

Anti-Corruption: Combatting Public Enemy Number One in Turkey

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Beginning in the 1970s and really taking off after the end of Cold War, globalization, the increased number of economically liberalized markets, and the expanding volume of cross-border trading and commercial activities has led to corruption becoming a major national and international public issue.

Corruption is not a new phenomenon; instead it has been persistent for thousands of years. Books, stories and theatrical plays have been written on the subject. Yet, it is now under the spotlight like never before given the prevalence of corruption among some corporations both in developed and developing countries in the last few decades. And it's having a detrimental effect and significantly obstructing economic development.

The international sentiment and decisiveness on the matter has culminated in overarching international treaties recognized by many states. With the increased awareness on the subject and its adverse consequences in recent years, national legislative approaches against the subject have also become more rigid and comprehensive.

It has become apparent that corruption takes many different forms and patterns. Accordingly, the World Bank has settled on a straightforward definition, the abuse of public office for private gain.

This definition is concise and broad enough to include most forms of corruption. That said, bribery, the form of corruption that is most common in Turkey, can be regarded as a violation of core ethic principles, neglect of duty and misconduct, infraction and irregularity, favoritism and discrimination, mobbing and the use of public resources for personal benefits.

This article explores how bribery is regulated under Turkish laws and regulations as well as the international treaties, ratified by the Republic of Turkey.

Regulation of Bribery under Turkish laws

As the core legal instrument against corruption, Turkish Penal Code numbered 5237 (TPC) criminalizes bribery under Article 252. Accordingly, the legal definition of bribery reads as "securing an undue advantage to a public official or to another person indicated by the public official in order to perform or not to perform a task with regard to his duty." Article 252 criminalizes both bribe giving and taking and foresees identical legal remedies. The sanction against bribery is imprisonment from four years to 12 years.

Pursuant to Article 252/3, when the parties agree upon a bribe, the offense is deemed as completed. Thus, regardless of whether money actually changes hands, the mere existence of an agreement to pay a bribe is considered as sufficient to be sentenced.

Any intermediary who transmits a bribe offer, finalizes the bribery agreement or delivers the bribe will be punished as a perpetrator, regardless of whether that person is a public official.

If the public official receiving the bribe is a judge, a notary public or a sworn public accountant the punishment increases by one third up to one half of the length of the imprisonment penalty.

The scope of bribery also covers bribery actions. Regardless of being a public official, it covers representatives of (i) companies having a public entity status, (ii) companies established with the partnership of the public entities or the professional organizations having a public entity status, (iii) foundations operating within the public entities or the professional organizations having a public entity status, (iv) public benefit associations, (v) cooperatives, and (vi) publicly traded joint-stock companies engage in in criminal behavior.

The enterprises that benefit from a bribe will also be punished with certain security measures such as invalidation of the license granted by a public authority and seizure of pecuniary benefits arising from or provided by the commitment of a bribery offense. Accordingly, TPC stipulates legal measures to be applied if an entity has secured an undue advantage from bribery and is involved in money laundering. The security measures involve cancellation of the license.

Furthermore, for regulated markets such as Capital Markets, Energy Markets and Banking bribery has severe results. In this respect, the results are as follows;

- Energy Market Regulatory Authority demands, as a prerequisite for a legal entity to obtain a license, that the shareholders of the legal entity who, directly or indirectly, has at least 10 percent of the shares not to be convicted for corruption offenses except for crimes committed by imprudence.
- According to Capital Market Law No. 6362, the individuals who have been sentenced of crimes of corruption are not allowed to be the founding partners of intermediary institutions as well as legal entities having significant influence. Moreover, in cases where capital market institutions determined to be engaged in activities contrary to the legislation, The Capital Markets Board may restrict or temporarily suspend directly the institutions from their activities or cancel their licenses fully or as for certain capital market activities.
- Banking Law No. 5411 envisages a similar requirement for the founders of banks, and the real person shareholders of the legal entity founders of banks with qualified shares are not allowed to be the founding partners in case of being sentenced to the corruption offenses.
- Insurance Law No. 5684 and the Regulation on the Individual Pension Intermediaries dated August 29, 2009 and numbered 27334 require that the founders of companies of insurance, reinsurance and intermediaries should not have been convicted of infamous offenses including corruption, even if they have benefited from effective remorse, except for crimes committed by imprudence.

