

Anti-Corruption Regulation

Contributing editor
Homer E Moyer Jr



2019

GETTING THE
DEAL THROUGH

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Homer E Moyer Jr
Miller & Chevalier Chartered

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Preface

Anti-Corruption Regulation 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Anti-Corruption Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia and Sweden.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier Chartered, for his continued assistance with this volume.

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London
January 2019

Turkey

Gönenç Gürkaynak and Ceren Yıldız

ELIG Gürkaynak Attorneys-at-Law

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

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

Council of Europe

- The Council of Europe Criminal Law Convention on Corruption of 27 January 1999 (signed 27 September 2001; ratified 29 March 2004);
- the Council of Europe Civil Law Convention on Corruption of 4 November 1999 (signed 27 September 2001; ratified 17 September 2003); and
- the 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 28 March 2007; ratified 18 February 2016).

International

- The Organisation for Economic Co-operation and Development (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 17 December 1997; ratified 26 July 2000);
- the United Nations Convention against Transnational Organized Crime, 15 November 2000 (signed 13 December 2000; ratified 25 March 2003); and
- the United Nations Convention against Corruption, 31 October 2003 (signed 10 December 2003; ratified 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.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The main legislation applying to acts of corruption is the Turkish Criminal Code No. 5,237 (the Criminal Code), which entered into force on 1 June 2005 and which prohibits bribery, malversation, malfeasance and embezzlement.

It also prohibits other forms of corruption such as:

- negligence of supervisory duty;
- unauthorised disclosure of office secrets; and
- fraudulent schemes to obtain illegal benefits.

Apart from the Criminal Code, the core statutory basis of Turkish anti-corruption legislation can briefly be summarised and categorised as follows:

- Turkish Criminal Procedure Law No. 5,271;
- Law No. 657 on Public Officers;

- Law No. 3,628 on Declaration of Property and Fight Against Bribery and Corruption;
- Regulation No. 90/748 on Declaration of Property (Regulation No. 90/748);
- Law No. 5,326 on Misdemeanours; and
- the Regulation on Ethical Principles for Public Officers and Procedures and Principles for Application (published in the Official Gazette No. 25,785 of 13 April 2005) (the Regulation on Ethical Principles).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Prior to 2003, bribing foreign public officials was not considered a crime in Turkish law. In 2003, Turkish Criminal Code No. 765 (the former Criminal Code) was amended so that offering, promising or giving advantages to foreign public officials or officials who perform a duty of an international nature, in order that the official 'act or refrain from acting or to obtain or retain business in the conduct of international business' was also considered bribery (Law No. 4,782 on Amending Certain Laws for Combating Bribery of Foreign Public Officials in International Business Transactions).

The provision regulating bribery in the Criminal Code (article 252) was amended in July 2012 so as to broaden the scope of this amendment. The provision now provides that bribery is committed if a benefit is provided, offered or promised directly or via intermediaries, or if the respective individuals request or accept such benefit directly or via intermediaries (both of which would be in relation to the execution of that individual's duty to perform or not to perform) (article 252(9), Criminal Code):

- to obtain or preserve a task or an illegal benefit due to international commercial transactions to public officials who have been elected or appointed in a foreign country;
- judges, jury members or other officials who work at international or supranational courts or foreign state courts;
- members of the international or supranational parliaments; individuals who carry out a public duty for a foreign country, including public institutions or public enterprises;
- a citizen or foreign arbitrators who have been entrusted with a task within the arbitration procedure resorted to in order to resolve a legal dispute; and
- officials or representatives working at international or supranational organisations that have been established based on an international agreement.

If bribery of foreign public officials is committed abroad by a foreigner, and if this type of bribery is committed to perform or not to perform an activity in relation to a dispute to which Turkey, a public institution in Turkey, a private legal person incorporated pursuant to Turkish laws or a Turkish citizen is a party to, or in relation to an authority or individuals, then an ex officio investigation and prosecution will be conducted into those individuals:

- who provide, offer or promise to bribe;
- who accept, request or agree to the offer or promise for the bribe;

- who mediate such; and
- to whom a benefit is provided because of this relationship.

This is contingent on these individuals being present in Turkey (article 252(10), Criminal Code).

4 Definition of a foreign public official

How does your law define a foreign public official?

