



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

TURKEY: PHASE 1
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION

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RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Turkey signed the Convention on 17 December 1997 and deposited the instrument of ratification 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 (Official Gazette No: 24990).

The Convention and the Turkish legal system

The fifth paragraph of article 90 of the Turkish Constitution states that: “*International treaties, entered into force according to the required legal procedures have the force of domestic laws and the Constitutional Court has no jurisdiction for a constitutional review on international treaties*”. Accordingly, the Turkish authorities indicate that the Convention will have the same legal force as the domestic law.

Convention as a Whole

In order to meet the requirements of Article 1 of the Convention, Turkey established criminal liability for the active bribery of a foreign public official through amendments to the Turkish Criminal Code. The “*Amendment to the Law regarding Prevention of Bribery of Foreign Public Officials in International Business Transactions*” No: 4782 of 2 January 2003, amended articles 4, 211 and 220 of the Turkish Criminal Code (Law no: 765 dated 1 March 1926). In particular article 2 of Law 4782/03 established a new offence (active foreign bribery) by adding a third paragraph to Article 211 of the Turkish Criminal Code and extending the punishment provided for active bribery of a national public official (article 213) to “*...officials whether appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a public function in international business transactions....*”.

The Turkish authorities provided the Secretariat with two versions of the implementing legislation translated into English and French respectively.^{1 2} It should be noted that the English text differs from

1. The French version of article 211/3 is as follows:

« *Tout fait d'offrir, ou de promettre ou d'octroyer des avantages indus directs ou par intermédiaire prévu par le premier paragraphe, aux agents ou aux fonctionnaires nommés ou élus dans un pays étranger des administrations ou des entreprises publiques qui détiennent des fonctions législatives ou administratives ou judiciaires, ou à ceux qui font des missions internationales dans ce pays, afin qu'on accomplisse ou s'abstienne d'accomplir une fonction publique ou en vue d'obtenir ou conserver un avantage indu, dans le cadre des transactions commerciales internationales, sont considérés aussi comme des actes de corruption* ».

2. The English version provided by the Turkish authorities is as follows:

“*The offering or the promising or the giving of the benefits directly or indirectly specified in the first paragraph to the officials whether appointed or elected and carrying out a legislative, administrative*

the French text in the description of a few elements of the offence. Although the French text is closer to article 1 of the OECD Convention, the Turkish replies to the OECD questionnaire are based on the English version of the implementing legislation. Consequently, the latter is the basis for the legal analysis which follows.

- Article 1 of Law 4782/03 amended and aligned article 4 of the Turkish Criminal Code regarding jurisdiction with articles 211 and 213 of the Turkish Criminal Code.
- Article 3 of Law 4782/03 amended the text of article 220 of the Turkish Criminal Code and established corporate liability for the bribery offences. The new text is as followed: *“If the bribery offences in this article are committed by authorised representatives of corporate bodies besides they are punished, the corporate body shall also be punished by heavy fine from two to three times of the benefit derived from crime”*.
- Articles 4 and 5 of Law 4782/03 by amending Article 85 of the Public Procurement Law and Article 2/a of the Law on Prevention of Money Laundering (Law No: 4208 dated 13 November 1996) aligned these pieces of legislation with article 211 and 220 of the Turkish Criminal Code.

ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

General Description of the Offence

The Turkish Criminal Code (Law no: 765 dated 1 March 1926) sets out provisions related to bribery in the 3rd subchapter (Bribery) of the 3rd Chapter (Crimes against the State Administration). In article 211 the offence of bribery is defined as follows:

Passive Bribery – ARTICLE 211

1. Any money, gift or any other benefits under any other designation received directly or indirectly, by any person who is considered a public officer in the application of Criminal Code in order to do or not to do anything which he is required to do or not to do by law or regulations as well as any exorbitant difference between the market value of any movable or immovable property they have sold, purchased or transferred for such purposes and the amount actually received or paid shall be considered as bribe.

2. All benefits received by those who, pursuant to the specific laws applicable to them, shall be considered public officials in certain cases even if they do not come under the scope of the definition of public officials in this Act and those who are subject to disciplinary action applicable to public officials in terms of some responsibilities and liabilities thereof, as a result of any of the procedures described in the preceding paragraph shall also be considered as bribe.

or judicial function in a foreign country or exercising a public function in the international business transactions for whether[sic] obtaining or retaining the business or taking improper advantage or keeping them shall be regarded as bribery”.

Active Bribery of Foreign Public Officials (ARTICLE 211)

3. The offering or the promising or the giving of the benefits directly or indirectly specified in the first paragraph to the officials whether [sic] appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a public function in the international business transactions for whether obtaining or retaining the business or taking improper advantage or keeping them shall be regarded as bribery.

As mentioned above, the offence of (*active*) bribery of a foreign public official (article 211/3) has been established by adding a third paragraph to article 211 of the Turkish Criminal Code. In particular, paragraph 1 of article 211 provides for the definition of “*benefits*” in article 211/3.

The crime of active domestic bribery is regulated in article 213 of the Turkish Criminal Code. This provision is (sub)divided into two paragraphs, one being the receiving or giving of a bribe *in violation* of the public official’s duty (qualified bribery), the other the receiving or giving of a bribe for an act to be fulfilled *in conformity* with the public official’s duty (simple bribery):

Qualified Bribery – ARTICLE 213

1. Any person, who has promised or offered a bribe to any person defined in Article 211 in order to ensure that he refrains from doing anything he is obliged to do or takes any action he has been prohibited from doing shall be punished by imprisonment from four to twelve years depending on the degree of breach of law or regulations or whether the action in question has been taken in whole or in part.

Simple Bribery

2. Any person, who has given a bribe or provided other benefits in order to ensure that any legal action is taken, shall be sentenced to a heavy fine equal to ten times the amount of the money or the benefit he has given or provided.

The offence of qualified (aggravated) bribery as defined in article 213/1 establishes the offence of bribing a foreign public official by reference to article 211/3. Thus, in summary, the foreign bribery offence is comprised by article 213/1, which establishes the offence of qualified bribery and prescribes a sanction, and applies the sanction to the bribery of foreign public official by reference to article 211/3, which in turn incorporates by reference the description of “*benefits*” in article 211/1 on the passive bribery of a domestic official. It should be noted that the same express reference is not present in the text of article 213/2 which is also applicable to foreign bribery. The linkage between the provisions could be confusing, and, additionally, article 213/1 on qualified bribery, 213/2 on simple bribery and 211/3 on foreign bribery establish self-contained bribery offences, which are not necessarily based upon the same elements. In the discussion that follows, article 211/3, 213/1 and 213/2 will be analysed as if they are separate offences.

