

## Anti-Corruption Legislation In Turkish Law

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### A. Introduction

Corruption poses an increasingly serious threat against Turkey as well as the rest of the world in many respects. The fight against corruption is crucial, in particular, to achieve an economic and political stability, to attract foreign investors and to establish the rule of law. In addition to those interests, which are common for almost all countries, anti-corruption has a particular importance for Turkey in the achievement of its goal of becoming a European Union member, since anti-corruption is expected to feature prominently in Turkey's talks on European Union accession.<sup>1</sup>

This article analyzes the legislation against corruption under Turkish law. The topic merits consideration because of its importance at both national and global levels and also because of the recent developments in Turkish law. In analyzing the anti-corruption legislation of Turkey, the local anti-corruption laws of general and specific nature such as the Criminal Code, the Law Against Bribery and Corruption and the Law Concerning Ethical Rules Applicable to Public Officials will be analyzed. The international anti-corruption conventions to which Turkey is a party, such as the United Nations Convention on Corruption, the Council of Europe's Criminal Law and Civil Law Conventions and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions shall also be analyzed.

### B. Crime of Bribery under the Turkish Law

#### *I. Crime of Bribing National Public Officials*

The new Turkish Criminal Code No. 5237 ("Criminal Code"), which entered into force on 1 June 2005, defines bribing as providing a benefit to a public official for

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<sup>1</sup> Bryane Michael, *Anti-Corruption in the Turkey's EU Accession*, 3(4) *TURKISH POLICY QUARTERLY* 1 (2004), available at <http://topics.developmentgateway.org/governance/rc/filedownload.do~itemId=1027458>.

the performance or omission of an act contrary to the requisites of the duties of the official.<sup>2</sup>

Under the old Turkish Criminal Code No. 765 (“Old Criminal Code”), providing a benefit to a public official to make him perform an act that he is normally required to make, or to omit an act which he is normally required not to make, was also considered as bribery.<sup>3</sup> Under the new Criminal Code, however, such acts are not considered as bribery but “abuse of duty.”<sup>4</sup> The penalty for the crime of abuse of duty is considerably less than for the crime of bribery. Abuse of duty carries a prison sentence of one to two years while the penalty for bribery is imprisonment for four to twelve years.

Under the Criminal Code, bribery is committed when a person and a public official agree to exchange a benefit for the performance or omission of an act contrary to the requisites of the duties of the official.<sup>5</sup> The actual transfer of money or another benefit is not an element of the crime of bribery.

Under the Criminal Code, a person who gives or whom receives a bribe, but then informs the investigation authorities about the bribe before initiation of an investigation, shall not be punished for the crime of bribery.<sup>6</sup> Additionally, a public official whom receives a bribe, but then turns over the entire bribe to the competent investigation authorities, shall not be punished for the crime of bribery.<sup>7</sup>

A public official whom receive a bribe is subject to the same penalty as a person who gives a bribe.

The Criminal Code sets forth that Turkish laws shall apply to the crimes of bribery committed abroad regardless of whether the crime is committed by a Turkish citizen or a foreigner.<sup>8</sup> It is a general principle that Turkish laws shall be applied to crimes committed within Turkey, whether committed by a Turkish citizen or foreigner. Thus, Turkish laws shall apply to the crimes of bribery regardless of

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<sup>2</sup> Criminal Code No. 5237 (“Criminal Code”), art. 252, para. 3.

<sup>3</sup> Old Criminal Code No. 765 (“Old Criminal Code”), art. 211, para. 1.

<sup>4</sup> Criminal Code, art. 257, para. 3.

<sup>5</sup> Criminal Code, art. 252, para. 1.

<sup>6</sup> Criminal Code, art. 254, para. 1.

<sup>7</sup> Criminal Code, art. 254, para. 2.

<sup>8</sup> Criminal Code, art. 13, para. 1.

whether committed by a Turkish national or foreigner or whether committed in Turkey or abroad.

