



Bribery & Corruption

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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;
- Regulation on Ethical Principles for Public Officers and Procedures and Principles for Application (Regulation on Ethical Principles);
- Law No. 6415 on the Financing of Terrorism (Law on Financing of Terrorism);
- Law No. 5549 on the Prevention of Laundering of Proceeds of Crime;
- Regulation on Compliance Programs Regarding Obligations on Laundering the Proceeds of Crime and Prevention of Financing of Terrorism (Regulation on Compliance Programs); and
- Regulation on Precautions Regarding Prevention of Laundering of Proceeds of Crime and Financing of Terrorism.

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 acts of crime 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 prosecution of the relevant crimes have been established. Once the judicial proceedings establish that a person is guilty, the perpetrator may be punished with: (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, and 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 legislation also regulates the crime of money laundering. The threshold of predicate offences is six months of imprisonment. According to article 282 of the Criminal Code, laundering of proceeds of a crime occurs when a person: (i) takes out of the country funds obtained due to a crime that fulfils the abovementioned threshold; (ii) subjects the funds to certain transactions to create the impression that they have been obtained legitimately; or (iii) subjects the funds to transactions to conceal their illegitimate source. Those who are not complicit in the perpetration of this crime but buy, accept, possess or use the asset which constitutes the subject of this crime will also be punished by imprisonment from two to five years. In case a person commits this crime during the performance of business or in case the crime is committed by a public officer, this constitutes an aggravating circumstance. A leniency procedure is available for money laundering under Turkish law. Security measures against legal persons might be taken due to the perpetration of this crime. These security measures are: (i) invalidation of the licence granted by a public authority; (ii) seizure of the goods which are used in the commission 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 commission of a crime.

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

Overview of enforcement activity and policy during the last year

The Roche case stemmed from an employee tip with regard to the difference in medicine prices between public and private hospitals, leading to criminal adjudication against 18 defendants on bid-rigging and abuse of duty charges, 12 years ago. The case had been dismissed due to statute of limitations. In 2015, the High Court of Appeals decided that since the crimes that are the subject matter of the case require more than 10 years of prison time, the case should have been adjudicated before high criminal courts, instead of the criminal courts of first instance, and therefore the case should be adjudicated again. In 2016, 10 defendants including the former general manager of the company and former managers of the Social Insurance Institute were sentenced to imprisonment for four years and two months.

During its G20 Presidency in 2015, Turkey established a separate working group for anti-corruption, resulting in the discussion of cutting-edge anti-corruption policy matters in the public and private sectors. Please see “Proposed reforms / The year ahead” below for a detailed explanation of the Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight against Corruption which was published in the Official Gazette on 30 April 2016.

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 his/her 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 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, through the leniency procedure provided in article 254 of the Criminal Code, 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; or (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 a person who gives a bribe to foreign public officials (article 254/4). A leniency procedure is also available for the crime of embezzlement if the embezzled goods are returned or the damages resulting from the crime are compensated in full before the investigation commences. In this case, the perpetrator's sentence will be reduced by two thirds (article 248/1). If the embezzled goods are returned voluntarily or the damages are compensated in full before the prosecution commences, the perpetrator's sentence will be reduced by half. In case the leniency occurs before the verdict, the perpetrator's sentence will be reduced by one third (article 248/2). Leniency is also regulated for the crime of laundering of proceeds of crime. Those who let the authorities capture the asset (which is the subject of the crime) before the investigation starts, or those who facilitate the seizure of the asset (which is the subject of the crime) by informing the authorities of the whereabouts of the asset, will be exempt from punishment (article 282/6).

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; ratified on 18 February 2016).

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 transactional irregularity. 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. Generally, the most recent criticism of the Working Group on Bribery through the Third Phase Report on Turkey is: (i) lack of enforcement of the foreign bribery crime; (ii) lack of a legal structure for whistleblower protection; and (iii) the ambivalent nature of administrative liability arising on legal persons in cases of bribery and bid-rigging.

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.

On the anti-money laundering side, the Law on Financing of Terrorism sets out that Turkey will promptly enforce asset-freeze decisions within the scope of the United Nations Security Council's resolutions number 1267 (1999), 1888 (2011) and 1889 (2011). As per the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, ratified on 18 February 2016, Turkey undertook to establish financial intelligence units ("FIU") which exchange, spontaneously or on request, any accessible information that may be relevant to the processing or analysis of information.

Turkey has appointed the Financial Crime Investigation Board as its FIU, to deal with asset-freezing requests made by foreign countries and requests made by Turkey to other countries.

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 commission 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 commission 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, and 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, money laundering and other corruption offences. Accordingly, legal persons risk being fined from 15,804 to 3,161,421 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 its enforcement are far from providing for corporate liability similar to that provided under the UK Bribery Act, 2010.

Proposed reforms / The year ahead

On 30 April 2016, the Turkish Prime Ministry published in the Official Gazette, the Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight against Corruption ("Circular"). The Circular succeeds the Strategy on Increasing Transparency and the Fight against Corruption, which was promulgated to be enforced within the years 2010 and 2014. The new Action Plan annexed to the Circular is promulgated to encompass the period between 2016 and 2019.

The action plan is organised under three chapters of precautions, namely: (i) precautions aimed at prevention; (ii) precautions aimed at enforcement of sanctions; and (iii) precautions aimed at enhancing social awareness.

According to the action plan, some of the precautions aimed at prevention include: (i) completing the studies on political ethics; (ii) review of the legislations and the effectiveness of enforcement of these legislations regarding works which cannot be undertaken by those who leave public service; (iii) determination of ethics rules for public service professions by the Public Officials Ethics Council; (iv) increasing the effectiveness of the ombudsman institution; (v) enforcement of a single window system with regard to customs (which aims to increase the use of technology in customs); and (vi) review of the Public Procurement Law in light of European Union legislations, etc.

The action plan prescribes the precautions on enforcement actions as follows: (i) review of the permission system regarding investigations against public officials; and (ii) preparation of regulations regarding the protection of whistleblowers within the public sector, private sector and non-governmental organisations.

Increasing the influence of the ethical behaviour principles in the Ministry of National Education curricular, and supporting social actions regarding fighting against corruption and a clean society, are the main elements under the precautions aimed at social awareness.



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Mr. Gürkaynak frequently speaks at international and national conferences on anti-corruption matters. He has published more than 100 articles in English and Turkish by various international and local publishers. Mr. Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.



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