1.1 The Elements of the Offence

General Defences

The general defences are listed together in the general part of the Turkish Criminal Code (articles 46-60). In particular, mental illness (art. 46-47), legitimate (self-) defence, state of necessity, or execution

of a legal order (art. 49) can either mitigate or eliminate the criminal responsibility of the accused. “Force major”, “force” and “threat and intimidation”, even if not expressly defined by the Turkish Criminal Code, are considered general defences excluding criminal liability.

Specific Defence

Article 215³ of the Turkish Criminal Code (effective regret and non-violation) sets out specific provisions regarding situations where either the briber or the public official declines to complete the illicit action, and reports to the relevant authorities.

In particular, article 215/2 states that a briber who informs the competent authorities before his unjust request is fulfilled “*shall not be held responsible*”. The Turkish authorities state the purpose of this defence is to “prevent offences of bribery, reward active contrition and disclose information about the person who was bribed”.

As the Convention does not provide for the possibility for the defendant to circumvent liability in case of “active regret”, it appears that the application of this defence may lead to a loophole in the implementation of the Convention.

1.1.1 any person

The bribery offences in article 213 apply to “any person”. Turkey explains that according to the text of this paragraph it is understood that “anyone” can be an offender. The offender may be a public official, as well as anyone else.

1.1.2 intentionally

Under Turkish Law, the offence of bribery, both in respect of qualified and simple bribery, is an intentional act. With respect to qualified bribery under article 213/1, the Turkish authorities state that the offender must be aware of the link of causality between the benefit provided and the end to be attained. Even if the realisation of the end requested from the public official is theoretically possible but practically impossible, the moral component is realised.

Turkey explains that the mental element does not encompass the notion of *dolus eventualis*.

1.1.3 to offer, promise or give

Article 211/3 refers to “*offering, promising and giving*”, whereas article 213/1 (qualified bribery) only refers to “*promising and offering*”. Turkey states that the differing terminology between article 211/3 and 213/1 is the result of translating from the Turkish language and that article 213/1 (qualified bribery) also comprises the conduct of “*giving*”.

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3.
 1. *If the person before or after receiving the bribe but not fulfilling the request even partially and before any inquiry informs the competent authorities or returns the money or other things shall not be held responsible.*
 2. *Likewise, the briber who informs the competent authorities before fulfilled his unjust request shall not be held responsible and the money and the other things he has given shall be taken and returned to him.*

The Turkish authorities explain that the offence of simple bribery (article 213/2) is only covered where a bribe is given. They also confirm that the acts of “offering” and “promising” in the case of simple bribery are only covered as an attempt. (See also 1.3 on “Attempt and Completion of the Crime”).

The Turkish authorities clarify that the offence of bribery is committed where the briber is responding to a solicitation from the foreign public official. The Turkish authorities also confirm that there would be an offence of bribery where the offer was made before the entry into force of the implementing legislation but the bribe was actually given after such entry into force. In particular, the crime shall be considered consummated at the time of “giving”.

1.1.4 any undue pecuniary or other advantage

In the description of the “pecuniary advantage”, article 211/3 refers to the term “benefit”, which in turn refers to paragraph 211/1 on passive bribery, wherein benefits are more fully defined as “any money, gift or any other benefits”. On the other hand, article 213 refers simply to “bribe”. The Turkish authorities state that the notion of “benefit” implies any kind of advantage that may ameliorate the situation of the official either materially or morally. In this regard Turkey specifies that anything that puts the official in a relatively better position with respect to the situation prior to the transfer constitutes a benefit and can be the subject of a bribe. In other words, benefits are not necessarily material; benefits providing moral and even sexual satisfaction are also in this category. However, the lack of uniformity between the description of this element in article 211/3 and 213/1 could create problems of interpretation.

1.1.5 whether directly or through intermediaries

Article 211/3 of the Turkish Criminal Code describes the offering, promising and giving of benefits referring to the term “directly or indirectly”. It should be noted that the Turkish legislator has not used comparable terminology under article 213 on qualified and simple bribery. Turkey confirms that the bribery offences cover the situation of bribing through an intermediary. Moreover, pursuant to article 216 of the Turkish Criminal Code “the intermediary in an act of bribery shall be considered the accomplice of the briber (...)”.

1.1.6 to a foreign public official⁴

Article 211/3 refers to the bribery of “officials whether appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a public function in international business transactions”. The Turkish authorities state that the term “exercising a public function in international business transactions” includes persons “exercising a public function for a foreign country, including for a public agency or public enterprise” as well as “officials or agents of a public international organization”, as required by the Convention. However, the fact that either the functional foreign public official or the international official is not expressly covered raises doubts on whether Turkey fully meets the standard of the Convention on this point.

1.1.7 for that official or for a third party

The Turkish authorities explain that the language “*directly or indirectly*” in article 211/3 covers the situation where the benefit is directed to a third party, as well as the case where a bribe is made through an intermediary. However, Turkey qualifies this with the statement that article 211/3 only

4. Note that the French translation of this particular element of the offence, provided by the Turkish authorities, is more consistent with Article 1 of the Convention in this regard (see footnote 1).

applies to situations where the bribe is for the benefit of a third party if there is a “relationship” between the official and the third party. It is unclear to what extent this qualification would create a gap in coverage as the term “relationship” has not been defined.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties⁵

Article 211/3 does not provide any definition of this element of the offence. Article 213/1 (qualified bribery) requires that the official “refrains from doing anything he is obliged to do or takes any action he has been prohibited from doing....” The Turkish authorities confirm that the notion of abuse of official function articulated in article 213/1 covers an improper use of discretion (e.g. the awarding of a contract to a company that is not the best qualified bidder). Turkey also states that the offence extends to *any use* of the public official’s position, whether or not within the official’s authorised competence but in relation thereto (article 1(4) c of the Convention).

1.1.9/1.1.10 in order to obtain or retain business or other improper advantage/in the conduct of international business⁶

The relevant terminology used in article 211/3 of the Turkish Criminal Code is “whether obtaining or retaining the business or taking improper advantage or keeping them”. In addition, the offence covers the bribery of officials “exercising a public function in the international business transactions”. Neither article 213/1 nor article 213/2 of the Turkish Criminal Code makes any reference to these elements. The Turkish authorities explain that the language used in article 211/3 of the Turkish Criminal Code fully complies with the relevant language of the Convention.

The wording “whether obtaining or retaining the business or taking improper advantage or keeping them” seems to be consistent with article 1 of the Convention. In addition, if there is no clear requirement that the business obtained or retained be “in the conduct of international business”, article 211/3 might go beyond the standard of the Convention in this regard. If however, the wording with respect to the applicable categories of foreign public officials (i.e. those “exercising a public function in the international business transactions”) means that some sort of international transaction must be the goal of the bribe, it might be the case that certain types of advantages in international business that do not per se constitute a transaction (e.g. preferential tax treatment or a license to open up a business) would not be covered.