If the public official whom receives a bribe is a judge, a notary public or a sworn financial consultant, the length of the prison sentence shall be increased by one third.<sup>9</sup>

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.<sup>10</sup> This general definition of public official is extended for the purposes of the crime of bribery. The following persons are also considered public officials: Officials of the (i) institutions of professions which are considered as public entities, such as chambers of commerce and industry or the union of bar associations; (ii) companies to which public entities are shareholders; (iii) foundations founded by public entities; (iv) associations working for the benefit of the public; (v) cooperative companies; and (v) joint stock companies whose shares are quoted in stock exchanges.<sup>11</sup>

If a bribe creates an unlawful benefit to a legal entity, the entity shall be punished through three security measures: invalidation of the license granted by a public authority; seizure of the goods which 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.<sup>12</sup> Criminal liability of legal entities was not regulated under the Old Criminal Code and is therefore a new concept under Turkish law.

## *II. Crime of Bribing Foreign Public Officials*

Turkey’s first attempt to criminalize bribing foreign public officials was the ratification in 2000 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention” discussed *infra*), which was followed by the enactment in 2003 of Law No. 4782 Amending Certain Laws for the Prevention of Bribing Foreign Public Officials in

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<sup>9</sup> Criminal Code, art. 252, para. 2.

<sup>10</sup> Criminal Code, art. 6.

<sup>11</sup> Criminal Code, art. 252(4).

<sup>12</sup> Criminal Code, art. 253.

International Commercial Transactions<sup>13</sup> (“Law No. 4782”) and the enactment of the new Criminal Code in 2005.

1. *Law No. 4782*

Law No. 4782 was enacted by the Turkish Parliament on 2 January 2003 to implement the OECD Convention; it amended Article 211 of the Old Criminal Code regarding the crime of bribery in order to criminalize bribery of foreign public officials. Law No. 4782 provides that “to offer, promise or give any of the advantages stated in paragraph 1 above, whether directly or through intermediaries, to the selected or appointed officials or officers of the foreign public authorities and institutions that perform a legislative or administrative or judicial duty, or the officials who perform a duty of an international nature, in order that such official or officer act or refrain from acting or to obtain or retain business in the conduct of international business shall also constitute the crime of bribery.” Prior to the amendment, bribing foreign public officials was not considered a crime under Turkish law.

2. *The Criminal Code*

Pursuant to the new Criminal Code, it is considered bribery to offer, promise or give, directly or indirectly, any pecuniary or other advantage to foreign public officials or officials of public international organizations in order that the official act or refrain from acting in relation to the performance of official duties, or in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>14</sup> In the case that a legal entity unlawfully benefits from a bribe, the entity shall be subject to the aforementioned security measures.

The Criminal Code implements the OECD Convention. Furthermore, the provisions of the Criminal Code regarding the bribing of foreign governmental officials are in line with the provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”). There are, however, a number of differences between the Criminal Code and the FCPA. For example, there is no exception under the Criminal Code for payments to facilitate or expedite performance of a “routine governmental action.”

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<sup>13</sup> Official Journal No. 24990 (11 January 2003).

<sup>14</sup> Criminal Code, art. 252, para. 5.

### C. Law on Combating Bribery and Corruption

Law No. 3628 Concerning the Declaration of Assets and Combating Bribery and Corruption ("Law No. 3628"), which entered into force on 4 May 1990, is one of the main pieces of legislation which aims to prevent corruption in Turkey.

Law No. 3628 requires certain public officials to declare their assets in order to monitor any increase in those assets. Pursuant to Law No. 3628, the public officials who are required to declare their assets on a regular basis include officials who are nominated through the selections; the notaries; certain higher officials of the Turkish Air Institute and Turkish Red Crescent; officials of the public entities such as ministries, municipalities, economic state enterprises, etc.; presidents of political parties; managers of foundations, cooperatives and unions; individuals who publish newspapers as well as the higher employees of newspapers. The basic idea behind asset declaration is to monitor any increase in the assets of a public official or other person who performs activities that are closely connected to the public interest. Individuals who are required to declare assets must also declare the assets of their wives and children. Within the scope of such requirement, any asset (such as money, stock shares, gold, rights, receivables, etc.) the value of which exceeds the amount of their salary for 5 months is required to be declared. The individual must also explain how the assets were acquired (through salaries, heritage, gifts, etc.).

