



# THE EUROPEAN, MIDDLE EASTERN AND AFRICAN INVESTIGATIONS REVIEW **2017**

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# Turkey

## Gönenç Gürkaynak and Ç Olgı Kama ELIG, Attorneys-at-Law

Turkey, as an emerging economy, has been responsive to the increasing anti-corruption efforts being made throughout the world. While it has an adequate legal framework in place, Transparency International's Corruption Perception Index (CPI) for 2016 showed that Turkey's ranking dropped during 2016. In the CPI results, Turkey lost one point<sup>1</sup> (42 points in 2015 and 41 in the 2016 results) and moved from the 66th least corrupt country to the 75th. This is following a drop of three points in 2015 results, which moved Turkey from the 64th least corrupt country to 66th.<sup>2</sup> On the global front, according to the OECD's 2015 Data on Enforcement of the Anti-Bribery Convention published in November 2016, between 1999 and December 2015, Turkey has not sanctioned any individual or legal person as a result of a foreign bribery case.<sup>3</sup> Similarly, Transparency International's Exporting Corruption Report published in 2015 indicates that in terms of enforcement of the OECD Anti-Bribery Convention, Turkey falls under the 'little or no enforcement' category.<sup>4</sup> The OECD Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Turkey demonstrated that the OECD was concerned about Turkey's level of detection and investigation of foreign bribery offences.<sup>5</sup>

This chapter will explore Turkey's current anti-corruption efforts and their outcomes, and will discuss anti-corruption recommendations for foreign investors wishing to conduct business in emerging economies countries.

### The anti-corruption framework in Turkey

This section will tackle Turkey's efforts in fighting local and foreign corruption, from its legal framework and its evaluation, to administrative and civil society efforts and touching upon Turkey's role in current global anti-corruption agenda.

Very significant changes in Turkey's legal framework have taken place in the last 20 years. Keeping up with international developments, Turkey has signed and ratified all territorially applicable anti-corruption treaties, namely:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) dated 17 December 1997, which Turkey signed in 1997 and ratified in 2000;
- the Council of Europe Criminal Law Convention on Corruption dated 27 January 1999. Turkey signed this document in 2001 and ratified it in 2004;
- the Council of Europe Civil Law Convention on Corruption dated 4 November 1999, which Turkey signed in 2001 and ratified in 2003;
- the United Nations Convention Against Transnational Organized Crime dated 15 November 2000, signed in 2000 and ratified in 2003;
- the United Nations Convention against Corruption dated 31 October 2003, signed in 2003 and ratified in 2006; and
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and

on the Financing of Terrorism, signed in 2007 and ratified in 2016.

In addition to the foregoing, Turkey has participated in the international anti-corruption initiatives through its membership of the Group of States against Corruption overseeing the states' compliance with the Council of Europe's anti-corruption standards, since 1 January 2004.

As a result, Turkey's anti-corruption legislation was amended in line with the international standards in this regard. The OECD Convention's influence has been particularly significant in remodeling the definition and the consequences of the crime of bribery in Turkey, owing to the work of the OECD Convention's monitoring body OECD Working Group on Bribery (WGB).

Although the OECD Convention is predominantly focused on criminalising the bribery of foreign public officials and therefore promotes an extraterritorial application of the anti-bribery laws, the OECD Convention has contributed greatly to changing the legislative landscape in the field of anti-bribery.

The legislative efforts of Turkey from the ratification of the OECD Convention to date include the following:

- increased sentences for the crime of bribery;
- bribery of foreign public officials became a crime under the Turkish Criminal Code (TCC);
- offering or promising bribes was criminalised;
- the scope of definition of foreign public officials was broadened;
- the provisions of the TCC granting leniency to perpetrators of the crime of bribing foreign public officials were abrogated; and
- despite the general principles of Turkish law not allowing corporations to be held criminally liable, administrative liability was eventually imposed on corporations whose representatives or persons acting on their behalf commit the offence of bribery.

From the administrative policies perspective, the Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight against Corruption was published in the Official Gazette on 30 April 2016 by the Turkish Prime Ministry (Circular), following the expiration of the Strategy on Increasing of Transparency and the Strengthening of the Fight Against Corruption (the Strategy). In 2012, Turkey had become a member of the Open Government Partnership Initiative (OGPI), however, recently its membership has acquired 'inactive' status.