According to article 252 of the Criminal Code, the below are considered as foreign public officials:

- public officials who have been elected or appointed in a foreign country;
- judges, jury members or other officials who work at international or supranational courts or foreign state courts;
- members of the international or supranational parliaments;
- individuals who carry out a public duty for a foreign country, including public institutions or public enterprises;
- a citizen or foreign arbitrators who have been entrusted with a task within the scope of arbitration procedure resorted to in order to resolve a legal dispute; and
- officials or representatives of international or supranational organisations that have been established based on an international agreement.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Criminal Code does not make any differentiation between facilitating payments or bribes. Accordingly, any gift, travel expense, or payments for meals or entertainment could potentially be deemed as bribery under Turkish law.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Unlike the anti-bribery provisions of the US Foreign Corrupt Practices Act (FCPA), the relevant provisions of the Criminal Code do not provide any exceptions regarding the facilitating payments. Making facilitating payments would constitute a crime in Turkey, even if they were to be done the way that is regulated as an exception under the FCPA. To that end, compliance officers and in-house counsel are advised to hesitate in recognising a facilitating payment exception in Turkey.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

As of July 2012, the Criminal Code sanctions an individual (as joint perpetrator) who acts as an intermediary for conveying the offer or the request of a bribe for accommodating the bribery agreement or for providing bribery (article 252(5), Criminal Code).

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

The Criminal Code accepts the principles of personal criminal liability. Therefore, real persons can be held criminally liable for crimes, while companies can be subject to certain security measures, as described in detail in question 15. Further, Law No. 5,326 on Misdemeanours (Law No. 5,326) also regulates administrative liability of legal persons, which provides that administrative fines (from 18,783 to 3,757,481 Turkish lira) may be imposed on legal persons in case, among other things, the crime of bribery or bid-rigging is committed to the benefit of the company by the organs or representatives of the legal person or anybody who is acting within the scope of the activities of the legal person (article 43/A of Law No. 5,326).

Individual liability under the Criminal Code is subject to the general principle of the individuality of the penalties under Turkish law

(article 20, Criminal Code). This means that the sanctions that are applicable to natural persons under the Turkish criminal law framework can only be imposed on individuals who have committed the crime, and not to anyone else (including the company who may be the employer of an employee committing a crime). While lacking criminal capacity, legal persons, as per article 20(2), may be subject to security measures (article 60, Criminal Code).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The enforcement of successor liability for anti-corruption offences is not a frequently observed legal phenomenon in the Turkish jurisdiction. This being said, the legislation allows for a form of successor liability. Article 202 of the Turkish Code of Obligations No. 6,098 provides that a legal person that takes over an enterprise with its active and passive assets will be liable for that enterprise's debts. Therefore, an acquiring company would be liable for the unpaid debts of the acquired company, arising from article 43/A of Law No. 5,326, because of the corruption offence perpetrated by the representatives of the acquired company for the benefit of the acquired company.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Turkish laws that regulate bribery are subject to criminal enforcement, as the primary legislation regulating bribery (more specifically foreign bribery) is the Criminal Code. Hence, civil enforcement is not observed in the Turkish legal framework for bribery and corruption. This being said, those injured by the crimes of the perpetrators can always file for damages before a civil court of law.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no particular government agency that is responsible for enforcing foreign bribery laws in Turkey. The judiciary has full powers to apply the provisions stipulated under the relevant laws, as described in question 2, in relation to bribery and corruption.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Pursuant to the Criminal Code, a person who gives or receives a bribe, but then informs the investigating authorities about the bribe before the initiation of an investigation, shall not be punished for the crime of bribery (article 254(1) and article 254(2)). However, this rule shall not be applicable to the person who gives a bribe to foreign public officials (article 254(4)).

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Turkish criminal enforcement does not allow for any dispute resolution mechanism other than a litigious approach.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Not applicable.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The general principle under Turkish criminal law is that penal sanctions cannot be imposed on legal entities (article 20 of the Turkish criminal law), save for the analyses provided under question 8. In other words, the provisions of the Turkish Criminal Code are applicable to legal persons who have committed a crime as stipulated under the Criminal Code in the Republic of Turkey.