Asset declaration is generally required to be made at the beginning and end of the office term as well as each year which ends with (0) or (5); i.e., with a five-year interval. Failure to make the asset declarations at due time is punishable by imprisonment for up to three months. Those who refrain from declaring their assets despite the initiation of an investigation may be subject to imprisonment for three months to one year. Incorrect asset declaration is punishable by imprisonment for six months to three years. In addition to the foregoing, an official who makes a false asset declaration may be prohibited from working as a public official for a period equivalent to his or her imprisonment term. Those officials who obtain unlawful assets--which are defined as assets the sources of which cannot be proven according to laws or public morals or assets that are not compatible/proportional to their revenues--may be prohibited from working as a public official for the rest of their lives. Most penalties cannot be postponed or converted into monetary fines.

Law No. 3628 also restricts the reception of gifts by public officials. A public official who receives a gift from a foreign country, foreign individual or legal entity, the value of which exceeds the official's salary for ten months, must deliver the gift to

the public entity that he or she works for.<sup>15</sup> The net minimum salary for the year 2007 is YTL 403 (approximately 305 US Dollars as of 26 August 2007). Therefore, the amount of minimum salaries for ten months is YTL 4,030 (approximately \$3,050). Consequently, if the value of a gift given to a public official by a foreign individual or a foreign legal entity exceeds approximately \$3,050, the gift must be delivered to the public authority that employs the official.

Law No. 3628 was amended by Laws No. 5020 and 5176, dated 12 December 2003 and 25 May 2004 respectively, in order to provide additional measures to make the law operate more efficiently. For example, the Public Officials Ethical Board was granted the authority to check the accuracy of the asset declarations, and an obligation to disclose information was imposed on all individuals, legal entities and public authorities during the investigations conducted under Law No. 3628, even if the information is otherwise protected by special laws such as the laws protecting bank records, accountant-client records and lawyer-client records. . The violation of this requirement is subject to a penalty of imprisonment from one to three years.

It is established by the precedents of the Yargıtay (Turkish Court of Appeal) that Law No. 3628 requires that a judge who hears a criminal lawsuit against a public official regarding an allegation of corruption must investigate whether the declared earning of the official is commensurate with his or her assets.<sup>16</sup> According to the Court of Appeal, assets such as movable and immovable properties and the bank accounts of the wife and children of the relevant public official must also be investigated to determine the compatibility of the earnings of the official with his or her assets for the purposes of Law No. 3628.<sup>17</sup>

#### **D. Law on Ethical Rules Concerning Public Officials**

Law No. 5176 Concerning the Establishment of the Public Officials Ethical Board and Amending Certain Laws (“Ethical Rules Law”) became effective on 8 June 2004 and sets forth the ethical rules that the public officials are required to comply with such as the transparency, impartiality, honesty, accountability and pursuing the public interest.

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<sup>15</sup> Regulation No. 90478 (10 August 1990).

<sup>16</sup> See e.g. Decision of the Turkish Court of Appeal, 7<sup>th</sup> Penal Chamber, No: E. 2003/2223, K. 2003/5867 (8 July 2003), in which the court held that a public official whom was alleged to own eight houses by corruption must be investigated pursuant to Law No. 3628.

<sup>17</sup> Decision of the Turkish Court of Appeal, 7<sup>th</sup> Penal Chamber, No: E. 2000/10977, K. 2000/16673 (6 December 2000).

The Ethical Rules Law established the Ethical Board to investigate any irregularities or other unethical conducts of the public officials. The Ethical Board is composed of eleven members who are appointed by the Council of Ministers among the high former public officials such as former ministers, mayors, retired Supreme Court judges and retired university rectors and deans. The Ethical Board holds regular meetings four times a week. A complaint alleging a breach of the ethical rules by the general directors or higher public officials may be submitted to the Ethical Board. A complaint alleging a breach of the ethical rules by an ordinary public official can only be made before the disciplinary board of the public entity that employs the official.

The Ethical Board is granted the authority necessary to perform their duties in an efficient manner. For example, the Ethical Rules Law provides that all ministries and other public entities are required to give any document or information requested by the Ethical Board. If the Ethical Board concludes after investigation that a public official has acted unethically, its decision shall be published in the Official Journal. These investigatory proceedings are envisaged to continue along with the criminal proceedings, if any, concerning the relevant conduct.