On a different note, Article 254 of the TPC provides a system called "effective remorse". Accordingly, an individual who gives or receives a bribe, but then informs the competent authorities regarding the issue at stake prior to the bribery being known by the authorities will not be punished. Nevertheless, it is set out in Article 254/4 that the "effective remorse" system shall not be applicable if one of the parties is a foreign public officer.

Regulation of Bribery Under International Treaties Ratified by the Republic of Turkey

Apart from TCP, bribery is also regulated in several international treaties to which the Republic of Turkey is a party. In this respect, by signing the international treaties, Turkey undertakes particular commitments to harmonize local laws with international treaties. Accordingly, Turkey's commitments under treaties that have been ratified and duly entered into force and the prospective indirect results arising from such commitments are analyzed below.

Turkey, to comply with its obligations under the international treaties, has made amendments through various judicial reform packages in the relevant law that regulate bribery. Even though certain provisions are synchronized with the international treaties, there are also certain laws that have not yet been synchronized with the international treaties.

Accordingly, the above-mentioned international conventions to which Turkey is a party consist of;

- the United Nations Convention Against Corruption (UN Corruption Convention)
- Council of Europe Criminal Law Convention on Corruption (Criminal Law Convention on Corruption)
- Council of Europe Civil Law Convention on Corruption (Civil Law Convention on Corruption)

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Corruption Convention)

Pursuant to the UN Corruption Convention, each country is required to adopt legislative and other measures that are deemed as necessary to establish the crime of bribery as a criminal offense when committed intentionally. The scope of the offense of bribery according to the Convention is the promise, offering or giving of an undue advantage to a public official, directly or indirectly, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. As explained above, bribery under TPC does not fall far from the regulations of the UN Corruption Convention.

As mentioned, Turkey is also a party to the Council of Europe Conventions on corruption; Criminal Law Convention on Corruption and Civil Law Convention on Corruption.

The Criminal Law Convention on Corruption is aimed at fighting against certain corrupt practices at national and international levels and envisages international cooperation such as mutual assistance and extradition in the investigation and prosecution of corruption offenses.

According to this Convention, the act of bribery is defined as the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions. The Criminal Law Convention on Corruption mainly covers the bribery of domestic and foreign public officials, bribery in the private sector and money laundering of proceeds from corruption. Furthermore, the Criminal Law Convention on Corruption requires its parties to provide effective sanctions and measures, including the penalty of imprisonment both for real persons and legal entities.

Nevertheless, domestic legislation on bribery is only criminal in its nature. However, it only deals with bribery of public officials and it does not regulate bribery in the private sector. Therefore, Turkey still has some road ahead to comply with its obligations under the Criminal Law Convention on Corruption.

The Civil Law Convention on Corruption provides that its 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 term "corruption" is defined as requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect, which distorts the proper performance of any duty or behavior required of the recipient.

The Convention mainly covers the measures to be taken at national and international levels, and deals with issues of compensation for damages, liability, validity of contracts, protection of employees who report corruption and the clarity and accuracy of accounts and audits. In terms of Turkish legislation there is no explicit provision stipulating the civil law implications of corruption such as the compensation arising from a bribery offence and Turkey has not synchronized its legislation as per the Convention.

OECD Corruption Convention requires the parties to criminalize the bribery of foreign public officials when committed intentionally. The offense of bribery is defined as to offer, promise or give any undue pecuniary or other advantage, directly or indirectly, 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.