1.2 Complicity/Conspiracy

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Article 1.2 further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

5. Note that the French translation of this particular element of the offence, provided by the Turkish authorities, is more consistent with Article 1 of the Convention in this regard (see footnote 1).

6. Note that the French translation of this particular element of the offence, provided by the Turkish authorities, is more consistent with Article 1 of the Convention in this regard (see footnote 1).

Turkey explains that there are general principles in the Turkish Criminal Code governing complicity. The sixth chapter (Participation in Felonies and Misdemeanours) of the first book of the Turkish Criminal Code (Principles) concerning complicity provides for the following categories of complicity: abetting (art. 64) and participation in a crime (article 65). Turkey indicates that the said provisions apply to the offence of bribery of foreign public officials.

The Turkish authorities state that anybody abetting (primary complicity) another person to commit an offence is subject to the same punishment as the principal. The notion of participation (secondary complicity) in a crime covers the actions of inciting, giving instructions and facilitating the commission of the crime. The severity of the punishment for the person who commits one of the said acts will be reduced but if the commission of the offence was not possible without his/her participation, the person shall not benefit from any reduction.

Article 216 of the Turkish Criminal Code states that “The intermediary in an act of bribery shall be considered the accomplice of the briber or the party receiving the bribe for whom he/she had acted.”

According to Turkey, the distinction between intermediation and the other forms of complicity is well established in the case law and also applies to the offence of bribery of a foreign public official. If it cannot be determined on whose behalf a person acts, the element to be taken into account should be his/her intention. If he/she acts with the intention to intermediate for the briber, he/she will be sentenced according to article 213 of the Turkish Criminal Code. If he/she acts with the intention to intermediate for the public official, he/she will be sentenced according to the article 212 of the Turkish Criminal Code. If the person acts on behalf of both the briber and the public official, he/she may be held responsible for both crimes (active and passive bribery) on the assumption that he/she was associated with both offenders.

The Turkish Criminal Code neither refers to the act of aiding nor to the authorisation of an act of bribery of a foreign public official. The Turkish authorities confirm that the acts of aiding and authorising foreign bribery are both covered under the notion of primary/secondary complicity. The notion of conspiracy does not exist in Turkish law.

1.3 Attempt and Completion of the Crime

Article 61 of the Turkish Criminal Code deals with the notion of attempt: anybody who commences the execution of an intended felony by effective means and who, due to reasons beyond his/her control, cannot complete the acts necessary to complete the felony, commits an attempt, and the punishment will be reduced. Similarly, article 62 states that where a person completes all the acts for the execution of the felony he/she intended to commit, but where due to reasons beyond his/her control the felony does not come into existence, he/she commits an attempt and the punishment will be reduced. The Turkish Criminal Code distinguishes between the following notions:

- Incompletion of the action/non-accomplishment of the result under the control of the agent (active contrition) where the agent will not be punished;
- Incompletion of the action/non-accomplishment of the result beyond the agent’s control where the punishment will be reduced. Turkey explains that the “hindrance” which prevents the agent from completing the action or accomplishing the result of the offence can be “physical, mental or through the intervention of a third party”. The distinction between incomplete attempt and full attempt **also** depends on whether the said hindrance will occur before the completion of the action (incomplete attempt) or

before the accomplishment of the result (full attempt). In either case the punishment will be reduced.

As for bribery, Turkey explains that an attempt may be punishable for the acts of giving and receiving a bribe, as long as this act is not a proposal. Turkey provides the following hypothetical example: If a person offers money and demands the execution of a certain act, not only does he/she commit an attempt but he/she makes a proposal at the same time. The Turkish authorities also state that as long as the offer of the bribe does not reach the official, and it is possible to separate the acts, an attempt might have been committed.

ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

Turkey explains that the liability of corporate bodies has been established in article 220 of the Turkish Criminal Code as amended by Law No. 4782/03:

“If the bribery offences in this section are committed by authorized representatives of corporate bodies besides they are punished, the corporate body shall also be punished by heavy fine from two to three times of the benefit derived from crime”.

Turkey clarifies that article 38 of the Turkish Constitution, which states that criminal responsibility “shall be personal” does not preclude the criminal responsibility of legal persons. In particular, the Turkish Constitutional Court has recognized the principle of criminal liability of legal persons and its compatibility with article 38 of the Turkish Constitution. Turkey also indicates that the criminal liability of legal persons has been established in respect of other offences such as articles 15 and 16 of Law 3167/85 (Regulation of the Payments through cheques and protection of the bearer of the cheques) and article 7 of Law 3713/91 (Law on Struggle against Terror).

Legal Entities

The Turkish authorities do not provide a list of the types of entities to which article 220 applies, although they mention that it applies to both private law and public legal persons.

The Turkish legislation excludes the application of criminal liability to the State, and the Turkish authorities explain that in cases where a public official commits a criminal offence in complicity with a state body, he/she will be held criminally responsible, the State body only having a concurrent civil responsibility.

Standard of Liability

According to the Turkish Law, the following two conditions must be present in order to trigger the criminal liability of a body corporate:

1. The act of bribery must be committed by an *authorized representative*, and
2. The bribe must have been given for the benefit of the legal person.

Authorised Representative

Turkey states that an authorised representative is a person who is *legally linked* to the body corporate. Turkey states that an express authorisation for the act of bribery is not required. The authorised representative can be any employee with a delegation of power within a business. Turkey also states that no proof of the complicity (association) between the natural person and the body corporate is required in order to punish the body corporate.

Procedure

The Turkish authorities clarify that the determination of the liability of the legal persons can take place in the same hearing for the natural person, and that the normal powers for investigating a criminal offence (e.g. search and seizure) are available in relation to legal persons.

The Turkish authorities clarify that the body corporate can be sanctioned where the natural person who committed the offence could not be punished for procedural reasons (e.g. amnesty, statute of limitations death).

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

The Turkish Criminal Code sets out sanctions for domestic and foreign bribery. As noted above, article 211/3 of the Turkish Criminal Code defines the offence of the bribery of foreign public officials, whereas article 213 provides for sanctions for natural persons and article 220 for legal persons.

(a) Natural persons

The qualified bribery of a foreign public official (art. 213/1) is subject to four to twelve years of imprisonment depending on the “degree of breach of law or regulations or whether the action in question has been taken “in whole or in part”.

Turkey states that the notion of “degree of breach of law or regulations...” as mentioned in art. 213/1 serves as a standard rule for the judge to determine the punishment “*in concreto*”.