#### **E. International Conventions against Corruption to Which Turkey is a Party**

Turkey supports the anti-corruption initiatives through various international conventions including the United Nations Convention Against Corruption (“UN Convention”) and the Council of Europe's Civil Law and Criminal Law Conventions on Corruption (“Council of Europe Conventions”).

##### *I. The UN Convention*

The UN Convention was adopted by the General Assembly of the United Nations and entered into force on 14 December 2005.<sup>18</sup> Turkey ratified the UN Convention on 11 August 2006 and published in the Official Journal on 2 October 2006.<sup>19</sup>

Article 1 of the UN Convention sets forth its purposes as to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; and to promote integrity, accountability and proper management of public affairs and public property.

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<sup>18</sup> UN Resolution No. 58/4 (31 October 2003).

<sup>19</sup> Council of Ministers' Decree No. 2006/10885.

The UN Convention covers the prevention, investigation and prosecution of corruption as well as the freezing, seizure, confiscation and return of proceeds from corruption. In order to implement the UN Convention, it is not necessary for the offences set forth in it to result in damage or harm to state property.

Pursuant to the UN Convention, each State Party is required to adopt such legislative and other measures as may be necessary to establish the crime of bribery as a criminal offence when committed intentionally. As explained above, the Turkish Criminal Code penalizes bribing public officials.

The UN Convention requires the signatories to take a number of preventive anti-corruption measures such as to develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability; to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption; and to collaborate with each other and with relevant international and regional organizations in promoting and developing these anti-corruption measures.

The UN Convention also requires the state parties to take the necessary steps to establish appropriate systems of procurement – based on transparency, competition and objective criteria in decision-making – that are effective, *inter alia*, in preventing corruption. Two Turkish laws meet this requirement: Turkish State Tender Law No. 2886, which generally applies to the sale and lease transactions of the state assets; and Public Tender Law No. 4734, which applies to the procurement of goods and services by the public entities. In addition, the Turkish Public Tender Authority has been established by Public Tender Law No. 4734 on 1 January 2003 in order to regulate, supervise and control the public procurements.

Pursuant to the UN Convention, the state parties are required to institute a comprehensive domestic regulatory and supervisory regime for banks, financial institutions and other natural or legal persons particularly susceptible to money-laundering in order to deter and detect all forms of money-laundering. The Turkish anti-money laundering legislation mainly consisting of the Anti-money Laundering Law No. 4208, which entered into force on 19 November 1996, and the Anti-Money Laundering Regulation, which entered into force on 2 July 1997, meets this requirement of the UN Convention. In particular, the Anti-Money Laundering Regulation states that if there is a suspicion that money or convertible assets are being used to launder or attempt to launder money, this shall immediately be reported to the Financial Crimes Investigation Agency, after making customer



identification. A person or entity who fails to report such suspicious transactions are subject to imprisonment from six months to one year as well as certain administrative fines. The Turkish Financial Crimes Investigation Board, which was established by the Anti-money Laundering Law No. 4208 and started operation on 17 February 1997, is a public authority specifically authorized to investigate money-laundering crimes.

## *II. The Council of Europe Conventions*

Turkey is a party to the three Council of Europe Conventions on corruption, namely the Council of Europe's Criminal Law Convention, the Council of Europe's Civil Law Convention on Corruption and the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

### *1. Criminal Law Convention on Corruption*

The Criminal Law on Corruption was open for signature on 27 January 1999 and entered into force on 1 July 2002. Turkey signed the Criminal Law Convention on 27 September 2001 and ratified it on 14 January 2004; the ratification was published in the Official Journal No. 25390 on 2 March 2004.<sup>20</sup>

The Criminal Law Convention on Corruption is aimed at fighting against certain corrupt practices at national and international levels and envisages international co-operation such as mutual assistance and extradition in the investigation and prosecution of corruption offences. The Convention mainly covers the bribery of domestic and foreign public officials; bribery in the private sector and money-laundering of proceeds from corruption.