If a bribe creates an unlawful benefit to a legal entity, the entity shall be punished through three measures:

- invalidation of the licence granted by a public authority;
- seizure of the goods that are used in the commitment of, or the result of, a crime by the representatives of a legal entity; and
- seizure of pecuniary benefits arising from or provided for the commitment of a crime (article 253).

The principle of territoriality, hence, is a natural outcome of the applicability of sanctions under the Turkish criminal law regime. The Criminal Code has adopted the principle of the place where the crime is committed when determining whether a crime has been committed in Turkey, and hence, whether the Turkish Criminal Code is applicable. According to this principle, if the behaviour and the result that constitute the material elements of a crime are realised in Turkey, the crime is deemed to have been committed in Turkey (article 8(1) of the Criminal Code). Consequently, foreign companies (where they are subject to the above measures) and their legal personal representatives will be subject to the provisions of the Criminal Code only in the event that they commit a crime in the Republic of Turkey.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

As per the Turkish criminal law regime, only acts that are committed in Turkey or that are deemed to have been committed in Turkey, as described in question 15, are subject to sanctioning. Therefore, acts that are punishable as per the principle of territoriality regime, that are committed by individuals and companies and that would constitute a crime pursuant to domestic bribery rules (ie, the Turkish Criminal Code) will also be subject to certain sanctions.

The penalties for acts of corruption under the Turkish Criminal Code can be summarised as follows.

Fraud

Fraud is punished by (article 157, Criminal Code) one to five years' imprisonment and up to 5,000 days of judicial monetary fines.

Qualified fraud is punished by (article 158, Criminal Code) three to 10 years' imprisonment and up to 5,000 days of judicial monetary fines.

The judicial monetary fines can vary between 20 and 100 Turkish lira. The judge determines the rate of the fine depending on the individual's economic status and other personal statuses (article 52, Criminal Code). Generally, penalties for fraud can only be imposed on natural persons, as companies, as legal entities, do not attract criminal liability (article 20, Criminal Code).

Bribery

Bribery (articles 252 et seq) warrants imprisonment of four to twelve years for the incumbent government official and bribe-giver, and appropriate measures (such as confiscation of property, cancellation of licences, etc) against legal entities benefiting from bribery, subject to attenuating and aggravating circumstances as set forth in the Criminal Code.

In addition, under article 252(7) of the Criminal Code, the length of imprisonment can be increased by one-third to one-half if the individual who receives a bribe, offers a bribe, agrees to act as such conducts judicial duty as an arbitrator, expert, notary public or sworn financial consultant.

Malversation

Malversation (articles 250 et seq) warrants imprisonment from five to 10 years for the defendant government official, subject to attenuating and aggravating circumstances as set forth in the Criminal Code.

Malfeasance

Depending on the form of the specific act, malfeasance (articles 255, 257, 259, 260, 261 et seq) may warrant various penalties against the defendant government official.

Embezzlement

Embezzlement (articles 247 et seq) warrants imprisonment from five to 12 years for the defendant government official, subject to attenuating and aggravating circumstances as set forth in the Criminal Code.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

To date, there have not been any foreign bribery cases under Turkish law. The following is an account of recent foreign bribery cases that involve corruption crimes committed under Turkish jurisdiction and internal investigations by Turkish companies.

In December 2010, the German media reported allegations that the German state-owned HSH Nordbank made payments to Turkish judges in 2009 to influence an action for damages filed against it by a Turkish company. According to reports, the bribes allegedly were paid via the German security company Prevent. These allegations reportedly resulted from an audit carried out by KPMG.

Siemens AG paid a fine of US\$800 million to the Securities Exchange Commission (the SEC) and the American Ministry of Justice and €395 million to the German Ministry of Justice for the bribes given to win international tenders in December 2008.

In April 2010, Daimler AG, the manufacturer of Mercedes, paid a fine of US\$93.6 million to the US Ministry of Justice and US\$91.4 million to the SEC for the bribes made by its subsidiaries in China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Montenegro, Nigeria, Russia, Serbia, Thailand, Turkey, Turkmenistan, Uzbekistan and Vietnam.

In 2014, Smith & Wesson paid a fine of US\$2 million to the SEC for the bribes to win gun sales to military and police forces in Pakistan, Indonesia and other countries. In addition, the company made illegal payments to third parties for them to convey the payments to government officials in Turkey, Nepal and Bangladesh.

