

TURKISH LAW AND THE FCPA

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Turkish Law In Comparison to the Legal Framework Established with the FCPA, UK Anti Bribery Act and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

THE Foreign Corrupt Practices Act ("FCPA"), a US federal law prohibiting bribery of foreign government officials, has risen to new prominence over the past decade. Since 2004, and particularly in the past 2 years, the FCPA has been enforced more aggressively, with greater financial penalties, and with increasing extraterritoriality. It is of particular relevance to US companies doing business abroad, and foreigners working with US companies - both of whom face heightened scrutiny for their dealings with foreign officials.

Basically, the FCPA makes it illegal for a US citizen, resident, or corporation to give or promise anything of value to an officer of a foreign government, international organization, political party, or a political candidate to influence an official decision in order to secure a business benefit either conducted domestically or abroad. It also prohibits the payments or promises to third parties, in order that the payment will pass on to a foreign official.

The FCPA's extraterritorial reach was expanded in 1998, and increasingly it is being used to investigate and prosecute non-US individuals and companies. Foreign-owned issuers of securities in the US are subject to the anti-bribery and accounting provisions of the FCPA. Foreign nationals are also increasingly subject to prosecution under the FCPA.

In view of both the implications of the FCPA, as well as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"), the UK Bribery Act 2010 ("Act") which has entered into force on July 1, 2011, was drafted in order to reform the criminal law of bribery, providing for a new consolidated scheme of bribery offences, i.e. offering, promising or giving of an advantage, as well as, requesting, agreeing to receive or accepting advantages, to cover bribery both in the United Kingdom (UK) and abroad.

The Act creates the discrete offence of bribery of a foreign public official and a new offence where a commercial organization fails to prevent bribery¹.

The extraterritorial effect of the Act particularly merits focus in that a non-UK registered company can be prosecuted in the UK for any act committed by it in the UK, or for any failure to prevent persons associated with it (including subsidiaries, joint venture partners, employees, agents and

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others) from committing an act of bribery anywhere in the world, if that non-UK company also has a business presence in the UK, unless adequate procedures had been put in place in an attempt to prevent bribery in accordance with the guidance published by the UK's Ministry of Justice².

The Act applies in both public and private sectors regarding bribery by the individuals or the companies. Individuals are subject to an imprisonment for up to ten years as well as an unlimited fine of a penalty payment likewise the companies.

From the Turkish standpoint, Turkey's progress in implementing the Convention since its Phase 2 examination in December 2007 has been significant. As a preliminary remark, the Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. The open-ended, peer-driven monitoring mechanism that the



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Convention establishes has allowed Turkey to make significant progress in its efforts to combat bribery in international business deals by fully implementing all but one of the recommendations made by the OECD Working Group on Bribery since 2007.

Within the context of the Turkish legal framework, bribery and its sanctions find their legal basis under the Turkish Criminal Law No. 5237 ("Turkish Criminal Law"), which was enacted on September 26, 2004. According to Turkish Criminal Law, a bribe is defined as any benefit taken by a governmental officer from a person through agreement for any service or compensation in violation of the governmental officer's duty. Sanctions of it are provided as imprisonment for both the governmental officer taking bribe and the person giving bribe. In order to constitute as "bribe," a mutual agreement is satisfactory; there is no need for further action.

In cases where foreign public officials are bribed, Turkish Criminal Law has also allowed for the provisions of the Convention to apply with an amendment that was introduced in 2005 to Article 252 of the Turkish Criminal Law in line with the requirement envisaged by the Convention which extends the scope of bribery by including sanctioning of foreign public officials. What must be understood from "foreign public officials" is; "officials or officers of a public authority or a public institution that carry out legislative or administrative or judicial work and who have been elected or appointed at a foreign country". Similarly,

those who conduct business that is of an international nature at a foreign country are also deemed to be "foreign public officials". The fact that these persons have been provided with a material benefit due to international commercial transactions for doing or not doing a job or in order to obtain an unjust benefit or retain such benefit is also considered to constitute bribery. In this respect, bribery is considered to have been committed when a material benefit or a promise is provided or made to a "foreign public official" as a result of "international commercial transactions".

Turkey has closely followed up on these global developments and trends and kept its local laws in concert with European and American practices, thereby allowing more room for extra-territorial application of national laws that could at first be considered to be territorial. However, the implications of the increasing number of investigations conducted by the DOJ and the SEC over the past few years, along with increasing fines, and the increased numbers of charges against foreign businesses and individuals, remain to be seen in the near future for Turkish businesses and international businesses closely connected to Turkey. ■

NOTES:

1 "Bribery Act 2010: Explanatory Notes";

http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpgaen_20100023_en.pdf (Accessed on June 25, 2011).

2 "The UK Bribery Act 2010: Are Non-UK Businesses Ready for the Act's Global Reach", Walker Morris.

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