The Anti-Bribery and Anti-Corruption Review

Sixth Edition

Editor
Mark F Mendelsohn

The Law Reviews

© 2017 Law Business Research Ltd

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2017
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark F Mendelsohn

THE LAWREVIEWS

© 2017 Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Tessa Brummitt

SUBEDITOR
Hilary Scott

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2017, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-93-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

© 2017 Law Business Research Ltd

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

www.TheLawReviews.co.uk

© 2017 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANAGNOSTOPOULOS

AZB & PARTNERS

BAKER & PARTNERS

BCL SOLICITORS LLP

BONN STEICHEN & PARTNERS

CLARK WILSON LLP

DECHERT

ESTUDIO BECCAR VARELA

FERRERE

HANNES SNELLMAN ATTORNEYS LTD

HERBERT SMITH FREEHILLS CIS LLP

HOGAN LOVELLS

JOHNSON WINTER & SLATTERY

JONES DAY

KOLCUOĞLU DEMİRKAN KOÇAKLI

LEE HISHAMMUDDIN ALLEN & GLEDHILL

MONFRINI BITTON KLEIN

MORI HAMADA & MATSUMOTO

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STETTER RECHTSANWÄLTE

STUDIO LEGALE PISANO

VIEIRA DE ALMEIDA

© 2017 Law Business Research Ltd

CONTENTS

PREFACE vii
Mark F Mendelsohn

Chapter 1 ARGENTINA 1
Maximiliano D'Auro, Manuel Beccar Varela, Dorothea Garff, Francisco Zavalía and Tadeo Leandro Fernández

Chapter 2 AUSTRALIA 11
Robert R Wyld and Jasmine Forde

Chapter 3 BRAZIL 41
Ricardo Pagliari Levy and Heloisa Figueiredo Ferraz de Andrade Vianna

Chapter 4 CANADA 53
Christopher J Ramsay

Chapter 5 CHINA 68
Kareena Teh and Philip Kwok

Chapter 6 ECUADOR 80
Javier Robalino Orellana, Jesús Beltrán and Ernesto Velasco

Chapter 7 ENGLAND AND WALES 94
Shaul Brazil and John Binns

Chapter 8 FRANCE 106
Antonin Lévy

Chapter 9 GERMANY 118
Sabine Stetter

© 2017 Law Business Research Ltd

Chapter 10 GREECE 128
Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti

Chapter 11 HONG KONG 137
Kareena Teh

Chapter 12 INDIA 149
Aditya Vikram Bhat and Shwetank Ginodia

Chapter 13 ITALY 162
Roberto Pisano

Chapter 14 JAPAN 175
Kana Manabe, Hideaki Roy Umetsu and Shiho Ono

Chapter 15 JERSEY 185
Simon Thomas and Lynne Gregory

Chapter 16 LUXEMBOURG 195
Anne Morel

Chapter 17 MALAYSIA 204
Rosli Dahlan and Muhammad Faizal Faiz Mohd Hasani

Chapter 18 MEXICO 220
Oliver J Armas, Luis Enrique Graham and Thomas N Pieper

Chapter 19 NETHERLANDS 231
Aldo Verbruggen

Chapter 20 POLAND 244
Tomasz Konopka

Chapter 21 PORTUGAL 256
Sofia Ribeiro Branco and Joana Bernardo

Chapter 22 RUSSIA 266
Alexei Panich and Sergei Eremin

© 2017 Law Business Research Ltd

Chapter 23 SWEDEN....277
David Ackebo, Elisabeth Vestin and Emelie Jansson

Chapter 24 SWITZERLAND....289
Yves Klein and Claire A Daams

Chapter 25 TURKEY....301
Okan Demirkan, Begüm Biçer İlikay and Başak İslim

Chapter 26 UNITED STATES....312
Mark F Mendelsohn

Appendix 1 ABOUT THE AUTHORS....337
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....357

© 2017 Law Business Research Ltd

PREFACE

This sixth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Argentina, Canada, Jersey and Sweden. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the ripple effects from several ongoing high-profile global corruption scandals have continued to dominate the foreign and domestic bribery landscape. Most notably, in Brazil, Operation Car Wash, the wide-ranging investigation that uncovered a colossal bribery and embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has implicated many domestic and multinational firms across a range of industries, and touched a growing number of foreign countries, leading to cross-border cooperation by enforcement agencies and one of the largest foreign bribery settlements in history. In December 2016, Odebrecht SA, the largest construction company in Latin America, and its subsidiary Braskem SA, a Brazilian petrochemical company, entered coordinated settlement agreements to pay approximately US$3.5 billion in fines and penalties to authorities in Brazil, the United States and Switzerland for making improper payments to government officials, including officials at Petrobras, Brazilian politicians and officials, and political parties through Odebrecht's off-book accounts in exchange for improper business advantages, including contracts with Petrobras. Additionally, J&F Investimentos SA, the parent company of the world's largest meatpacker JBS SA, entered a leniency agreement with Brazil's Federal Prosecutor's Office, agreeing to pay US$3.2 billion for its role in corrupting more than a thousand politicians over the course of a decade. Over the past year, Brazilian enforcement authorities have increasingly utilised plea bargains and leniency agreements both to secure cooperating witnesses and encourage companies to pay fines that ultimately reduce the financial and reputational impact from harsh sanctions.

Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB). The Swiss Office of the Attorney General has been pursuing a money laundering investigation into 1MDB and two Swiss private banks with the help of Singapore, Luxembourg, and the US Department of Justice (DOJ). In June 2017, the DOJ filed additional civil forfeiture complaints seeking recovery of assets valued at approximately US$540 million. Combined with the DOJ's June 2016 civil forfeiture complaints to recover more than US$1 billion in assets, this remains the largest civil forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative. The DOJ has also turned its focus to a criminal investigation into

© 2017 Law Business Research Ltd

1MDB, particularly in relation to funds used to acquire real estate and other assets in the United States.

Judicial and legislative developments over the past year have further clarified the breadth and scope of anti-corruption investigations and enforcement. For instance, in December 2016, the French parliament passed the Sapin II law, a corporate anti-corruption law that, among other things, established the French Anti-Corruption Agency and required companies with 500 or more employees to establish a compliance programme by mid 2017. In May 2017, the UK High Court in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* reduced the scope of litigation privilege to communications created to obtain information when the litigation is in progress or reasonably imminent, is adversarial, and the communication's primary purpose is conducting the litigation. If upheld, this has an impact on how investigative internal investigations in the UK are structured so as to maintain legal privilege. Finally, in June 2017, the US Supreme Court held in a unanimous decision in *Kokesh v. SEC* that claims for disgorgement brought by the Securities and Exchange Commission (SEC) were subject to a five-year statute of limitations, thereby limiting the SEC's ability to seek monetary penalties for misconduct that occurred more than five years before the enforcement action.

Continuing a recent trend, the enforcement actions this year reflect cooperation between authorities all over the globe to investigate and charge companies involved in corruption scandals. For example, the successful investigation into Odebrecht SA and Braskem SA was a result of cooperation between the DOJ, the Brazilian Federal Prosecutor's Office and the Swiss Office of the Attorney General. Likewise, in January 2017, the DOJ, the UK's Serious Fraud Office and the Brazilian Federal Prosecutor's Office reached an US$800 million coordinated settlement agreement with Rolls-Royce Plc, a UK-based multinational engineering company that manufactures, designs and distributes power systems, for its role in a bribery scheme involving payments to foreign officials around the globe in exchange for government contracts. And recently in September 2017, in the only corporate Foreign Corrupt Practices Act (FCPA) enforcement action under the Trump administration to date, Swedish international telecommunications company Telia Company AB and its subsidiary entered coordinated settlement agreements with the DOJ, SEC and the Public Prosecution Service of the Netherlands, agreeing to pay US$965 million in fines and penalties for making bribe payments of over US$331 million to an Uzbek official in exchange for expansion into the Uzbek telecommunications market. This is the second settlement arising from the expansive collaborative investigation into bribe payments made to an Uzbek government official; Amsterdam-based telecommunications company VimpelCom Limited and its subsidiary entered a US$795 million global settlement last year to resolve similar allegations as a result of cooperation between enforcement agencies in, among others, Belgium, Bermuda, the British Virgin Islands, the Cayman Islands, Estonia, France, Ireland, the Netherlands, Norway, Spain, Sweden and Switzerland.

In the United States, the DOJ has continued to emphasise the importance of an effective compliance programme and self-reporting. In February 2017, the DOJ Fraud Section released a guidance document, 'Evaluation of Corporate Compliance Programs', identifying a list of 119 common questions that the Fraud Section may ask in evaluating corporate compliance programmes in the context of a criminal investigation. Relatedly, April 2017 marked the one-year anniversary of the DOJ's Pilot Program, aimed at providing greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations, and

© 2017 Law Business Research Ltd

remediation of internal controls and compliance programmes. The Pilot Program remains in effect under the current administration, but its future remains uncertain as the DOJ continues to assess its utility and efficacy. To date, the DOJ has issued seven declinations to companies that self-reported and disgorged profits under the Pilot Program, with no monitorship requirements.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2017

© 2017 Law Business Research Ltd

Chapter 25

TURKEY

Okan Demirkan, Begüm Biçer İlikay and Başak İslim[1]

I INTRODUCTION

In the past two decades, rapid growth and globalisation in business have triggered many challenges, such as the prevention of corruption and bribery, sustainability of fair competition, environmental protection and income justice. As two major global problems, corruption and bribery concern trade and investment regulations, governmental transparency and misconduct. The implementation of anti-corruption and anti-bribery measures is particularly important for sustaining economic and political consistency, as well as for developing ethical and transparent business conduct in multinational corporations.

Turkey's fight against corruption and bribery was and still is a crucial condition for its accession to the European Union. In the past 20 years, Turkey has signed and ratified a number of international conventions and substantively aligned its domestic legislation with these conventions.

