The Role and Liabilities of the Private Sector in Fighting Foreign Bribery in Turkey

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The OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the "**OECD Anti-Bribery Convention**") establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of bribery transaction. 34 OECD member countries and 7 non-member countries, namely Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa, have adopted the OECD Anti-Bribery Convention1.

Turkey signed the Convention on 17 December 1997 and deposited the ratification instrument with the OECD on 1 January 2000. On 2 January 2002, Turkey enacted implementing legislation in the form of the "Amendment to the Law regarding Prevention of Bribery of Foreign Public Officials in International Business Transactions" No: 4782 of 2 January 2003, which entered into force on 11 January 2003. In order to meet the requirements of the OECD Anti-Bribery Convention, Turkey established criminal liability for the active bribery of a foreign public official through amendments to its legislation, including amendments to the Turkish Criminal Code, Public Procurement Law and Law on Prevention of Money Laundering.

The Working Group on Bribery of the OECD (the "**Working Group**") evaluated Turkey's performance regarding both legislative compliance and implementation, then submitted its recommendations in three phases which each focused on a different aspect of the OECD Anti-Bribery Convention and involved preparation of a detailed report for each phase. Phase 1 Report (dated November 2004) evaluated the adequacy of Turkey's legislation to implement the OECD Anti-Bribery Convention. Phase 2 Report (dated December 2007) assessed whether Turkey is applying its legislation effectively. In addition to that, a Phase 2bis Report (dated June 2009) and a Follow-up Report on Phase 2 and Phase 2bis Report (dated March 2010) have been published as well. Most recently, Phase 3 Report (dated October 2014) focused on enforcement of the laws implementing the OECD Anti-Bribery Convention and associated instruments.

Phase 4 will focus on detection, enforcement and corporate liability, as well as other major topics relevant to adequate implementation of the obligations arising from the OECD Anti-Bribery Convention. Phase 4 will obviously take a more tailored approach, focusing more closely on the specific enforcement situation in each country.

Beyond the shadow of a doubt, the Turkey's progress shown in the Phase 3 Report is far from satisfactory. Although the Working Group welcomes Turkey's efforts to improve its foreign bribery offence, it remains seriously concerned about Turkey's low level of enforcement of foreign bribery, as well as certain aspects of Turkey's corporate liability legislation.

This Article focuses on the liabilities and role of private sector legal entities and enterprises vis-à-vis the requirements of the OECD Anti-Bribery Convention on the brink of Phase 4. It also aims to provide these entities and enterprises with the necessary nuts and bolts for compliance programs and other good practices which are set forth in international guidelines and key recommendations.

Liabilities of the Private Sector Actors

Article 1 of the OECD Convention defines foreign bribery as offering, promising or giving any undue 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. Foreign bribery offence is regulated under Article 252 of the Turkish Criminal Code numbered 5237 and dated 12 October 2004 ("TCC") as follows:

> *In the event that (a) the elected or appointed public officials in a foreign state, (b) the judges, jurors or other officials working for international or supranational courts or foreign courts, (c) international or supranational parliamentarians, (d) the persons carrying out a public activity for a foreign country including public institutions and public enterprises, (e) the national or foreign arbitrators assigned within the framework of the arbitration procedure applied for the settlement of a legal dispute, (f) the officials or representatives of international or supranational public organizations established on the basis of an international agreement directly or through intermediaries, are provided, offered or promised any undue advantage, or request or accept such undue advantage in order to act or refrain from acting in the exercise of their duties or to secure or preserve a business activity or any undue advantage due to international commercial transactions, the provisions of the Article 252 of the TCC which regulate penalties for bribery shall be applied.*

Liability of legal persons in Turkey regarding foreign bribery is established by the Article 43/A of the Code of Misdemeanors numbered 5326 and dated 31 March 2005 (the "**CM**"), which also applies to civil legal persons. Civil legal persons include private law legal persons, which include associations, foundations, unions, confederations, political parties, commercial companies (collective, limited, commandite and joint stock companies) and attorney partnerships. However, companies that are over 50% state-owned are audited by the Court of Accounts and fall outside the remit of Article 43/A of the CM.

As per Article 43/A of the CM, where the act does not constitute a misdemeanor which requires more severe administrative fines; in case that an organ or a representative of a civil legal person; or; a person, who is not the organ or representative, but undertakes a duty within the scope of that legal person`s operational framework commits the foreign bribery offence to the benefit of that legal person, the legal person shall alsobe penalized with an administrative fine of TL 10,000 to TL 2,000,000.

