkey to make significant progress in its efforts to combat bribery in international business deals. Turkey has fully implemented all but one of the recommendations made by the OECD Working Group on Bribery since 2007.

With the overreaching applications of the FCPA and the UK Bribery Act, the globalisation of anti-corruption legislation has pointed the barrel of the gun at the Turkish subsidiaries of US and UK companies. Accordingly, such companies have been the first to seek legal help in complying with the Turkish anti-corruption legislation as well as the FCPA and the UK Bribery Act.

### **Corporate liability for bribery and corruption offences**

As per Article 20 of the Criminal Code, criminal sanctions cannot be imposed against legal persons. However, in case of a crime, security measures may be imposed against a legal person. In line with this provision, legal persons who receive an unjust benefit due to bribery may face: (i) invalidation of the licence granted by a public authority; (ii) seizure of the goods which are used in the commitment of, or the result of, a crime by the representatives of a legal entity; or (iii) seizure of pecuniary benefits arising from or provided for the commitment of a crime. Law No. 5326 on Misdemeanours holds a legal person liable for misdemeanours committed in the scope of duty by its organs, representatives or persons who are assigned with duties to carry out its activities (Article 8). This provision was added in 2009, within the scope of Turkey's efforts to comply with the OECD Convention on Bribery. Article 43/A was inserted into the Law No. 5326 with the special purpose of increasing corporate liability for bribery and corruption offences. Accordingly, legal persons risk being fined from ten thousand Turkish Liras to two million Turkish Liras, if the organs, representatives or persons who are assigned with duties to carry out its activities, commit the crimes of bid-rigging and bribery for its benefit. This being said, Turkish law and the enforcement of it is far from providing for corporate liability similar to that provided under the UK Bribery Act, 2010.

### **Proposed reforms / The year ahead**

Although there is no clear cut agenda for reforms to be realised in the coming years, several areas are

at the forefront of criticism in the field of corruption and bribery in Turkey. The first of these issues is that there is no central institution responsible for the enforcement of anti-corruption laws, although there are some public agencies with an anti-corruption mandate, including: (i) the Financial Crimes Investigation Board (MASAK) which works on issues of money laundering; (ii) the abovementioned Council of Ethics, whose main function is promoting transparency in public administration; and (iii) the Prime Ministry Inspection Board which has the mandate to inspect public bodies. Furthermore, there is no coordination between these existing agencies. Therefore, there is an explicit need for a specialised and coordinated enforcement body in the field of corruption and bribery.

It is also important to note that the previous reforms enacted for the purpose of combating corruption and bribery, lacked sufficient involvement of the civil society and non-governmental actors. Accordingly, in the coming reforms, the greater participation of wider segments of society should be secured.

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