In July 2012, provisions governing the crimes of corruption and bribery under the Turkish Penal Code[2] (TPC) were amended with the enactment of Law No. 6352. This amendment redefined the crime of bribery and broadened its scope. The law provides that even where bribery has been committed outside Turkey, if the crime is connected in any way with the state of Turkey or a Turkish public institution, private entity or individual, it will be prosecuted in Turkey. With regard to the crime of corruption, the 2012 amendment enlightened the judiciary about the definition of 'coercion', which is the main element that distinguishes corruption from bribery.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

There is no specific anti-corruption and anti-bribery law in Turkey. The legislative instruments in this regard are governed under various pieces of legislation. These are: (1) the TPC; (2) Law No. 3628 on the Declaration of Assets and Combating Bribery and Corruption[3] (the Asset Declaration Law); (3) Law No. 657 on Civil Servants[4] (the Civil Servants Law); and (4) the Law Related to the Establishment of the Council of Ethics for Public Services and Amendments to Some Laws[5] (the Ethics Rules Law).

---

1 Okan Demirkan is a partner, and Begüm Biçer İlikay and Başak İslim are associates, at Kolcuoğlu Demirkan Koçaklı.

2 Published in the Official Gazette dated 12 October 2004 and numbered 25611.

3 Published in the Official Gazette dated 4 May 1990 and numbered 20508.

4 Published in the Official Gazette dated 20 July 1965 and numbered 12053.

5 Published in the Official Gazette dated 8 June 2004 and numbered 25486.

© 2017 Law Business Research Ltd

i Scope of the term 'public official'

Turkish law does not provide a uniform definition for the term 'public official'. The scope of this term varies from one legislative instrument to another. Article 128 of the Turkish Constitution provides that the fundamental and permanent functions required by public services will be carried out by 'civil servants' and 'other public employees'. The breadth of this provision is such that the term 'public employees' comprises both civil servants and other public employees, who perform public services based on assignment or their employment relationship with the state, even though they may not necessarily be civil servants.

The Civil Servants Law sets forth four employment categories: civil servants, personnel employed on a contractual basis,[6] temporary personnel and employees. The term 'civil servant' is defined under Article 4 as 'regardless of the existing establishment structure of the relevant entity, persons who are assigned the task of performing fundamental and permanent public services, executed in line with the general administrative principles of the state and other public legal entities'. The Civil Servants Law prohibits civil servants from requesting and accepting gifts. According to this Law, the Public Officials Ethics Board (the Ethics Board) is authorised to determine the scope of this prohibition.

The Ethics Board was established pursuant to the Ethics Rules Law, which entered into force for adopting rules and monitoring public officials' implementation of principles related to transparency, impartiality, honesty, accountability and obligation to observe public interest. The Ethics Rules Law is applicable to:

> *[...] all personnel employed at departments included in the general state budget, contributed budget administrations, state economic enterprises, working capital establishments, local administrations and unions thereof, all public establishments and institutions founded under the names of committees, upper committees, institutions, institutes, enterprises, organisations, funds and similar possessing public entities, the chairpersons and members of management and audit committees, boards and supreme boards.*

The Ethics Rules Law is not applicable to the President, members of the Grand National Assembly of Turkey, members of the Council of Ministers, members of the Turkish Armed Forces, and members of the judiciary and universities.

Another law that provides a different definition for the term 'public official', while setting forth rules on the provision of gifts and benefits to public officials, is the Asset Declaration Law. Persons falling within this scope are, in summary:

a officers appointed through elections as well as externally appointed ministers;

b public notaries;

---

6 Personnel in the following five groups are considered to be personnel employed on a contractual basis, who are regulated separately by special laws:

a personnel working on the basis of Article 4(B) of the Civil Servants Law;

b permanent personnel employed on a contractual basis;

c personnel working in regulatory authorities (independent administrative authorities) employed on a contractual basis (e.g., the Competition Board, Capital Markets Board and Banking Regulation and Supervision Authority);

d personnel working in the Ministry of Health and Ministry of Education, employed on a contractual basis; and

e personnel working in state economic enterprises in line with Decree No. 399 on the Personnel Regime of State Economic Enterprises employed on a contractual basis.

© 2017 Law Business Research Ltd

c certain higher officials of various public institutions;
d officers, civil servants, directors, auditors and other persons who are not employees, that work in general and contributed budget institutions, municipalities, special provincial administrations, state economic enterprises and their subsidiaries and affiliates;
e leaders of political parties;
f members of administrative bodies of foundations;
g chairpersons, board members and general managers of cooperatives and unions;
h directors and auditors of public interest associations; and
i individuals owning newspapers, and board members, auditors, responsible managers and columnists of companies that own newspapers.