In February 2018, Teradata Corporation announced that the FCPA investigation involving potential FCPA violations regarding procurement of gifts and travel expenses at its Turkish subsidiary in Turkey has ended and the company will not face an enforcement action. The SEC advised Teradata in January 2018 that its investigation was closed. The company received a declination from the DOJ on 20 February 2018.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Accurate corporate books and records

Article 64(1) of the Turkish Commercial Code No. 6,102 (Law No. 6,102) stipulates that every merchant has to keep commercial books, within which it would have to show explicitly as per Law No. 6,102, its commercial acts and the economic and fiscal status of its commercial business and its accounts receivable and accounts payable along with the results it obtains in each accounting period.

Books have to be kept so as to allow third-party experts to gain insight into the activities and financial status of the relevant commercial business, through an audit they would carry out in a reasonable period of time.

Except for the types of books mentioned explicitly under article 64 of Law No. 6,102 and Regulation on Commercial Books, additional books to be kept shall be determined as per the Turkish Tax Procedure Law No. 213, through reference to article 64(5) of Law No. 6,102.

Article 65(1) and (2) of Law No. 6,102 stipulates that commercial books and other relevant records shall be kept in the Turkish language and recordings shall be in full, accurate, of a regular manner and on time.

Furthermore, article 88(1) of Law No. 6,102 stipulates that real person and legal entity merchants, in preparing their individual and consolidated financial tables, should comply with and apply Turkish Accounting Standards (TAS), accounting principles found within the conceptual framework, and commentary, which is an integral part thereof.

Pursuant to article 88(2) of Law No. 6,102 and its reasoning, TAS are obliged to be identical with International Financial Reporting Standards.

Effective internal company controls and external auditing

Article 392 of the Law No. 6,102 stipulates that each board member is entitled to request information, ask questions and make examinations on all works and transactions of a limited liability company (LLC) or a joint-stock company.

As such, a company cannot reject requests by a board member to:

- provide any corporate book, record, agreement, correspondence and document to the board of directors;
- examine and discuss these documents by a board of directors or board members; and
- obtain information from an employee or executive of the company.

Each member of the board of directors is also entitled to request information on business and specific transactions of the company from the executives with the approval of the chairman of the board of directors, and to request from the chairman of the board of directors the corporate books and company files to be presented to his or her attention if it is necessary for fulfilment of his or her duties outside the board meetings.

If the foregoing requests are rejected, the matter that the information request relates to should be discussed at a board of directors' meeting within two days. However, if the board cannot convene or also rejects the information request of the board member, the board member making the request may apply to court to receive the requested information.

During board meetings, individuals authorised for the company's day-to-day management and if any, management committees, as well as all members of the board of directors, are obliged to provide information.

Unlike above (ie, a request of information outside board meetings), the request of any board member in this respect that is directed during a board meeting cannot be rejected nor left unanswered.

As per article 437 of the Law No. 6,102, financial statements, consolidated financial tables, activity reports of the board of directors, auditors' reports (if any) and the board of directors' suggestions as to profit distribution shall be available at headquarters and branches of the company for review by the shareholders, starting from at least 15 days in advance of the day of a general assembly meeting in joint-stock companies.

Among these documents, financial statements and consolidated financial tables shall be available at headquarters and branches of the company for review of the shareholders for one year.

Each shareholder has the right to request a copy of the income statement and balance sheet of the company. Also, each shareholder may request information from the board of directors regarding the company's business and from the auditors (if any) regarding their audit methods and results during a general assembly meeting.

The information to be provided to the shareholders should be honest and accurate, in accordance with principles of accountability and good faith.

The request for information may only be rejected by the general assembly on the grounds that such an explanation will carry the risk of company trade secrets being disclosed, or company interests being jeopardised.

Clear consent of the general assembly or a specific board resolution is required, regarding the questions raised by a shareholder, for an evaluation of a certain part of the commercial books and the company's correspondence to go ahead.

If a shareholder's request for information and examination is not answered, unlawfully rejected or postponed, and such a shareholder does not obtain the information, the shareholder may apply to a court. The court reviews the file and may order the company to share the information with the shareholder.

The right to request information and examination may not be abolished or restricted by the articles of association of the company or by a resolution of the general assembly or the board of directors.