The Convention requires the signatories to provide for effective and dissuasive sanctions and measures, including the penalty of imprisonment. Legal entities can also be subject to criminal or non-criminal sanctions for offences committed to benefit them.

### *2. Civil Law Convention on Corruption*

The Civil Law on Corruption was open for signature on 4 November 1999 and entered into force on 1 November 2003. Turkey approved the Convention on 17 April 2003.<sup>21</sup>

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<sup>20</sup> Law No. 5065 (14 January 2004); Council of Ministers' Decree No. 2004/6771.

<sup>21</sup> Law No. 4852 (17 April 2003); Council of Ministers' Decree No. 2003/5685.

The Civil Law on Corruption is the first attempt to define common international rules in the field of civil law and corruption. Pursuant to the Convention, the contracting parties are required to provide "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."

The Convention mainly covers the measures to be taken at national and international levels, and deals with issues of compensation for damage, liability (including State liability for acts of corruption committed by public officials), validity of contracts, protection of employees who report corruption, and the clarity and accuracy of accounts and audits.

### *3. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was open for signature on 8 November 1990 and entered into force on 1 September 1993. Turkey signed the Convention on 27 September 2001 and approved it on 16 June 2004.<sup>22</sup>

The Convention aims to facilitate international co-operation in investigating crimes and tracking, seizing and confiscating the proceeds thereof. It therefore envisages investigative assistance between states, provisional measures such as freezing of bank accounts and seizure of property; and measures to confiscate the proceeds of crime, such as enforcement by a state of a confiscation order of another state. The Convention requires the contracting parties to criminalize the laundering of the proceeds of crime as well as to confiscate instrumentalities and unlawfully acquired proceeds.

### *III. The OECD Convention on Combating Bribery of Foreign Public Officials*

The Organization of Economic Co-operation and Development ("OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") on 17 December 1997 in Paris. Signatories to the OECD Convention include all 29 member states of the OECD--including the United States--as well as five non-members. The OECD Convention

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<sup>22</sup> Law No. 5191 (16 June 2004); Council of Ministers' Decree No. 2004/7712.

entered into effect on 15 February 1999. Turkey ratified the OECD Convention on 1 February 2000.<sup>23</sup>

The goal of the OECD Convention, stated in the preamble, is to combat the “widespread phenomenon” of bribery in international business transactions.

Article 1 of the OECD Convention requires the signatories to criminalize bribing foreign public officials by providing:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

According to the “Commentaries on the Convention,” which were adopted by the signatories on 21 November 1997, the OECD Convention sets a “standard” to be met by signatory states rather than using “precise terms,” and thus leaves the method of implementation to the signatory states. However, the OECD Convention states that the sanctions must consist of “effective, proportionate and dissuasive criminal penalties” comparable to those for bribery of local officials. In so doing, the OECD Convention seeks to assure a consistency between the various local legislations with respect to the crime of bribing foreign officials.

The OECD Convention makes it unlawful to offer or pay bribes, but leaves the matter of soliciting or receiving bribes to the domestic laws of the signatory states. It envisages the criminalization of the bribery of foreign public officials regardless of whether the home country of the relevant official is a party to the OECD Convention.

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<sup>23</sup> Law No. 4518; Official Journal No. 23956 (6 February 2000).

## F. Conclusion

Corruption, directly or through intermediaries such as economic and governance factors, impedes economic growth and causes poverty. Fight against corruption is therefore crucial to achieve economic development and stability. It has a particular importance for Turkey in the achievement of its goal of becoming a European Union member.

Having examined the Turkish anti-corruption legislation, it can be seen that some considerable steps are already taken by Turkey. Being a candidate for the European Union accession and a member to several international conventions against corruption such as the UN Convention on Corruption, the Council of Europe's Criminal and Civil Law Conventions and the OECD Convention on Combating Bribery of Foreign Public, Turkey also actively supports the anti-corruption initiatives at the international level. These positive steps alone, however, are not sufficient to combat corruption in an efficient manner, which requires a comprehensive governmental strategy and support from the civil society as well as a universal anti-corruption strategy to fight against the global phenomenon of corruption.