The broadest definition for the term 'public official' is provided under the TPC. Article 6(c) of the TPC defines the term 'public official' as 'a person who is involved in the operations of public activities, for a definite or indefinite term, either by way of election or nomination or any other way'. Accordingly, the main criterion for regarding a person as a 'public official' is the public nature of the services that he or she is rendering. The person's 'employment relationship' with the state (or any public legal entity) is not specifically sought.

ii Legal framework of anti-bribery and anti-corruption policies of Turkey

Turkey constructed its legislative system on three main divisions: (1) public administration law; (2) civil law; and (3) criminal law. Turkey developed a comprehensive legal framework to facilitate a sustainable fight against corruption and bribery, both in the public and the private sectors. Although the definition and elements of the crimes of bribery and corruption and their legal consequences are primarily dealt with under the TPC, there are many other laws concerning public administration that regulate public officials' acceptance of gifts and benefits. These laws ultimately aim to ensure transparency, equality and ethical conduct in the rendering of public services.

iii Criminal law perspective

The TPC is the primary legislation governing the crimes of bribery and corruption. The crime of bribery is described as a reciprocal crime (i.e., both the party who provides or promises the bribe and the public official involved in the crime will be subject to criminal penalties). On the other hand, in the crime of corruption, the offender is the public official, while the person who is approached for the benefit is the victim.

Article 252 of the TPC states that providing a benefit to a public official or a third party that is designated by a public official, directly or through third parties, for ensuring the performance or omission of the public official's duties, constitutes the crime of bribery. Article 252 specifies the legal sanction for the crime of bribery as imprisonment for four to 12 years.

Bribery is deemed to have been committed if and when a person (or a legal entity) and a public official reach an agreement on the provision of a benefit, in return for the public official's performance or omission of his or her duties. Accordingly, performing the 'provision of the benefit' is not necessary for bribery to be committed. The parties' intention and their mere agreement are sufficient.

In principle, bribery can be committed with the involvement of both parties (i.e., the individual or legal entity and the public official), and both parties will be subject to criminal penalties. However, under Article 252(8) of the TPC, in order to punish an individual or

© 2017 Law Business Research Ltd

legal entity in the private sector for bribery, the recipient or requesting party must be one of the following: (1) an organisation in the form of a public institution; (2) a corporation or organisation incorporated with the participation of a public institution, in the form of a public institution; (3) a foundation operating within an organisation; (4) an association or cooperative serving a public interest; or (5) a publicly held joint-stock corporation.

If an individual (or legal entity) offers to provide a benefit to a public official but the public official refuses to receive the bribe or a public official asks for the benefit but the addressee of the request refuses to provide it, only the party who was involved in the criminal actions will be held liable, and the duration of imprisonment will be reduced.

Furthermore, a third party who helps the parties to conclude a bribery agreement or a third party to whom a benefit is provided, as requested by the public official, will be deemed an accomplice. Accomplices will also be subject to criminal penalties. In addition, under Article 253 of the TPC, if a legal entity gains benefits through bribery, it can be subject to certain security measures.[7] In addition to the applicable security measures, legal entities can also be subject to administrative fines of between 23,000 lira and 4.6 million lira, based on the Law on Misdemeanours.[8]

The crime of corruption, on the other hand, is defined under Article 250 of the TPC as: 'the public official's forcing of a person in a coercive manner, abusing his or her public authority and powers, to provide him or her or a third party with a benefit or forcing a person to promise to do so, for performing his or her duties'. The main criterion for specifying the public official's criminal actions as corrupt is their use of coercion towards the person. As described under Article 250, coercion is deemed to exist where a person provides a benefit to a public official or a third party because of concerns that, without it, the official will not perform his or her duties (at all or on time). The legal sanction for committing corruption is imprisonment for five to 10 years.

However, the TPC also stipulates that if and when coercion does not exist (i.e., if a public official convinces a person in a fraudulent manner, by abusing the trustworthiness of his or her position, to provide him or her or a third party with a benefit or to promise to do so), the public official will be sentenced to imprisonment for three to five years. Furthermore, if the public official commits this crime by exploiting the person's misunderstanding, he or she will be sentenced to imprisonment for one to three years. Article 250 of the TPC also provides that the length of the imprisonment penalty may be reduced, once the value of the benefit and the victim's economic conditions are taken into account.

iv Public administration law perspective

A public official's acceptance of gifts or other benefits can be subject to various laws, and regulations of Turkish public administration law, depending on different factors. These include the characteristics of the benefit in question, the status and duties of the public official, and the legal relationship between the relevant official and the provider of the gift or benefit.

For example, the Asset Declaration Law stipulates an asset declaration obligation that public officials must fulfil on a periodical basis. This statutory obligation aims to monitor

7 The most commonly implemented security measure in Turkey is cancellation of the legal entity's licences to conduct its operations, if the entity is active in a regulated business. Seizure of the benefits that the legal entity obtained through the crime of bribery may also be implemented as a different security measure.