The Turkish Law does not provide any pecuniary sanction (apart from confiscatory measures) for natural persons in cases involving the “qualified” bribery of foreign public officials (213/1). Moreover, article 213/2 does not provide for deprivation of liberty in cases of “simple” bribery of

foreign public officials, thus preventing extradition in such cases. The absence of the sanction of deprivation of liberty for all forms of simple bribery raises concerns about whether the requirement under the Convention of “effective, proportionate and dissuasive” criminal sanctions has been met.

In article 214⁷ of the Turkish Criminal Code the public function of the official is regarded as an aggravating circumstance and “*punishment shall be increased from one-third to half according to the degree of breach of the law and regulation*”.

Moreover, specific aggravating and mitigating circumstances for bribery offences are established in article 219⁸ of the Turkish Criminal Code. Depending on either the nature of the offender (commanding or administrative/judicial authority) or the value of the bribe or benefit, the penalties are respectively aggravated (“*increased by half*”) or mitigated (“*reduced by two thirds*”).

According to article 281 of the Turkish Criminal Code, the abuse of authority in committing an offence is regarded as an aggravating circumstance also applicable to the offences of bribery.

(b) Legal persons

Article 220 of the Turkish Criminal Code provides for a “heavy fine from two to three times the benefit derived from the crime”. The foregoing aggravating and mitigating circumstances (described in relation to natural persons) are applicable as well to legal persons.

It is unclear whether a sanction can be imposed where the benefit cannot be quantified because it was, for instance, in the form of a contract which had not yet been executed, or the obtaining of a licence, as well as where no quo was delivered but through the offer, promise or gift the briber intended to obtain a substantial benefit.

7. Article 214:

If the person, who has been offered the bribe is an authority that has administrative competence, a judge and [sic] a public prosecutor or is entrusted by a governmental department with a special task or public notary, lawyer, attorney at law, the punishment shall be increased from one-third to half according to the degree of breach of the law and regulation.

8. Article 219 of the Turkish Criminal Code is as follows:

1. The penalties imposed in case of committing the offences in the Articles from 202 to 218 by an authority that has administrative competence, a judge and [sic] a public prosecutor or charged with a special duty by official agency shall be increased by half.

2. If the bribe received by a person, who has been entrusted by a court or a judicial office or other governmental departments with a legal duty, or by any of the persons defined in Article 211, has influenced a final court judgment, then the offenders shall be subject to provision of the paragraph (1).

3. Where the bribe or benefit accepted or given in connection with any of the offences defined in Articles 202 to 218 has a low value, the sentence to be reduced by half and if its value is very low, then it shall be reduced by two thirds.

4. The persons who have been convicted under Articles 202, 205, 208, 209, 212, 213, 214, 216, 218 and 219 shall also be prohibited from accepting employment in any governmental department during the rest of their lives.

3.3 Penalties and Mutual Legal Assistance

Turkey explains that in cases of bribery of a foreign public official, penalties provided for by the Turkish Criminal Code are sufficient to enable mutual legal assistance. Turkey indicates that the sanction provided for by art. 213/2 is sufficient to enable MLA. Turkey also states that there is no legal barrier in applying legal assistance with respect to bribery offences committed by legal persons.

3.4 Penalties and Extradition

Turkey explains that in cases of qualified bribery of a foreign public official (art. 213/1), penalties provided for by the Turkish Criminal Code are sufficient to enable extradition.

On the other hand, article 213/2 (simple bribery) does not include the sanction of deprivation of liberty, and thus extradition could not be granted in such a case.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

(a) Seizure

Article 86 of the Criminal Courts Procedure Law states that objects, which may be utilised as evidence for the investigation or objects whose confiscation may be ordered may be kept under protection. If the holder declines to voluntarily transfer these objects they are seized. Turkey indicates that the notion of *objects* as set out in article 86 includes the bribe and the proceeds of bribery.

According to article 90 of the Turkish Criminal Procedure Code the judicial authority decides on seizure. However, in cases of urgency, prosecutors or security officers assisting them may seize without judicial authority. The competent judge is to be notified in order to obtain his/her approval within three days.

(b) Confiscation⁹

Article 217 of the Turkish Criminal Code, which regulates the confiscation of property and benefits involved in the offences of bribery, states:

“In case of not existing any provision contrary in the law, the money, goods or other things or the assets and values obtained from these shall be confiscated”.

Turkey explains that the scope of the said provision is very wide and covers not only the confiscation of the bribe itself, but also any benefit derived from the act of bribery.

Turkey explains that confiscation under article 36 and 217 of the Turkish Criminal Code also applies to convicted legal persons and third parties.

9. Article 36 of the Turkish Criminal Code is the general provision on confiscation which states that:

“1. In case of conviction, articles used or prepared to be used in the commission of the offence, or produced as a result of the commission of the act, will be seized and confiscated provided they belong to parties involved in the act (...)”

Turkey indicates that confiscation under article 36/1 is mandatory.

3.8 Civil Penalties and Administrative Sanctions

Pursuant to article 219/4 of the Turkish Criminal Code, the persons who have been convicted under articles 202, 205, 208, 209, 212, 213, 214, 216, 218 and 219 shall also be permanently prohibited from accepting employment in any governmental department.

Turkey states that ancillary sanctions applicable in addition to criminal punishment can be found in other pieces of legislation. In particular, Public Procurement Law No: 4734/02 provides for sanctions such as exclusion from the procurement process or prohibition from participating in any tender carried out by the public institution where a legal or natural tenderer *“is established to be involved in acts such as to conduct or attempt to conduct procurement fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, corruption, bribery or other actions”*.

Similarly the Law on Public Sector Procurement Contracts No: 4735/02 sanctions the act of corrupting any transactions pertaining to the contract through *“fraud, intrigue, promises, threats, using influence, or arranging for (personal) gain or other means or attempting the same”*. Depending on the seriousness of the said practices bidders are subject to the sanction of temporary or permanent prohibition from participating in any bidding processes carried out by any public organisation or institution.

Turkey states that with respect to cases of bribery under the laws No: 4734 and No: 4735, no distinction is made on the basis of the nationality of the public official involved. Turkey indicates that foreign bidders convicted abroad for bribery offences will be excluded from participating in any bidding processes carried out by any Turkish public organization or institution.

According to article 76 of the Turkish Constitution natural persons who have been convicted of bribery offences cannot be *“elected deputies, even if they have been pardoned”*. However, it is not clear whether this provision also applies to foreign bribery offences.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Article 3 of the Turkish Criminal Code establishes territorial jurisdiction as follows:

1. *“1. Whoever commits a crime in Turkey shall be punished in accordance with Turkish Law, and a Turk, even if sentenced in a foreign country for a commission of a crime, shall be retried in Turkey.*
2. *A foreigner, who has been sentenced in a foreign country for a crime, shall be retried in Turkey upon the request of the Minister of Justice.”*

It should be noted that article 3 of the Turkish Criminal Code does not expressly establish territorial jurisdiction where an offence is committed in part in Turkish territory.