Turkey, as one of the parties of the OECD Corruption Convention and has synchronized the local legislation pursuant to the respective Convention. Accordingly, bribing a foreign official in international commercial transactions is also stipulated in the Article 252/9 of the TPC in the event where an undue advantage is obtained by, offered or promised directly or through intermediaries to;

- public officials elected or appointed in a foreign country
- judges, jury members or other officials acting in international or transnational or foreign state courts

- members of international or transnational parliament
- persons performing public activities for a foreign country, including public institutions or public corporations
- citizens or foreign arbitrators appointed within the framework of arbitration procedure applied for solution of a legal dispute
- officials or representatives of international or supranational organizations established based on an international agreement, in order to perform or not to perform a task with regard to their duties or to obtain or preserve a work or an unjust benefit due to international commercial transactions, or where an undue advantage requested or accepted by the respective persons shall also be considered as bribery and sentenced to the above mentioned sanction thereof

Moreover, when the bribery offense falls within the scope of Article 252/9 and is committed by a foreigner abroad, with regard to a dispute to which; (i) Turkey, (ii) a public institution in Turkey, (iii) a legal entity established as per Turkish legislation, (iv) a Turkish citizen, is a party, or to perform or not to perform a transaction concerning these institutions or persons, investigation and prosecution are initiated ex officio against the persons who receive, request, accept the offer, promise or mediate a bribe or obtains an undue advantage for himself in connection with a bribery relationship if they are present in Turkey.

By way of the mentioned amendment, Turkey has mostly complied with the OECD Corruption Convention, but there are recommendations by the OECD Working Group on Bribery in International Business Transactions regarding the measures to be taken which includes:

- Re-establishing an anti-bribery law on corporate liability, which will hold Turkish companies liable for bribery in their international business transactions
- Actively enforcing the Turkish codes against foreign bribery in ongoing investigations for three foreign bribery cases
- Adopting specific legislative and regulatory provisions, including instituting new laws to protect whistle-blowers and ending tax deductions for bribe payments
- Developing awareness-raising and training on the bribery of foreign public officials in international business deals.

More Work to be Done

Even though several preventive and law enforcement measures for fighting against corruption are in place, the general overview of Turkey shows that there is a lot more work to be done in terms of developing a more secure legal system and decisive and impartial implementation.

As per the European Commission, Turkey 2013 Progress Report: "Turkey collects certain statistics on court decisions in corruption cases, with a break-down of figures for bribery, embezzlement, extortion and misuse of power. Overall for these four types of offenses, there were 3.902 convictions, 15.265 acquittals and 69 arrests in 2012. Efforts are needed to develop a thorough track record of investigations, indictments and convictions. Following up on the policy suggestion to establish comprehensive tracking of data on corruption is of crucial importance in this respect".

As a matter of respective fact, weak enforcement of the laws and regulations in place has been reported by several international organizations. For instance, it has been stated in the European Commission, Turkey 2014 Progress Report that: "There continued to be insufficient control over and verification of assets declared by elected public officials, appointed public officials and political figures. In line with art. 20 of the United Nations' Convention Against Corruption, Turkey should consider criminalizing illicit enrichment. No changes were made on the immunity of Members of Parliament and certain public officials regarding corruption-related offenses. The Council of Ethics for Public Servants had no power to enforce their decisions with disciplinary measures. Codes of ethics do not exist for military personnel or academics. Legal loopholes (disclosing gifts, financial interests and shares, foreign travel paid for by outside sources, etc.) in the code of ethics for parliamentarians remained".

In light of this, Turkey is supposed to bulk up its efforts to combat corruption based on its international commitments. The significant headline-grabbing corruption scandals, which are released to the public from time to time, could be seen as a need for a more aggressive and vigorous approach in Turkey's battle against corruption. The recent cases also hint to both short- and long-term action plans with a view to include more legislative efforts and an improved enforcement environment to tackle public enemy number one.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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