8 Published in the Official Gazette dated 31 March 2005 and numbered 25772.

© 2017 Law Business Research Ltd

increases in the public official's personal assets. The Asset Declaration Law also provides that a public official who receives a gift or donation of a value exceeding 10 multiples of his or her monthly salary from any foreign country, international organisation or any other international legal entity pursuant to any international protocol, must deliver the property to the organisation in which he or she is employed.

The Civil Servants Law prohibits civil servants from requesting or receiving gifts and loans from their subordinates and third parties. As to the definition of the term 'gift', the Civil Servants Law refers to the Ethics Board's authority. The Ethics Board has published the Regulation on the Ethical Conduct Principles of Public Officials (the Ethics Regulation), which provides that:

> *[...] public officials are not allowed to accept gifts or benefits, directly or through an intermediary, from individuals or legal entities with whom they are in a business, service or benefit relationship, within the scope of their duties, either for themselves or for their relatives, any third parties or other institutions.*

Under the Ethics Regulation, 'any kind of property or interest, with or without economic value, accepted either directly or indirectly, is regarded as gifts, if they have an effect on or have the possibility to affect the impartiality, performance, decision or duty of a public official'. In this regard, depending on the merits of each case, even the provision of a meal and transportation to a business meeting with a public official may be found impermissible, if it is possible that the meal and transportation affected the public official's decision.

Under Turkish public administration law, the main criterion to consider when determining whether the provision of a gift or benefit to a public official is permissible is the 'effect' that such a gift or benefit has on the public official, rather than its size or material value. According to the Public Officials Ethics Guide, published by the Ethics Board in 2014, if a public official has doubts on whether a gift or benefit is permissible, then he or she should ask himself or herself the following question: 'If I were not a public official, and if I were not holding the position that I hold today, would I still have received this gift or benefit?' According to this guide, if the answer is 'absolutely yes', the gift can be accepted. However, if the answer is 'no' or if there are any reservations, then the gift must be declined.

III ENFORCEMENT: DOMESTIC BRIBERY

In Transparency International's Corruption Perceptions Index 2016,[9] which measures the perceived level of corruption in countries worldwide, Turkey was ranked 75th among 176 countries, with a score of 41. Since 2014, Turkey's score has dropped by four points and its rank has fallen by 11 places. This decrease highlights the importance of integrating business culture in Turkey with international ethical standards to re-establish clean and fair business conduct.

The Phase 3 Report on Implementing the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention in Turkey dated October 2014 (the Phase 3 Report) evaluated and made recommendations on Turkey's implementation and enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), as well as other related

9 www.transparency.org/news/feature/corruption_perceptions_index_2016.

© 2017 Law Business Research Ltd

instruments. In the Phase 3 Report, the OECD indicated that it has concerns regarding Turkey's level of detection and investigation of bribery in which foreign public officials are involved. The OECD emphasised that only six out of 10 accusations led to prosecution in 2014. In addition, the OECD updated the Phase 3 Report with a report titled 'Follow-Up to the Phase 3 Report & Recommendations' (the Follow-up Report)[10] in May 2017 and provided further recommendations, as well as a summary of developments in Turkey since the Phase 3 Report. According to the Follow-up Report, Turkey's written answer to the Phase 3 Report demonstrates very limited progress regarding the lack of active enforcement. Even though there is some progress regarding the recommendations on foreign bribery offences, responsibility of legal entities, sanctions, confiscation of the bribe, investigation and prosecution of the bribery offence, money laundering, accounting and tax-related issues according to the Phase 3 Report, the OECD Working Group on Bribery in International Business Transactions (the Working Group) considers that the measures taken by Turkey since 2014 constitute only a modest implementation of the recommendations, and fall short of remedying the enforcement of anti-bribery and anti-corruption laws. The Working Group emphasises the problems regarding lack of enforcement activity and the slow progress with respect to the recommendations made in the Phase 3 Report and has requested Turkey to submit a report on the implementation of the recommendations within one year.

According to the Ethics Board's annual report of 2016,[11] 145 applications were made to the Ethics Board regarding violation of ethical principles. Of these applications, 121 were rejected by the Ethics Board for procedural reasons, while 24 applications were subject to investigation. Out of these 24 applications, only five applications were concluded with detection of ethics violations.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Ratification of the OECD Convention in July 2000 has deeply affected Turkey's approach towards anti-corruption in an international context. Officers of public international organisations operating in Turkey fall within the scope of 'foreign public officials' as defined in the OECD Convention. Under Section 1, Article 4(a) of the OECD Convention, a foreign public official is defined as 'any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected, any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official and agent of a public international organisation'.

In line with the international obligations that Turkey undertook by ratifying the OECD Convention, Article 252(9) of the TPC provides that the following persons can be the offender in a crime of bribery:

a public officials who are elected or appointed in a foreign country;

b judges, jurists or other officers that are serving international or supranational courts or foreign national courts;

c delegates of international or supranational parliaments;

d persons that are carrying out public duties in foreign countries (e.g., in public institutions or public corporations of foreign countries);

10 www.oecd.org/corruption/anti-bribery/Turkey-Phase-3-Written-Follow-Up-Report-ENG.pdf.