Turkey explains that in accordance with the principle of territoriality established in article 3 of the Turkish Criminal Code, if the offence of bribery of a foreign public official is committed partially or completely in Turkey, the suspect or the suspects are tried in Turkey and they are punished according to the Turkish laws, even if they have been sentenced abroad. However, the Turkish authorities have not provided supporting case law for this assertion.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Nationality jurisdiction is available as follows pursuant to the Turkish Criminal Code:

1. A person, who commits a felony during and in connection with the performance of an office or mission on behalf of Turkey in a foreign country, shall be prosecuted in Turkey (article 4.3).
2. A Turkish national who commits a felony in a foreign country that is punishable by a minimum of three years of imprisonment under Turkish law shall be punished according to Turkish law, if found in Turkey (article 5.1).
3. A Turkish national who commits a felony in a foreign country that is punishable by a minimum of less than three years of imprisonment shall be prosecuted if found in Turkey, only upon the complaint of the injured party or the foreign government (article 5.2).
4. Where the victim of the offence is a foreigner, “the act must also involve a punishment according to the law of the country where it was committed” (article 5.3).

Thus pursuant to article 5.1 nationality jurisdiction is applicable in respect of qualified bribery, since it is punishable with four to twelve years of imprisonment. In the case of simple bribery, nationality jurisdiction is only applicable upon the complaint of the injured party or the foreign government (article 5.2), or where the offence is committed by a person during and in connection with the performance of an office or mission on behalf of Turkey (article 4.3).

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Turkey explains that dual proceedings regarding a case may be terminated through mutual agreement, taking into consideration either the provisions of the European Convention on the Transfer of Proceedings in Criminal Matters or the principle of reciprocity. Turkey has been transferring or receiving proceedings by implementing the said European convention for some time.

4.4 Review of Current Basis for Jurisdiction

Turkey states that its current basis for jurisdiction over the foreign bribery offence is effective in the fight against the bribery of foreign public officials.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention demands that the investigation and prosecution of the bribery of a foreign public official be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

5.1 Rules and Principles Regarding Investigations and Prosecutions

(a) Generally

The investigation and prosecution of bribery of a foreign public official is governed by the same rules and principles that govern any criminal investigation or prosecution. The relevant provisions are included in the Criminal Procedure Law (No. 1412 dated 4 April 1929) (articles 148, 153, 156, 163 and 253).

As soon as a prosecutor receives information concerning an offence, he/she must initiate a preliminary investigation (assisted by the police) in the name of the State. The procedures concerning the preliminary investigation are kept confidential, for the purpose of preventing the obstruction of evidence. If the evidence collected as the result of the preliminary investigation is sufficient for initiation of public prosecution, the prosecutor initiates the public prosecution by presenting the indictment.

In accordance with Article 148 of the Criminal Procedure Law, “unless otherwise foreseen by the Law”, the prosecutor is obliged to initiate a public prosecution if there is enough evidence. Article 148 also states that the Minister of Justice may give an order to the prosecutor to initiate a public prosecution.

The trial phase is in principle open to the public and the evidence is heard orally. Pursuant to article 253 of the Criminal Procedure Law, the possible verdicts include acquittal, conviction, refusal, dismissal and “sojourn”. For its execution, the verdict must be final.

(b) Immunity from Prosecution

Turkey explains that pursuant to article 83 of the Turkish Constitution, Members of Parliament are immune from prosecution unless an “absolute majority” of the Grand National Assembly repeals his/her membership or lifts immunity. Clarification has not been provided by the Turkish authorities about whether other authorities such as the President of the Republic and members of the judiciary are immune from investigation and/or prosecution.

5.2 Considerations such as National Economic Interest

Turkey has not addressed the question of whether the investigation and prosecution of foreign bribery could be influenced “by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved”.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Articles 102-120 of the Turkish Criminal Code Law establish the statute of limitations for criminal offences. The Turkish Criminal Code distinguishes between the statute of limitations regarding the trial and the execution of the sentence. The former is based on the maximum limit of the punishment foreseen by the relevant law in abstracto, the latter on the sanction imposed in concreto by the court. Taking into account suspensions and interruptions, the statute of limitations cannot be extended for more than the period resulting from the addition of one-half of the periods prescribed by article 102.

As a result, the statute of limitations regarding the trial of qualified bribery of a foreign public official (article 213/1) is ten years, and this period cannot exceed 15 years. The statute of limitation for the offence of simple bribery of a foreign public official is five years and cannot exceed 7 years 6 months¹⁰.

As for the statute of limitation linked to the trial, it begins to run on the date of perpetration of the criminal act, for offences that are consummated, and for felonies attempted or not consummated, on the date of perpetration of the last felonious act. These periods may be interrupted upon the conviction of the accused, issuance of warrants of seizure, arrest or a subpoena, questioning of the accused by judicial authorities, rendition of a decision to initiate the final investigation, or the submittal of an indictment to the court. In case of interruption, a new period begins to run which is also controlled by another application of the new statute of limitations. The trial must have been completed within the limitations period prescribed by law.

The statute of limitations regarding the execution of sentence is determined with respect to the nature and the duration of the punishment imposed by courts. It begins to run on the date the sentence becomes final or its execution is interrupted. Pursuant to article 112 of the Turkish Criminal Code, the punishment with respect to the bribery of a foreign public official shall be set aside with the lapse of twenty years (qualified bribery) and ten years (simple bribery) respectively.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

10. Article 102

Except as otherwise prescribed by the law, public prosecution shall be dismissed with the lapse of the following periods:

{...}

“3. ten years, in the case of felonies punishable by heavy imprisonment for more than 5 years and less than 20 years or imprisonment for more than five years or disqualification for life to hold public office”.

“4. five years, in the case of felonies punishable by heavy imprisonment or imprisonment or banishment or temporary disqualification to hold public office for not more than five years or by heavy fine”.

7.1 Domestic and Foreign Bribery

Turkey enacted Law no. 4208 on the Prevention of Money Laundering on 19 November 1996, pursuant to which it is a crime to launder the proceeds of a range of serious crimes. The offences of bribery (articles 211-220) have been included in the list of the predicate offences by article 5 of Law No: 4782/03, which amended article 2 of the Law on Prevention of Money Laundering.

