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The Turkish question: anti-corruption legislation or enforcement, which needs to change?

The legal framework around bribery and corruption in Turkey is in a phase of rapid transition, which foreign companies operating in the country need to watch closely if they are to avoid risk of sanction, say ***Pelin Baysal****,* ***Ceren Aral*** *and* ***Bensu Aydın*** *of Istanbul-based law firm Gün + Partners.*

In December 2014, The Organisation for Economic Co-operation and Development ("OECD") took an important initiative by publishing its very first Foreign Bribery Report. Examining 427 bribery cases, The Report revealed that only 17 out of 41 members of the OECD Anti-Bribery Convention concluded bribery investigations with court decisions over the past 15 years. Such a small number clearly presented the need for better enforcement of anti-corruption laws worldwide.

While such important developments were taking place internationally, Turkey was marking the anniversary of the 'graft probe' initiated in December 2013. As reported worldwide, a number of high level public officials, including four ministers of state and their family members were subjected to investigations, arrests and the confiscation of property following large scale bribery and international trade violation accusations.

Today, Turkey ranks 64th out of 175 countries in the Corruption Perception Index. The Third Progress Report issued by the OECD in October 2014 reveals that Turkey has concluded only two bribery cases despite being a member of the OECD for more than 10 years. The statistics show that Turkey's anti-corruption practice requires some improvement.

This article outlines the existing legislative framework along with the revisions made during the graft probe, and examines the white collar crime landscape in Turkey and proposes near future implications as well as some prospects.

Existing legislative framework

Bribery and its elements are described in the relevant provisions of the Turkish Criminal Code amended to its current version in 2012.

Prior to the amendment, the law set forth the crime of bribery in a traditional sense. Bribery is considered to be a reciprocal crime where only performing a task contrary to the official's requisite duties constitutes the offence of bribery. It requires an agreement to be reached between the briber and the public official and they are equally punished by from 4 to 12 years of imprisonment.

The 2012 amendments revised the bribery definition and expanded its scope. Receiving or providing a benefit illegally secured directly or through an *intermediary* by a public official or another person appointed by a public official to perform, or not to perform, a task regarding the performance of the official's duties is included in the definition of the crime.

Even though they do not technically qualify as civil servants, the provision also became applicable to individuals acting on behalf of

professional organisations that are public institutions; companies that have been incorporated by the participation of public institutions or entities, or professional organisations that are public institutions; foundations that are engaged in activities within a body of public institutions or entities, or professional organisations that are public institutions and publicly held joint stock companies as they would be regarded as public officials in their dealings with third persons and companies.

In line with the trending enforcement of the Foreign Corrupt Practices Act ("FCPA") and the UK Bribery Act, the provision penalising the bribery of foreign public officials is amended to give the power to initiate prosecution *ex officio* against foreigners, who bribe foreign officials outside Turkey in relation to a transaction in which Turkey, or a public institution located in Turkey, or a legal entity, established under Turkish laws, or a Turkish citizen, is involved. With the latest judicial package introduced in July 2014, the requirement on the request for prosecution by the Ministry of Justice has also been lifted. The foreigners who bribe foreign officials outside Turkey in relation to Turkish affairs are now subject to investigation and prosecution *ex officio* without pre-requisites.

The amendments were indeed a step forward as they introduced private bribery to the Turkish legal system, included intermediaries within the scope of the crime and provided a degree of extraterritoriality to enforcement.

It is important to note that the Turkish Criminal Law adopts the principle of personal liability stating that no punitive sanctions may be imposed for legal entities and legal entities can only be subject to security measures. In practice, however, it is often the board members of the company who are held liable for the bribery and corruption and not the company itself.

The above being the main legal instruments, there is complementary legislation providing specific list of acceptable and non-acceptable gifts that can be given to the civil servants and requiring leaders of political parties, newspaper owners and board members and civil servants, among others, to submit a declaration of property and to hand in any gifts that exceed the total value of 10 times of the monthly minimum wage.

Last but not least, among others, Turkey is a member of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 and has taken legislative steps to bring the local legal standards in line with the OECD Convention.

The impact of the 'graft probe' involving high level public officials

The investigations initiated on 17-25 December, 2013 related to criminal charges for corruption and white collar crimes i.e, tender conspiracy, bribery, fictitious export, money laundering, gold smuggling, illegal zone planning towards 49 individuals that included bureaucrats, several prominent businessmen, a mayor in Istanbul and the sons of three ministers, have shaken the criminal judicial system of Turkey. The effects of the investigations were so full of scars and the fact that the investigations remained inconclusive for nearly a year, made them a target of both the parliament and the public.

While eventually no sanctions were issued on the suspects, the legislative framework absorbed the reflection of the investigations. The 5th judicial reform package was published on February 21, 2014, including amendments to the Turkish Criminal Procedure Code. There were significant amendments on preventive measures. For **issuing a confiscation decision;** the **prerequisite of a report from a competent regulatory authority**[1] regarding the determination of the value generated from committing a crime is introduced**; the unanimous affirmative votes of three judges** at the High Criminal Court became applicable and **material evidence rather than former strong doubt** that the property of a suspect had been obtained from a committed crime became the prerequisite. Some restrictive revisions made on **inspection of telecommunication** as well.

The package highlighted the international standards of prosecution as well as the right of due process and human rights. It was welcomed for proportioning preventive measures to raise the threshold of scrutiny as well. However, it was criticised due to its timing and

raised serious concerns on its possible effect on the release of the graft probe suspects.

Even after the graft probe, the judicial framework was constantly under renewal. A consecutive judicial package reducing the prerequisite for a search warrant from strong doubt together with material evidence to **only reasonable doubt** in the process of sudden and loaded replacements of police force and district attorneys that took part in the initiation of the graft probe was also criticised as to the government's motivation. The government justified the whole process in relation to the graft probe and the subsequent replacement of the public officials by a parallel state conspiracy against the current government.

Proposals regarding near future implications and prospects

Although the graft probe was mostly aimed at bureaucrats and resulted in dismissal of the charges, the Turkish government is sending out signals of an increased surveillance to government officials and governmental corporations. This would naturally have an impact on the companies involved with key regulatory and business-related matters such as supervising cross-border financial transactions, arranging tenders and customs procedures.

As the legislation can change quite rapidly in Turkey, the key personnel of multinational corporations operating in Turkey are advised to follow up the developments, as they may be possible targets for criminal investigations and sanctions. With regard to the relatively extraterritorial enforcement provided to the bribery provisions, and the inclusion of intermediaries within the scope of the crime, it is advisable to approach intermediaries with great scrutiny and place mechanisms to regularly audit the same. With respect to the expected increased transparency requirements and the ease provided to search warrants, irregular visits from both administrative and judicial authorities are expected to become frequent in the near future. Companies must, therefore, keep up to date with the amended procedural rules also.

All in all, companies must assess whether they have more broadly evaluated their anti-corruption risk exposure in Turkey and implemented well-structured anti-corruption compliance programs.

As Turkey stands as a commercial hub between the west and the east, regardless of the sector, customs is one of the most problematic areas of compliance where corruption appears as a general and joint problem. On ways of dealing with this, there is an interesting debate which may be worth following up, on whether an audit right may be granted to companies during customs transactions.

Finally, it seems like Turkey has the right legislation in place alleging corruption and foreign bribery, however their overall enforcement must be ensured with more objectivity and reliability for both public welfare and foreign investment sustainability reasons.

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