11 http://etik.gov.tr/Portals/0/faaliyet_raporlari/faaliyetraporu_2016.pdf.

© 2017 Law Business Research Ltd

e persons or arbitrators that are appointed for dispute resolution through arbitration; and
f officials or representatives of international or supranational organisations that have been established based on international agreements.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The Financial Crimes Investigation Board (FCIB) was established in 1996, to develop policies against money laundering and evaluate suspicious transactions. Law No. 5549 on the Prevention of Laundering Proceeds of Crime[12] (Law No. 5549) requires companies and individuals operating in certain business areas to keep documents, company books and records for eight years and to notify the FCIB of any suspicious transaction. Law No. 5549 provides that transactions that are suspicious because the transferred asset may have been acquired through illegal ways or will be used for illegal purposes or transactions, and that are above a certain value to be specified by the Ministry of Finance, will be regarded as 'suspicious transactions' and must be disclosed to the FCIB.

These requirements are applicable to companies and individuals that are involved in banking, insurance, individual pensions, capital markets, other financial services, postal services, transportation, lottery and bets, currency exchange, real estate, jewellery and valuable metals, construction and transportation vehicles, artworks, antiques and notaries, sports clubs and others that are specified by the Council of Ministers. If a company or an individual fails to comply with these obligations, that company or individual will be subject to administrative or judicial fines.

Moreover, under Article 282 of the TPC, a person who transfers assets abroad that were obtained through a crime (the legal sanction for which is imprisonment for six months or more), or who uses such assets in any process to hide the illicit source of the assets or to give the impression that they have been legitimately acquired, will be sentenced to imprisonment for three to seven years and must pay a judicial fine of up to 2 million lira. In addition, a person who is not directly involved in the crime, but received, used, kept or purchased the assets and were aware of their connection to the crime, will also be sentenced to imprisonment for three to five years. If the offender is a public official, or the crime is committed as part of a criminal organisation's operations, the penalties will be doubled.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

Before the TPC entered into force on 1 June 2005, the crimes of bribery and corruption were governed under the former Penal Code,[13] which had been in force since 1926. This Code was silent on bribery committed outside Turkey. However, following Turkey's ratification of the OECD Convention in 2000, the legislature amended the Code in 2003 to align it with international standards and to correspond with Turkish individuals' and legal entities' acts of bribery in foreign countries.

Although the legislative instruments for prosecuting foreign bribery in Turkey are present, Turkey's unwillingness to follow up foreign bribery accusations remain the same as before. According to the Phase 3 Report, 10 allegations of foreign bribery have come to light

12 Published in the Official Gazette dated 18 October 2006 and numbered 26323.

13 Published in the Official Gazette dated 13 March 1926 and numbered 320.

© 2017 Law Business Research Ltd

since 2003 and Turkish authorities have taken limited investigative steps in only six cases. Three out of these six cases ended because of the foreign authorities' failure to supply sufficient evidence and one case ended in acquittal of the suspects. The Phase 3 Report criticises Turkey for not detecting and investigating allegations of foreign bribery proactively by gathering information through more diverse sources. In the Follow-Up Report, the Working Group also underlines investigation about foreign bribery. Since the Phase 3 Report, Turkey has not amended its regulations to enable all Turkish legal entities, including state-owned enterprises, to be held liable because of foreign bribery or legal entities to be held liable without prior prosecution or conviction of an individual. The Working Group further encourages Turkey to impose fines as well as imprisonment for individuals who commit bribery. The Phase 3 Report also criticises Turkey for not allocating adequate resources to specialised units in the Public Prosecutor's Office and improving these specialised units' cooperation with other public authorities. The Phase 3 Report and the Follow-Up report suggest that Turkey should adopt legislative measures to afford adequate protection to whistle-blowers, both in the private and public sectors.

On a positive note, however, the Follow-Up Report underlines that Turkey has taken steps to improve its capacity to detect foreign bribery through money laundering cases. Some significant steps have been taken to detect and investigate bribery by raising awareness and training reporting entities, such as the FCIB and law enforcement authorities. However, the Working Group believes that politically involved individuals should make more effort to comply with the Turkish anti-money laundering regulations.

According to Transparency International's findings in the OECD Progress Report on Exporting Corruption,[14] Turkey rarely enforces domestic and international legal instruments when combating foreign bribery.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Turkey has signed and ratified several conventions against corruption. Under Article 90 of the Constitution, multinational treaties that have been duly ratified by the Turkish parliament and are deemed a part of Turkish domestic law. The primary international conventions are:

a the OECD Convention;
b the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
c the United Nations Convention against Corruption;
d the United Nations Convention against Transnational Organized Crime;
e the Council of Europe Criminal Law Convention on Corruption;
f the Council of Europe Civil Law Convention on Corruption; and
g the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

Turkey has also been a member of the Group of States against Corruption (GRECO) since 2004, the Financial Action Task Force since 1991 and the OECD Working Group on Bribery since 2000. GRECO is a group within the Council of Europe, established to monitor member states' legislation to ensure their compliance with the Council of Europe's anti-corruption regulations. GRECO has published several reports pertaining to the effective

14 www.issuu.com/transparencyinternational/docs/2015_exportingcorruption_oecdprogre/1.