Pursuant to articles 438 and 439 of the Law No. 6,102, each shareholder has the right during a general assembly to request an audit to clarify certain issues, even though such an audit is not included in the general assembly's agenda, provided that foregoing information rights have already been exercised by the shareholder requesting the audit. In other words, to ask a company to appoint a special auditor, the shareholder that requests the audit should have first exercised its right to request and examine information. If the general assembly approves this request, either the company or each shareholder may apply to a court for a special auditor to be appointed.

If the general assembly does not approve this request, shareholders representing at least 10 per cent of the share capital may apply to court for appointment of a special auditor. In order for the court to accept it, the request addressed to court should convince the court that founders or corporate bodies of the company have explicitly violated the articles of association and relevant legislation, and caused damage to company and shareholders.

Article 614 of the Law No. 6,102 stipulates that each shareholder is entitled to request information from directors on all works and accounts of the company and make examination on certain matters in LLCs. If there is a risk that the shareholder may use the information obtained in a manner to damage the company, the directors may prevent providing information and examination to the extent necessary, and the general assembly shall decide on the matter upon the request of the shareholder. If the general assembly unduly prevents providing information and examination, the court decides on the matter upon the request of the shareholder.

As for external auditing, article 397 of the Law No. 6,102 rules that the companies that will be determined by the Turkish Council of Ministers are subject to independent audit. Accordingly, the Decree on Determination of Companies Subject to Independent Audit was published in the Official Gazette on 23 January 2013 (as amended from time to time) and determined companies and certain criteria as to being subject to independent audit.

Joint-stock companies that do not fall within scope of the Decree on the Determination of the Companies Subject to Independent Audit – thus, ones that are not obliged to appoint an independent auditor – are required to appoint 'statutory auditors' under article 397(5) of the Law No. 6,102. This said, secondary legislation that will determine the details of statutory audit and auditors has not been published yet. Therefore, requirements regarding the appointment of statutory auditors are not yet applicable as of the date this chapter was written.

In addition to and along with the auditing mechanism explained above, a provision specific to groups of companies, article 207 of the Law No. 6,102, stipulates that each of the shareholders of a subsidiary company might apply to the commercial courts of first instance, requesting the appointment of a private auditor, in cases where the need to protect the subsidiary company against the parent company arises, as stipulated by the same article. Article 210 of the Law No. 6,102 and the regulation issued in accordance with the relevant article stipulate that the Ministry of Customs and Commerce might audit companies on its own accord, or upon request, notice or complaint of shareholders or third parties.

Finally, as per article 1,524 of the Law No. 6,102, and the Regulation on Opening Website by the Companies, companies subject to independent auditing, as explained above, will be required to set up and maintain a company website, and must allocate a part of the website to the required announcements.

Periodic financial statements

In accordance with article 514 of the Law No. 6,102, boards of directors have to prepare financial statements and activity reports within three months as of the end of the previous financial year. Pursuant to Article 515 of the Law No. 6,102, financial statements have to be prepared in accordance with the TAS to reflect the company's assets,

liabilities and obligations, equities and results of business activities in a realistic, honest, full, clear and comparable way, and in a transparent and reliable manner to address the requirements and nature of business.

As per article 516 of the Law No. 6,102, the activity report shall reflect the company's flow of activities and financial status in an accurate, full, straightforward, true and fair manner. This report shall address the financial status of the company based on the financial statements. The report shall also point out potential risks to be faced by the company. The contents of activity reports have been determined by the Regulation on Minimum Contents of the Annual Activity Reports of Companies.

Publicly held companies should also comply with the rules and regulations, as set out by the Capital Markets Board. Article 14 of the Capital Markets Law No. 6,362 stipulates that issuers have to prepare and present financial tables and reports, which are to be disclosed to the public or could be requested by the Capital Markets Board, when need be; on time, fully and correctly; and in compliance with the requirements set out by the board, within scope of the TAS, with respect to content and form. Issuers, as per the Capital Markets Law No. 6,362, are legal entities who issue capital markets instruments, who apply to the Capital Markets Board to issue such instruments or whose capital markets instruments are offered to the public, and the investment funds, who are subject to the Capital Markets Law No. 6,362.