The offence of money laundering is committed where the proceeds of crime are:

- (a) Converted, concealed, used or subject to cross-border transactions by the person who committed the predicate offence;
- (b) Acquired, possessed, used, converted, or concealed by third parties knowing that the property in question represents the proceeds of crime; or
- (c) Subject to cross-border transactions, disguised, converted, or transferred in order to help the offender to evade the legal consequences of the predicate offence, or subject to other actions to prevent their detection.

The Turkish authorities state that “regardless of where the bribery occurred” laundering the proceeds of crime in violation of the provisions of the Law on the Prevention of Money Laundering constitutes the offence of money laundering.

The notion of the proceeds of crime (“dirty money”) covers money and monetary instruments, property and proceeds derived from predicate offences. It also covers all the economic advantages and assets derived from the conversion of money, monetary instruments, property and proceeds from one form to another, including currency conversion. Turkey states that the bribe payment and the proceeds of bribery are considered proceeds of crime and shall be confiscated pursuant to article 7 of the Law on Prevention of Money Laundering.

For an offence to be committed under article 2, the act in question must be performed “knowing” that the assets constitute the proceeds of crime. This would rarely apply to third parties as they would normally have a belief but not absolute knowledge that the assets represent the proceeds of crime.

The Turkish authorities indicate that a conviction regarding the predicate offence is not a prerequisite to proceed against the money launderer, and that the proceedings for the predicate offence and the offence of money laundering can be carried out separately.

The offence of money laundering is punished by imprisonment from two years to up to five years and also a fine of “one fold” of the money laundered. All the property and the assets in the scope of the proceeds of crime including the returns derived from them are subject to confiscation, and in case the property and assets cannot be seized, their corresponding value shall be confiscated. The statute of limitations with respect to the offence of money laundering is fifteen years.

Turkey explains that the legislative authority for the liability of corporate bodies for the offence of money laundering is set forth in article 7 of the Law on Prevention of Money Laundering, which also applies to corporate bodies where the foreign bribery offence constitutes the predicate offence. The Turkish authorities explain that the Law provides for a fine from five hundred million Turkish liras (EUR 262 or USD 331) to up to five billion Turkish liras (EUR 2 620 or USD 3 310) for corporate bodies.¹¹ These amounts are adjusted each year in accordance with the Tax Procedure Law.¹² The

11. The conversions into EUR and USD are based on the exchange rate on 22 October 2004.

conviction of the managers of the corporate body is a prerequisite to proceed against the body corporate.

Article 7 paragraph 6 of the Law on the Prevention of Money Laundering reduces the penalty from one-half to two-thirds where “the money laundering offence is committed by one of the ascendants or descendants or wife-husband or sister-brother in order to disguise the predicate crimes from which the dirty money is stemmed...”. According to the Turkish authorities the basis for this reduction is article 38 of the Turkish Constitution.¹³

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1 Maintenance of Books and Records

Several different legal sources provide guidance on Turkish accounting standards. The basic requirement that bookkeeping must be maintained by companies is derived from the Turkish Commercial Code, last revised in 1956. Chapter V of Book One provides for a minimum level for bookkeeping. In 1994 the Ministry of Finance introduced a Uniform Chart of Accounts with the purpose of regulating the basic concepts and principles of accounting and for the preparation of financial statements. The purpose of the Chart of Accounts is to provide for a true and fair reflection of the operations and results for companies. The Turkish Tax Procedures Code is relied on to provide extensive rules and requirements for businesses regarding the recording of financial information including sanctions for the failure to properly record financial information. The Turkish authorities refer to the rules and authority of the Tax Code to support the prohibition of off-the-books or improperly identified transactions.

For companies operating within the securities market the Capital Markets Board has regulatory and supervisory authority. The Capital Markets Board has the authority to issue accounting standards for all companies subject to its authority. The banking sector in Turkey is guided by accounting standards which are issued by the Banking Regulation and Supervision Agency (BRSA).

The Tax Code represents the source law for how and what information must be recorded and maintained. General accounting rules and their implementation are guided by the General Communiqué on the Implementation of the Accountancy System #1, promulgated in the Official Gazette No 21447 of 26 December 1992, which covers basic accounting and accounting policy, financial tables and how to record transactions. Article 172 of the Tax Code requires companies to keep books and records. Article 221 provides guidance on what information is to be kept. A book of daily records, a book of inventory and the transactions must be recorded in a certain number of days in accordance with articles 215-219 of the Tax Code.

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12. The Turkish authorities provide that for the year 2004 these amounts were adjusted from 29 707 959 000 Turkish liras to 297 079 593 000 Turkish liras.
 13. Article 38 of the Turkish Constitution states that “no one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence...”.

8.2 Companies subject to these Laws and Regulations

All companies in Turkey are subject to the Turkish accounting principles provided within the uniform chart of accounts and the laws regarding accounting incorporated into the Tax Code. However, sole proprietors are only required to comply with the 'Basic Concepts of Accounting', a basic component of the chart of accounts. Registered and listed companies are subject to the rules and regulations of the Capital Markets Board. Under Turkish law joint stock companies with 250 shareholders or more are considered public and subject to the Capital Markets Law. Banks, insurance companies, special finance institutions, financial leasing companies, stocks and bonds investment funds and intermediary institution and investment partnerships are required to use different accountancy techniques.

8.3 Penalties for Omissions or Falsifications

The making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or the hiding of such bribery is not expressly prohibited under Turkish Law.

Turkey states that the failure to maintain registered books within a certain time frame is subject to a fine in accordance with articles 352 and 353 of the Tax Code. If the books are incorrect or misleading, if they are counterfeited, hidden or falsified, there is the potential for imprisonment and a fine pursuant to article 359 of the Tax Code. A false document is defined as a document certifying an action or operation which does not exist or is misleading.

Turkey explains that the Tax Procedure Law also provides for fines for violations of the accounting standards, the uniform account plan, and the rules and procedures concerning the preparation of financial tables. Pursuant to the foregoing, fines are available for producing unrecorded accounts, making unrecorded transactions, recording non-existent expenses, entering incorrect liabilities, or using false documents.

8.4 Auditing

(a) Independence of Auditors and Reporting Obligations

Turkey passed the Independent Accountancy Law in 1989, which applies to accountants and auditors. There is no formal licensing, qualification, or education requirement to be met to qualify an auditor. In addition, there is no mandatory requirement that the audit committee should be independent.

Article 43 of the Independent Accountancy Law prohibits accounting professionals and their employees from disclosing information acquired in the course of performing their duties. However, according to the provision, information about offenses should be disclosed to the competent authorities. In addition, the Law provides an exception to the confidentiality requirements regarding investigations or inquiries performed by judicial and tax authorities.