© 2017 Law Business Research Ltd

implementation and review of Turkish legislation on anti-corruption and anti-bribery, and providing recommendations in this regard. These recommendations are related to the 'incrimination' and 'transparency of political funding' aspects of Turkish laws. After multiple reports and evaluation rounds, GRECO analysed the evolution of Turkish laws in its latest report, the 'Third Interim Compliance Report' (the Interim Report).[15] GRECO categorised six out of eight recommendations regarding the 'incrimination' issue as 'implemented satisfactorily'. However, the remaining two recommendations are still categorised as 'partly implemented'. The first of these two remaining recommendations is about the criminalisation of active and passive bribery in the private sector. According to GRECO, the TPC requires the intervention of a public institution or for there to be an impact on public interest to penalise business-to-business bribery. The Interim Report suggests extending the scope of the anti-bribery provisions to ensure that it includes 'any persons who direct or work for, in any capacity, any private sector entities'.

Furthermore, the second recommendation that has not yet been executed by Turkey is related to effective regret. Under Article 254 of the TPC, if a person who commits bribery informs the authorities before they become aware of the crime, and if the individual returns the benefit in its entirety, this individual shall not be punished for bribery. GRECO recommends that (1) this provision is amended and the total exemption from punishment is abolished and (2) the following clarification is provided: 'the exemption from punishment is not granted in cases where effective regret is invoked after the start of preliminary investigations'. As these two important recommendations have still not been adopted by Turkey, the overall conclusion of the Interim Report is that Turkey 'has not made any new tangible progress' for the effective implementation of the recommendations.

On another note, GRECO also provided nine recommendations regarding the 'transparency of (political) party funding' issue in its Third Round Evaluation Report.[16] GRECO categorised these nine previous recommendations as 'not implemented satisfactorily'. GRECO's main recommendations regarding the transparency of party funding were related to the following: annual accounting of political parties, transparency of political parties' campaigns, obligation to disclose donations for both political parties and election candidates, more effective monitoring and supervision of political financing, and introduction of more effective and dissuasive sanctions for infringements. As Turkey has not implemented these recommendations, GRECO stated in the Interim Report that Turkey 'has not made any new tangible progress' and that the current result is 'clearly disappointing'.

GRECO concludes the Interim Report stating that the current level of compliance with the GRECO recommendations is still 'globally unsatisfactory'.

VIII LEGISLATIVE DEVELOPMENTS

Turkey needs to develop stronger preventive measures. The main reason for Turkey's apparent weakness when it comes to challenging bribery and corruption is the lack of a central body that coordinates the development and supervision of the implementation of anti-corruption and anti-bribery policies. Even though there are public agencies that are authorised to observe the application of anti-corruption laws, such as the Ethics Board and the FCIB, there is no coordination between these agencies.

15 https://rm.coe.int/third-evaluation-round-third-interim-compliance-report-on-turkey-incri/168072247a.

16 https://rm.coe.int/16806c9c31.

© 2017 Law Business Research Ltd

Furthermore, under the Asset Declaration Law, appointed public officials and political figures must declare their assets. However, Global Corruption Barometer 2015–2016[17] data indicate that political parties, the parliament and the media are perceived as the most corrupt fields in Turkey. The main reason for this is the wide scope of immunities of parliamentary members. In this respect, adopting measures against this strong immunity system and corruption in the public sector is very significant for Turkey's fight against corruption. Additionally, according to the Global Corruption Barometer, 18 per cent of households pay bribes in order to access basic services. This highlights the need to establish an anti-corruption culture in Turkey and raising awareness to the problem.

Turkey became a member of the Open Government Partnership (the Partnership) in 2012. It was planning to increase integrity and transparency in the public sector by performing its undertakings. In this context, Turkey decided to set up an official public website, where the government's projects and strategies concerning anti-bribery and anti-corruption will be published. Turkey also made the decision to organise recommendation platforms, workshops and conferences on transparency and openness in public, for both private and public sectors. However, in 2016 the Steering Committee of the Partnership resolved to render Turkey an inactive member of the Partnership, through a unanimous resolution of the Steering Committee. Owing to the change in its membership status, Turkey will not be entitled to vote in the Partnership elections and will only be able to attend the Partnership's events as an observer for learning purposes.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

The TPC is the primary legislation concerning corruption and bribery. Issues concerning corruption are generally governed under separate pieces of legislation, such as the Asset Declaration Law, the Civil Servants Law and the Ethics Rules Law.

The Turkish Commercial Code, the Customs Law, the Smuggling Law, the Public Tender Law and the Law on Independent Accountant Financial Advisers and Certified Public Accountants also provide legal instruments for anti-corruption and anti-bribery.