Since legal persons cannot be held criminally liable under Turkish law, they can only be held administratively liable. In addition to the abovementioned administrative fine, other sanctions may also be applied to legal persons in case of a foreign bribery, such as (i) confiscation of the bribe (property used for committing an intentional offence) regulated under Article 54 of the TCC, (ii) proceeds of bribery (material gain obtained through the commission of an offence) regulated under Article 55 of the TCC, (iii) debarment and prohibition from receiving public subsidies regulated under Article 11 of the Public Procurement Law numbered 4734 and dated 22 January 2002 and (iv) dissolution of the entity by revoking the operating license of a legal entity as a special security measure regulated under Article 60 of the TCC.

The level of authority of the natural person whose conduct may trigger corporate liability should be interpreted broadly. Therefore, any employee of a company may trigger corporate liability, regardless of his/her position, seniority, type of functions, part time/full time employee status, etc.

It is also noteworthy to mention the Working Group's concern, emphasized in the Phase 3 Report, that a criminal procedure must be initiated against a natural person for the case to be brought before the criminal courts. The Turkish criminal courts are unable to hear a case solely seeking to establish the administrative liability of a legal person, as provided under article 43/A of the CM2.

Accounting Requirements for Companies

Through integration of the international standards on auditing and financial reporting into the Turkish national legislation and establishment of the Public Oversight, Accounting and Audit Standards Authority (Kamu Gözetimi Kurumu - the "**KGK**") in 2011, Turkish law introduced a reporting obligations on external auditors to report not only up the management chain, but also directly to law enforcement authorities under certain situations.

Moreover, Article 359 of the Tax Procedure Code numbered 213 and dated 10 January 1961 (the "TPC") regulates the false accounting offence and the sanctions imposed for false accounting. Furthermore, the Capital Market Board set additional criteria which independent auditors must meet for auditing publicly held joint stock companies and capital market institutions. The sanctions for accounting offences under Turkish law target the accountants more than the companies. However, integration of the international standards on auditing and financial reporting into the legislation now require accountants as well as companies to be more careful on foreign bribery issues. This is because auditors are now obliged to directly inform law enforcement authorities about any foreign bribery matters.

The Role of Companies in Combatting Foreign Bribery

The government is the primary authority responsible for improving Turkey's ability to fight foreign bribery is the government. The government has the executive power to amend legislation in compliance with the OECD Anti-Bribery Convention, as well as the authority to provide training resources to the police, prosecutors and judges. However, companies themselves should shoulder some portion of this responsibility as well.

Private sector actors may both take initiatives on an individual basis, by establishing and implementing proportionate and solid corporate compliance programs within their own organizations and by planning and taking part in collaborative efforts between government, private sector and civil society to leverage and improve corruption standards and practices, identified as weak, and to cultivate a business culture to fight corruption. Under Turkish laws, none of the abovementioned initiatives are compulsory. There is no statutory obligation for companies to establish compliance programs. A notable exception is the requirement to create a compliance program imposed primarily on financial institutions, which must comply with anti-money laundering and counter-terrorist financing obligations within the scope of the Regulation of Programme of Compliance with Obligations of Anti-Money Laundering and Combating the Financing of Terrorism dated 16 September 2008 ("RoC"). Not surprisingly, this is among the areas which the Phase 3 Report criticizes Turkey and recommends the jurisdiction to increase its awareness-raising activities in the private sector about the importance of developing and implementing internal controls and corporate compliance programs regarding anti-bribery.

1. Establishing and Implementing Corporate Compliance Programs

For an effective fight against corruption, it is important to establish a clearly articulated, visible and proportionate corporate compliance policy, which prohibits any and all kinds of corruption, including foreign bribery. Incorporation of a system for financial and accounting procedures is also essential for accomplishing the expectations of an established corporate compliance program. The system should include internal controls and be reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to prevent these being used for the purpose of foreign bribery, or hiding such bribery.

The Good Practice Guidance on Internal Controls, Ethics and Compliance adopted on 18 February 2010 by the OECD Council (the "OECD Compliance Guidance") is an integral part of the Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions (dated 26 November 2009). The OECD Compliance Guidance is intended to serve as a non-legally binding guide for companies regarding establishment of effective internal controls, ethics, and compliance programs, or measures for preventing and detecting foreign bribery3. The OECD Compliance Guidance is one of the most comprehensive and systematic guidelines publically available.