(b) Internal Audit and Company Controls

Chapter IV of Book Two of the Turkish Commercial Code contains the requirement that joint stock companies appoint at least one auditor, where the number of shareholders is greater than twenty. The task of the auditor is to check the transactions and accounts of a company and ensure that the company is in compliance with the law and its articles of association. There is no formal licensing, qualification or education requirement to be met to qualify as an auditor. In addition, there is no mandatory requirement that the audit committee should be independent.

The Turkish Commercial Code imposes certain duties and requirements upon directors of the company, and makes them liable in the event of failures or misrepresentations. Company directors under the Code are required to exercise due diligence, care, foresight and good faith. Directors are jointly liable if payments for shares are not exact, dividends fictitious, or books are not kept in accordance with the law. Newly appointed board members must inform the auditor of irregularities committed by their predecessors; otherwise they share liability.

(c) External Audits

Companies listed on the Istanbul Stock Exchange (ISE) must have an external audit performed on an annual and semi-annual basis with this information submitted to the Capital Markets Board and the Istanbul Stock Exchange. Audits are based on guidance provided by the Capital Markets Board and financial statements, and they are to be presented based on Turkish Accounting Standards.

The Banking Regulation and Supervision Agency (BRSA) issues auditing principles and procedures in respect of auditors independence in compliance with international auditing standards and in a more detailed manner for banks and special finance institutions. According to these principles, in addition to annual accounts, quarterly accounts of banks and special finance institutions are audited by independent auditing firms.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person that are within the scope of the Convention.

In addition to the requirements of article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

Turkey indicates that there is no specific law regulating mutual legal assistance. Article 90 of the Turkish Constitution states that the “*international agreements duly put into effect carry the force of law*”. Turkey also indicates that multilateral and bilateral international agreements regarding the area of mutual legal assistance carry the force of law and are an integral part of Turkish domestic law.

9.1.1 Criminal Matters

Turkey indicates that it is able to provide effective legal assistance regarding natural and legal persons pursuant to the bilateral and multilateral treaties or conventions on MLA to which Turkey is a party,¹⁴

14. Turkey advises that it has concluded treaties on MLA with the following countries: Bosnia-Herzegovina, China, Egypt, India, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Morocco, Syria, Tajikistan, Turkish Republic of Northern Cyprus, Tunisia, United States and Uzbekistan. At the time of the Phase 1 examination (February 2004), Turkey was negotiating treaties on MLA with the following countries: Japan, Kyrgyzstan, Mongolia, Pakistan, Qatar, South Africa and Turkmenistan.

including the European Convention on Mutual Legal Assistance and its additional protocol and the “UN Convention against Trafficking of Drugs and Psychotropic Substances”.

In the absence of an agreement or treaty, Turkey provides MLA pursuant to the principle of reciprocity, on a case-by-case basis and pursuant to the supervision of the Turkish Ministry of Justice, which is responsible for responding to requests for mutual legal assistance. Where mutual legal assistance is rendered on the basis of reciprocity the requests should not have a political nature or be related to political or military offences. Furthermore, the implementation of the requests cannot threaten the sovereignty, security, public order, human rights and other interests protected by Turkish laws. The Turkish authorities state that in the absence of a specific multilateral/bilateral treaty or agreement on MLA they would consider the Convention as a sufficient legal basis for providing MLA for the foreign bribery offence.

The conventions on mutual legal assistance in criminal matters and the Turkish Criminal Procedure Code set out the provisions governing the execution of requests of mutual legal assistance. Both the Ministry of Justice and Courts are the relevant authorities involved in the procedure.

The types of MLA typically available under the bilateral and multilateral treaties include the following: forwarding the objects of crime; sending the copies of the records, documents and investigation documents; taking the testimonies of the accused person, witness, intervener and complainant; interrogating the accused person; notification of court decisions, indictment and the dates of trials; search and seizure procedures; forwarding the records of convictions and bringing the accused persons, witnesses and the experts before the judicial authorities of the requested party.

9.1.2 Non-Criminal Matters

Turkey explains that based on article 90 of the Turkish Constitution it can provide mutual legal assistance to other Parties in non-criminal matters concerning legal persons. In this context article 9 of the Convention is considered an integral part of Turkish domestic law.

9.2 Dual Criminality

Under the European Convention on Mutual Legal Assistance in Criminal Matters mutual legal assistance is conditional on the existence of dual criminality. Turkey states that requests for MLA are fulfilled in compliance with the said Convention as well with other treaties to which Turkey is a party. Turkey states that if the offence for which assistance is sought is within the scope of the OECD Convention, dual criminality is deemed to exist.

9.3 Bank Secrecy

Turkey states that bank secrecy is not a reason to refuse legal assistance. Banks cannot refuse the disclosure of information on banking operations to the courts. Pursuant to article 22 of the Banks Act, refusing to provide information and documents requested by the relevant authorities, providing false information in documents addressed to them and omissions in recording banking operations are punished by imprisonment and heavy fines. Turkey explains that the provisions governing MLA will be applied to requests from foreign judicial authorities concerning the disclosure of information on banking operations.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

Turkey indicates that there is no specific law regulating extradition. Article 90 of the Turkish Constitution states that the “*international agreements duly put into effect carry the force of law*”. Turkey states that multilateral and bilateral international agreements signed in the area of extradition carry the force of law and they are an integral part of Turkish domestic law.¹⁵

Turkey is party to the “European Convention on Extradition” (ECE) which entered into force on 18 April 1960. Turkey states that the offence of qualified bribery of a foreign public official is an extraditable offence in accordance with Turkish domestic law and the European Convention on Extradition. Article 213/2 (simple bribery) does not include the sanction of deprivation of liberty. Turkey states that therefore pursuant to article 2/1¹⁶ (extraditable offences) of the ECE, extradition would not be granted. However, Turkey indicates that the principle “*aut dedere aut iudicare*” (to extradite or to prosecute) shall be applied to requests for extradition concerning the simple bribery of a foreign public official (213/2). Turkey also states that article 5 (on nationality jurisdiction) of the Turkish Criminal Code will be applied in cases where a Turkish national commits the offence of simple bribery of a foreign public official abroad.

10.2 Legal Basis for Extradition

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

As noted above, Turkey states that in the absence of an extradition treaty with another Party, it will consider the Convention as a legal basis for extradition.

The Turkish Council of ministers is the final authority for granting extradition. Criminal Courts, prosecutors and the Ministry of Justice are also involved in the procedure, which is carried out pursuant to article 9 of the Turkish Criminal Code. The provisions of the 1957 European Convention on Extradition will be also applied.

15. Turkey advises that it has extradition treaties with the following countries: Algeria, Australia, Bosnia-Herzegovina, Egypt, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Morocco, Pakistan, Syria, Tajikistan, Turkish Republic of Northern Cyprus, Tunisia, United States and Uzbekistan. At the time of the Phase 1 examination of Turkey (February 2004), Turkey was negotiating treaties on extradition with the following countries: India, Japan, Kyrgyzstan, Qatar, Saudi Arabia, Sri Lanka and Turkmenistan.