Additionally, issuers and capital markets entities, except the investment funds and funds of housing financing and asset financing (collectively 'enterprises'), are also subject to the provisions set out in Communiqué on Financial Reporting in Capital Markets (Communiqué Series No. II, 14.1). According to article 6 of the Communiqué Series No. II, 14.1, enterprises are obliged to keep financial reports annually. According to article 7 of the Communiqué Series No. II, 14.1, companies that issue capital markets instruments, which are traded in the exchange or some other standardised market, investment companies, investment funds, asset management companies, mortgage financing companies and asset leasing companies are obliged to keep interim financial reports on a quarterly basis. Article 4 of the Communiqué Series No. II, 14.1 stipulates that the financial reports consist of financial statements, board of directors' activity reports and responsibility statements. As per article 14 of the Communiqué Series No. II, 14.1, enterprises are also obliged to publish their annual and interim financial reports on their websites, once these are publicly announced.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Section 5 of the Turkish Constitution of 1982, entitled 'Privacy and Protection of Private Life', and in particular article 22, preserves the secrecy of communications. The Turkish Civil Code, article 23 et seq, includes provisions regulating the protection of personal rights in general. Also, according to article 24, an individual whose personal rights are violated unjustly is entitled to file a civil action. Therefore, in practice, corporations place provisions within their employment contracts that are to be signed by the employee and the officer of the corporation, indicating what items constitute the 'property of the corporation' and these generally include computers, memory disks, and any kind of document, whether printed or not, to prevent any ambiguity in relation to employee claims regarding what may constitute personal data.

Additionally, while the principle of confidentiality prevails in matters relating to accounting (article 5 of Turkish Tax Procedure Law No. 213), the disclosure of certain violations, which are established with Turkish Tax Procedure Law No. 213, will not be a breach of the confidentiality principle. The Ministry of Finance is responsible for determining the procedure regarding the disclosure of such information.

The internal actions that could be taken are set out in articles 392, 437, 438, 439 and 614 of Law No. 6,102 as described in question 18.

Furthermore, publicly held companies are subject to the provisions of the Communiqué on Financial Reporting in Capital Markets (Series No. II, 14.1) and Material Events Communiqué (Series No. II, 15.1), Material Events Disclosure of Non-Publicly Traded Companies (Series No. II, 15.2) and other applicable legislation of the Capital Markets Board as the case may be, through which they have to inform the public of changes to the internal and continuous information that might

impact the value and price of the capital markets instruments and the investment decisions of the investors.

20 Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

All the rules and legislation described above under question 18 and article 19 shall be applied to each company's record and bookkeeping. A company's failure to perform its obligations under the relevant legislation could lead to the company and its relevant authorised body being liable towards the authorities, if they carry indications of domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Article 341 of the Turkish Tax Procedure Law No. 213 defines what must be understood from loss of tax, although the definition does not distinguish between losses of tax as a result of bribery, be it domestic or foreign. Accordingly, loss of tax is when tax is not computed on time or is computed incompletely, as a result of the inability to fulfil or incompletely fulfil the relevant taxation duties borne by the taxpayer or the responsible individual. In this regard, article 343 sets out the minimum penalty for committing a loss of tax for the stamp taxes to be no less than 12 Turkish lira, and 24 Turkish lira for other types of taxes for each document, bond and bill.

Article 112(2) of the Capital Markets Law No. 6,362 stipulates that the following people may be punished according to the Criminal Code:

- persons who intentionally prepare financial tables and reports that do not reflect the truth;
- persons who falsely open an account;
- persons who conduct any type of accounting fraud;
- persons who prepare false or misleading independent auditing and evaluation reports; and
- the responsible board of directors' members or responsible managers for issuers who allow for such false reports to be prepared.

The first paragraph of the same article also provides that the persons who intentionally keep books and records as required by the law, but irregularly or not within the time periods stipulated by law shall be punished with imprisonment from six months to two years and up to 5,000 days of judicial monetary fine.

The General Communiqué on Tax Procedure Law (Series No. 229) regulates, among other things, the penalty imposed in the event of committing fraud, the description of what is to be understood from gross fault and special irregularities (such as invoicing a service or good that has not been purchased and not issuing a retail sales certificate).