X COMPLIANCE

In Turkey, there is no specific law or guidance applicable to compliance programmes. However, there is the Regulation on Program of Compliance with Obligations of Anti-Money Laundering and Combating the Financing of Terrorism. However, this Regulation is solely binding for banks, capital markets, brokerage firms and insurance companies.

Companies issue their own anti-corruption guidelines and implement compliance programmes to ensure better protection against corruption. Any corporate compliance programme implemented by entities conducting activities in Turkey must adhere to Turkish laws. These programmes should be tailored according to the needs of the local cultures in which the companies operate. They should also be able to communicate in the local language, so that all guidelines, etc., can be followed in a clear and concise way by all employees. A strong commitment by senior management to compliance programmes encourages employees at all levels. For this reason, it is important for senior managers and employees to have an in-depth

17 www.transparency.org/whatwedo/publication/people_and_corruption_europe_and_central_asia_2016.

© 2017 Law Business Research Ltd

understanding of compliance policies. Further, an effective programme should involve monitoring and supervision. As compliance within the private sector is a relatively new topic of discussion in the Turkish business world and there is no legal provision regulating business-to-business corruption, there is no established practice in Turkey on this issue. However, the Turkish private sector has been more persistent in ensuring that a compliance culture is established and is increasingly taking the necessary actions to ensure it complies with national and international anti-corruption and anti-bribery regulations. In this respect, multinational companies tend to implement anti-bribery compliance systems based on the rules of the US Foreign Corrupt Practices Act and the UK Bribery Act 2011. In addition, the OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance (2010) is one of the most comprehensive guidelines publicly available for compliance programmes.

XI OUTLOOK AND CONCLUSIONS

Having received 'alarming' recommendations from various international institutions and groups, it would be helpful for Turkey to acknowledge its weak points. In recognising these weaknesses, Turkey could take more decisive legislative action against bribery and corruption. However, developing a strong compliance culture will require more than simple legislative changes by the government; there will need to be significant investment by the private sector, which is already paying a high price for the lack of sufficient legislation and prosecution in Turkey.

© 2017 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

OKAN DEMİRKAN

Kolcuoğlu Demirkan Koçaklı

Mr Okan Demirkan graduated from Sussex University School of Law in 2000. He spent 10 years working in the Istanbul, Ankara and London offices of a major Turkish law firm. He joined Kolcuoğlu Demirkan Koçaklı in 2010 as a named partner. He has significant experience in energy and infrastructure, arbitration and litigation. He currently leads Kolcuoğlu Demirkan Koçaklı's dispute resolution and energy practices and has significant know-how and extensive experience in both the consultancy and dispute resolution aspects of anti-bribery and anti-corruption.

Over the course of his career of more than 17 years, Mr Demirkan has dealt with several ministries and regulatory authorities, including the Ministry of Energy, Ministry of Transport, Ministry of Labour, Ministry of Environment, Civil Aviation Authority, Competition Authority, Banking Authority, Public Tender Authority and Energy Market Regulatory Authority. He has provided advice in the fields of anti-corruption, anti-bribery and compliance for clients operating in the private sector.

Kolcuoğlu Demirkan Koçaklı is a corporate member of the Turkish Ethics and Reputation Society (TEİD) (www.teid.org), which is Turkey's leading civil society institution in the area of anti-corruption and ethics. Mr Demirkan has been a member of TEİD's board of directors since early 2015. Mr Demirkan is also among the faculty of TEİD's "Academy", training Turkish companies' lawyers, internal auditors and compliance officers on Turkish anti-bribery and anti-corruption regulations.

BEGÜM BİÇER İLİKAY

Kolcuoğlu Demirkan Koçaklı

Ms Begüm Biçer İlikay graduated from Galatasaray University School of Law in 2012 and was admitted to the Istanbul Bar Association in 2013. She joined Kolcuoğlu Demirkan Koçaklı in August 2016. She has broad experience in international and domestic anti-bribery investigation procedures.

BAŞAK İSLİM

Kolcuoğlu Demirkan Koçaklı

Ms Başak İslim graduated from Strasbourg University School of Law in 2013 and subsequently completed her Master 1 degree in International and European Law and LLM

© 2017 Law Business Research Ltd

degree in International and European Business Law at Strasbourg University. She joined Kolcuoğlu Demirkan Koçaklı in early 2016 and works on general corporate law, anti-bribery and anti-corruption related matters.

KOLCUOĞLU DEMİRKAN KOÇAKLI

Sağlam Fikir Sokak Kelebek Çıkmazı No. 5
Esentepe-Şişli 34394
Istanbul
Turkey
Tel: +90 212 355 99 00
Fax: +90 212 355 99 99
odemirkan@kolcuoglu.av.tr
bbicer@kolcuoglu.av.tr
bislim@kolcuoglu.av.tr
www.kolcuoglu.av.tr

© 2017 Law Business Research Ltd

Strategic Research Sponsor of the
ABA Section of International Law

ISBN 978-1-910813-93-5

© 2017 Law Business Research Ltd