16. Article 2/1 of the European Convention on Extradition states as follows:

“Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months”.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

In line with article 38 of the Turkish Constitution, article 9 of the Turkish Criminal Code states that a Turkish national cannot be extradited to a foreign country. Turkey indicates that where nationality is the sole reason for declining a request to extradite a person for the bribery of a foreign public official, the case shall be submitted to the relevant authorities for investigation. In this respect, Turkey again refers to article 5 of the Turkish Criminal Code, which states that a Turkish national who commits abroad an offence punishable with imprisonment of at least three years under Turkish Law, shall be punished “*according to Turkish Law, if he is found in Turkey*”.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

Turkey requires dual criminality pursuant to article 1 of the European Convention on Extradition. However, as noted above, Turkey indicates that it shall deem dual criminality to exist if the offence is within the scope of the Convention.

On the other hand, the requirement of dual criminality will not be recognised in the case of simple bribery of foreign public officials (art 213/2 Criminal Code) as Turkey deems that this offence is not covered by the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Turkey indicates that the authority responsible for the duties mentioned in article 11 of the Convention is the Turkish Ministry of Justice.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

There is no express disallowance of the deduction of a bribe for tax purposes in the Turkish legislation. Turkey explains that according to income and corporate tax laws “a bribery expense is not deductible for both individual and corporation tax payers”; in particular because there is no explicit rule permitting them to be deducted. However no supporting case law has been provided in this regard. Turkey also provides that in order for an expense to be tax deductible it should be directly related to either earning or maintaining income and it should be documented in accordance with the laws and regulations. It is unclear whether tax deductibility is only disallowed where there has been a conviction for the bribery of a foreign public official under the Turkish Criminal Code.

The list of allowable expenses in the Income Tax Law and the Corporate Tax Law contains categories of expenses under which it appears possible to conceal bribe payments (e.g. “communication expenses”, “bureau expenses” and “general business expenses of all kinds”). The Turkish authorities state that nevertheless it is unlikely that a tax payer would claim a deduction for a bribe payment given that by so doing the bribery offence could be revealed to the law enforcement authorities.

Turkey states that finance inspectors and tax auditors are obliged to report suspicions of bribery offences to prosecutors.

EVALUATION OF TURKEY

General Remarks

The Working Group appreciates the high level of co-operation of the Turkish authorities throughout the examination process and commends their efforts for providing explanations of all relevant legislative provisions.

The Working Group is of the opinion that overall the Turkish implementing legislation conforms to the standards under the Convention. However, some concerns remain with regard to the specific issues identified below.

Specific Issues

1. Offence of bribing a foreign public official

a) The nature of the offence

The Working Group noted the particularly complex structure of the bribery offences and took note of the explanation by the Turkish authorities in this respect. The Working Group welcomes the statement by the Turkish authorities that the Turkish Parliament is now considering an amendment simplifying the offences.

b) The defence of “effective regret”

Article 215/2 of the Turkish Criminal Code (effective regret) states that a briber who informs the competent authorities before his unjust request is fulfilled “*shall not be held responsible*”. The Turkish authorities pointed out that the purpose of this defence is “to prevent offences of bribery, reward active contrition and disclose information about the person who was bribed”. Nonetheless the Working Group remained concerned that the application of this defence may lead to a loophole in the implementation of the Convention. The Working Group considers the issue to be of a broader nature. It agreed to revert to it in Phase 2 in order to examine the practical effect of such a provision.

c) To Offer, promise, or give

The Turkish authorities explain that the offence of simple bribery is constituted only in the giving of a bribe. The Turkish authorities confirm that the acts of “offering” and “promising” in the case of simple bribery are only covered by attempt. Consequently, it does not meet the standard of article 1 of the Convention. The Working Group recommends that the Turkish legislation be amended so that the acts of “offering” and “promising” are incriminated as consummated offences in the case of simple bribery offence.

d) Definition of foreign public official

Article 211/3 of the Turkish Criminal Code refers to the bribery of “officials whether appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a public function in international business transactions”. It is the position of the Turkish authorities that the term “exercising a public function in international business transactions” includes persons “exercising a public function for a foreign country, including for a public agency or public enterprise” as well as “officials or agents of a public international organization”, as required by the Convention.

The Working Group remained seriously concerned that either the functional foreign public official or the international official is not covered. The Working Group is not able to determine whether Turkey meets the standard on this point. The Working Group therefore recommends that Turkey take remedial action.

2. Sanctions

a) Natural persons

The Turkish Law does not provide any pecuniary sanction (apart from confiscatory measures) for natural persons in cases involving the “qualified” bribery of foreign public officials (213/1). On the other hand article 213/2 does not provide for deprivation of liberty in cases of “simple” bribery of foreign public officials, thus preventing extradition in such cases. Furthermore, the Working Group considers that the absence of the sanction of deprivation of liberty for all forms of simple bribery raises concerns about whether the requirement under the Convention of “effective, proportionate and dissuasive” criminal sanctions has been met. Accordingly, the Working Group recommends to the Turkish authorities that they introduce the sanction of deprivation of liberty also for the simple bribery offence.

b) Legal persons

The Working Group notes that with respect to legal persons, Turkey introduced the system of corporate criminal liability for bribery offences, including bribery of foreign public officials. However, there has been no case law yet. The Working Group considers that this issue be followed-up in Phase 2 in particular to determine whether there have been difficulties in evaluating the benefit derived from the crime.

3. Tax deductibility

According to the Turkish authorities the deduction of bribes is not allowed because there is no explicit rule permitting them to be deducted, and that in order for an expense to be tax deductible it should be directly related to either earning or maintaining income and it should be documented in accordance with the laws and regulations. Nevertheless, the Working Group considers that a bribe payment could be considered such an expense. Moreover, the list of allowable expenses in the Income Tax Law and the Corporate Tax Law contains categories of expenses under which it might be possible to conceal bribe payments (e.g. “communication expenses”, “bureau expenses” and “general business expenses of all kinds”). However, the Turkish authorities assured the Working Group that in order for an expense to be tax deductible it should be documented in accordance with the laws and regulations, and

that it is unlikely that a tax payer would claim a deduction for a bribe payment given that in so doing the bribery offence could be revealed to the law enforcement authorities.

The Working Group invites the Turkish Government to provide guidance to their tax officials on how to distinguish bribe payments from legitimate business expenses, along the lines of the OECD Bribery Awareness Handbook for Tax examiners.

The Working Group takes note of the clarification provided by the Turkish authorities and will revert to this matter in Phase 2 of the evaluation process.