The OECD Compliance Guidance underlines the importance of addressing a company's individual circumstances (such as its geographical and industrial sector of operation and the vulnerability of these to corruption) during creation of effective internal controls, ethics, and compliance programmes or measures. A good corporate compliance program should involve regular monitoring and re-assessment of its circumstances. It should also adapt itself as necessary to ensure its sustainable effectiveness at achieving its purpose.

Strong commitment from senior management to the company's corporate compliance program encourages the compliance of employees and business parties involved with the company. Such commitment has a major effect on the overall success of the program through-out the organization.

In accordance with the OECD Compliance Guidance, a solid corporate compliance program destined to fight corruption is recommended to include the following processes, among others:

1. Dissemination of clear and to-the-point written policy materials vis-à-vis persons within and outside the organization, Systematic and regular trainings,
2. Creation of contractual obligations in employment contracts, as well as contracts entered into by business partners and counterparts,
3. Establishing self-reporting and whistleblowing mechanisms,
4. Performing a risk based4 due diligence while entering into and maintaining relations with business partners and counterparts. These include third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners,
5. Performing a risk based due diligence while establishing joint-ventures and acquiring business entities outside the organization.

Corporate compliance programs should also ensure compatibility with the relevant and applicable laws. Due to the intricacies of any relevant applicable law, the suggestions in a non-binding compliance program require detailed and diligent legal review and analysis before being put in place. Accordingly, to avoid complications during the implementation process it is essential to explicitly state a compliance program in detail, within the framework of the requirements and restrictions of the applicable law.

Having that said, any corporate compliance program implemented by any entity doing business in Turkey must conform with Turkish laws. It is also critical for companies which have connections with the United States and which fall within the scope of the United States' Foreign Corrupt Practices Act ("FCPA") as well as those which have connections to the United Kingdom and falls under the scope of application of the UK Bribery Act ("UKBA"), to give due regard to the requirements of these pieces of legislation while establishing and implementing their corporate compliance programs. These are the two major national legislative instruments which has extra-territorial application. The law enforcement authorities in relation to both the FCPA and the UKBA consider the existence of corporate compliance programs as a factor while bringing charges against companies, including as a mitigating factor in reducing any penalties imposed.

2. Taking Part in Collective Action

The individual efforts of companies in fighting against corruption within their own organizations are precious. However, these efforts alone are insufficient to successfully win a whole nation's fight against corruption. In order to ensure an effective fight against corruption, companies should combine their forces, thereby contributing to the solutions required for the fight against corruption.

In the "Collective Action in the Fight Against Corruption", a joint publication produced by members of the World Bank Institute Working Group, collective action is defined as a process of cooperation between various stakeholders, with the aim to jointly counter corruption. It means that companies, governments and civil society organizations join forces in order to guarantee transparency in business; for example, during public procurement processes. The ultimate aim of these joint efforts is to create fair and equal market conditions - a "level playing field" - for all market players, as well as to eliminate the temptations of corruption for all of them5.

Collective action can be initiated and driven through various channels. The available methods range from integrity pacts for individual procurement transactions to industry-specific codes of conduct and compliance pacts. It could also include joint measures implemented as part of a long-term initiative to raise a country's public awareness and tighten up its regulatory system and procurement guidelines. For collective action to be as effective as possible, such activities should involve companies, the public sector, non-governmental organizations and other interest groups working jointly in industry specific or a country-specific context. It is also crucial to examine potential anti-trust aspects in each individual case6.

Companies, as well as non-business organizations, can be a part of the collective action by becoming members of platforms which bring companies together with other companies, agencies, labour and civil society such as the United Nations Global Compact.

1 http://oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm

2 http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf

3 Good Practice Guidance on Internal Controls, Ethics and Compliance, February 2010, OECD Council

4 A higher level of diligence could be required for third parties that are dealing directly with governmental agencies or with business units that are in high-risk industries or highrisk countries.

5 Collective Action in the Fight Against Corruption, Joint publication of the members of the World Bank Institute Working Group

6 United Nations Global Compact, UN Global Compact 10th Principle, 22 August 2011

Related Practices

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