Issuing fake invoices and irregularity on invoices (such as obtaining an invoice for a donation that was not given) are penalised according to the provisions of the Criminal Code (article 207 - imprisonment from one to three years) and the Turkish Tax Procedure Law No. 213 (article 353 - penalty of 10 per cent of the difference between the actual value of the invoice and the value forged, but that is no lower than 240 Turkish lira).

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

To assess the net profit, article 40 of the Income Tax Law No. 193 regulates those expenses that can be deducted from income tax. These expenses are:

- general expenses that are incurred to generate and maintain commercial income;
- accommodation expenses for staff and employees at the workplace or for the equipment of the workplace;
- treatment and medical expenses;
- insurance premiums and retirement allowances;
- damages;
- costs and compensation that is paid as per an agreement, judicial decision or a legal provision (subject to its being related to the respective work);

Update and trends

Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight Against Corruption published by the Turkish Prime Ministry in the Official Gazette was promulgated to be enforced within the period 2016 to 2019. Transparency International's assessment on the Action Plan points out that the previous Action Plan had not been enforced properly, and that the 65th Government Plan did not include any mentioning of fight against corruption. The association called upon the government to enforce the plan within the foreseen time period.

Transparency International published 'Corruption in Turkey: Legislation, Enforcement and Areas of Risk' on 16 May 2017. The report sets out that tender processes, licencing processes, social welfare, brokerage and customs transactions in Turkey are particularly vulnerable to corruption. Furthermore, the report provides certain survey results and statistics such as number of defendants pertaining to corruption cases in 2015. The report concludes by indicating the necessity of diminishing legislative powers' influence on public institutions and closing the gap between legislation and their enforcement.

The Professional Standards of Ethics and Compliance Management, which had been drafted by the Ethics and Reputation

Society and approved by the Professional Competency Board, has been published in the Official Gazette and came into legal force on 9 June 2018. The Standards focuses on the definition of the profession and the applicable legislation, while also stating the duties and related activities of ethics and compliance managers. The Ethics and Reputation Society is also coordinating a certification programme for ethics and compliance managers, prepared in accordance with global ethics and compliance standards of which the first session took place on 6 October 2018.

The Group of States Against Corruption published its reports on Turkey's current state on fight against corruption and transparency on its political party expenses. The reports state that Turkey has not followed a number of its recommendations such as conferring new legislation with citizens and non-governmental organisations, avoiding omnibus bills, establishing a mechanism to check the assets of members of the parliament. However, the second report indicates that six of the eight recommendations relating to aggravation of punishments of corruption have been followed by Turkey. Lastly, the second report contains further recommendations on how to render incomes of political parties and reports pertaining to these incomes and expenditures more transparent.

- work and residence expenses that are related to the respective work and that are reasonable in relation to the scope and nature of the relevant work;
- expenses relating to vehicles used in relation to the work;
- real tax; and
- duties and charges amortisations indicated in the Turkish Tax Procedural Law.

Expenses other than those enumerated under the foregoing article cannot be deducted from tax and any indication of other expenses in company and financial records will violate both the Turkish Tax Procedure Law No. 213 and the Turkish criminal law, depending on the facts.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Bribing domestic public officials under the Criminal Code is regulated both for individuals who provides benefit to public officials or other persons whom they indicate, as well as for public officials who benefit for themselves or provide benefit to other persons (article 252(1) and article 252(2), Criminal Code). In both cases, bribery takes place in relation to the execution of a public official's duty - in exchange for a bribe the public officials may be asked directly or via intermediaries to perform or not to perform his or her duties.

Both the persons granting the benefit and the government official are subject to criminal liability, irrespective of whether the agreement regarding bribery is reached. Sanctions - albeit reduced ones - are imposed on parties proposing to bribe their counterparts, even if the counterparts do not agree to such proposal (article 252(4), Criminal Code).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

See question 3.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The Criminal Code defines 'public official' as any person who performs a public activity through appointment or selection on an unlimited, permanent or temporary basis (article 6(1c)).

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Law No. 657 on Public Officials prohibits public officials from being involved in any commercial activity. Therefore, throughout their employment with the government, public officials can neither be employed by nor provide consultancy services to any private entity (article 28).

27 Travel and entertainment

Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 28.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Article 29 of Law No. 657 explicitly regulates the prohibition of public officials on receiving gifts. According to this article, public officials are prohibited from:

- requesting gifts directly or via intermediaries;
- accepting gifts for the purpose of providing benefits, even if such act does not take place while discharging their duties; or
- requesting to borrow money from business owners or receiving such money.

Pursuant to the second paragraph of the same article, the Public Officials Council of Ethics is authorised to determine the scope of the prohibition of receiving gifts and, where necessary, request a list, at the end of each calendar year, of gifts that were accepted by public officials who are at least at general director level or an equivalent high-level official.

The Regulation on Ethical Principles prohibits public officials from receiving gifts or obtaining further benefits for themselves, their relatives, third parties or institutions from individuals or legal entities, in relation to their duties. The Regulation on Ethical Principles does not set any monetary limit on such gifts or benefits. According to Resolution No. 2007/1 of the Council of Ethics for Public Officials, the receipt of gift or hospitality, irrespective of its monetary value, constitutes a violation of the rule set forth by both Law No. 657 and the Regulation on Ethical Principles.

However, article 15 of the Regulation on Ethical Principles provides that the following items do not fall within the scope of the rule stipulated thereunder:

- gifts donated to institutions or received on the condition that they are allocated to public service, which will not affect the legal

- discharge of the institution's duties; registered with the inventory list of the relevant public institution and announced to the public;
- books, magazines, articles, cassettes, calendars, CDs or similar material;
 - rewards and gifts received within public contests, campaigns or events;
 - souvenirs given in public conferences, symposiums, forums, panels, meals, receptions and similar events;
 - advertisement and handicraft products distributed to everyone and having symbolic value; and
 - loans extended by financial institutions on market conditions.

In addition to the foregoing, Notice No. 2004/27 on the Public Officials Council of Ethics regulates the duties and obligations of the Council of Ethics, which was established with Law No. 5,176 on the Establishment of the Public Officials Council of Ethics and Certain Laws. According to the notice, the Council of Ethics determines the scope of the prohibition on receiving gifts and can request, if need be, at the end of each calendar year, a list of the gifts that have been received by senior-level public officials who are at least of a general manager level or equivalent.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

The Criminal Code regulates private commercial bribery. Accordingly:

- if a benefit is provided, offered or promised to the respective individuals;
- if the respective individuals request or accept such benefit;
- if such a request is mediated; and
- if a benefit is provided to another individual because of the foregoing relationship.

The general provisions regulating domestic bribery are applicable to individuals acting on behalf of the following entities, irrespective of whether the individual is a public official and in relation to the execution of the respective individual's duty to directly or, via intermediaries, perform or not perform:

- occupational organisations that are public institutions;
- companies that have been incorporated by the participation of public institutions or entities, or occupational organisations that are public institutions;
- foundations that carry out their activities within a body of public institutions or entities, or occupational organisations that are public institutions;
- associations working in the public interest;
- cooperatives; and
- publicly traded joint-stock companies (article 252(8), Criminal Code).

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See questions 15 and 16 respectively for the sanctions imposed on companies and individuals violating domestic bribery rules.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Within the past year, a number of cases and investigations were initiated relating to individuals rather than private companies.

An 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 and 10,000 Turkish lira 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 and scholarships for relatives and paid off holiday expenses, in exchange for providing standardisation documents to companies. Upon receipt of the notification letter, 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.

In November 2017, a total of 33 people (including 23 public officials) were taken into custody because of bribery allegations in Van, located in eastern Turkey. According to allegations, public officials working in the customs office in Van were receiving bribes in exchange for allowing the entrance of food-loaded vehicles into Turkey with forged documents.

In March 2018, a tax inspector and two certified public accountants were arrested for accepting 250,000 Turkish lira as the first instalment of a bribe amount of 2 million Turkish lira.

In August 2018, two officials from Istanbul Sisli Municipality were taken into custody regarding corruption allegations involving constant request for bribes (amounting to approximately 30,000 Turkish lira) from an individual for granting approval to his construction works in the district.



Gönenç Gürkaynak
Ceren Yıldız

gonenc.gurkaynak@elig.com
ceren.yildiz@elig.com

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş, 34349
Istanbul
Turkey

Tel: +90 212 327 17 24
Fax: +90 212 327 17 25
www.elig.com

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