### The Circular

The Strategy was accepted by a cabinet decree on 22 February 2010 to be enforced between 2010 and 2014, recognising that the subject of corruption needs to be tackled from social and economic angles alongside the laws.<sup>6</sup> The Circular succeeded the Strategy and the new Action Plan annexed to the Circular shall be implemented between 2016 and 2019. Pursuant to the Circular, a Commission is appointed to approve the action plans within the scope of the Circular and

the Executive Council is to execute and coordinate the action plans effectively. The action plan has three chapters, namely precautions for prevention, precautions for enforcement of sanctions and precautions for enhancing social awareness.

### The OGPI

Turkey became a member of the OGPI in April 2012. The OGPI shares the same principles of accountability and transparency for an improved quality of governance. Turkey's undertakings within the framework of the OGPI have included increasing integrity and transparency in the public sector and improving the quality of public services. Within the OGPI framework, Turkey undertook to open a public website where the government will publish the project and strategies used in the fight against corruption, allow public debate on the matter, provide transparency on public expenditure and citizens' participation in the process of development policies. Turkey also undertook to create an electronic public tender platform.<sup>7</sup> Moreover, Turkey promised to organise 'Recommendation Platform for Transparency and Openness in Public' workshops and conferences for both the public and private sectors and civil society, carry out risk analysis to detect the areas at risk of corruption, and take preventive and deterrent measures afterwards. The plan also included measuring the efficiency of the mechanisms in place to increase integrity and transparency, and to address the perception of corruption that prevails among citizens and the private sector. The desired and planned transparency in participatory processes is expected to create barriers to corruption. However, on 21 September 2016, the Steering Committee of the OGPI designated Turkey's OGPI status as inactive, since Turkey failed to deliver a national action plan since 2014.<sup>8</sup>

In addition to the above-mentioned legislative and administrative efforts, the civil society has joined forces in the fight against corruption. Civil society organisations publish articles, conduct research and help to raise public awareness against corruption by creating discussion platforms.

The private sector is remarkably active in the fight against corruption, due to the US Foreign Corrupt Practices Act and the UK Bribery Act, both milestones in the extraterritorial reach of foreign legislation. Since multinational enterprises conducting business in Turkey are also bound by the foreign legislation, they observe their businesses' compliance with the foregoing in addition to the local laws in Turkey, thus creating a dual front in the fight against corruption. Consequently, the private sector's efforts may help to create and maintain an anti-corruption culture among companies and raise awareness within the business field.

Despite the above-mentioned efforts on the legislative, administrative and private sector fronts, global and local studies and surveys indicate that Turkey has not yet reached its goals in the field of anti-corruption.

The fall of Turkey's ranking by a decrease of three points in 2015 followed by a drop of one point in 2015 in the Transparency International CPI and its status change in OGPI are indicators of Turkey's anti-corruption outlook. The OECD WGB's Phase 3 Report on Turkey repeats its previous criticisms about Turkey's lack of enforcement of foreign bribery cases and the uncertainty about corporate criminal liability (ie, whether the conviction of a real person is a prerequisite to that of a legal person is not clear). The WGB has expressed its concerns about Turkey's lack of proactivity in detecting, investigating and prosecuting acts of foreign bribery and is concerned about the fact that Turkish authorities were unaware of certain foreign bribery allegations that gained massive media coverage in the foreign press. The Phase 3 Report questions whether the

prosecution of foreign bribery cases would be improperly influenced by concerns of a political nature.

Turkey took on the G20 and B20 presidencies in 2015. The 2015 B20 summit aimed to bring the businesses of the G20 economies together and tailor the G20 agenda to their problems and interests. The fight against corruption has been included in the B20 agendas since the B20 Korea summit of 2010. Traditionally, anti-corruption constituted a significant item in the agendas of both the G20, whose aim is to ensure economic cooperation, and the B20. B20 2015 under the Turkish presidency tackled the issue of anti-corruption among other important agenda items and raised awareness of anti-corruption initiatives in Turkish businesses and drew public attention to the issue of corruption through the media coverage of the event. The B20 2015 summit was an important opportunity for Turkey to strengthen its position in the global anti-corruption arena and to prove to the international business world that Turkey is willing to eradicate corruption, provide a safer business environment and welcome investors from all around the world.

### Preventive tools

Like all emerging economies, Turkey needs to receive foreign investment, focus on growth and create a level playing field for all business actors in order to allow new businesses and new ideas to flourish. The key to achieving this depends on transparency and accountability on a large scale. On the governmental front, this may be established through adequate control and audit mechanisms and an efficient legal framework for the protection of whistleblowers.

For investors interested in conducting business in emerging economies, simply relying on that country's legislative framework may not be sufficient. Investors may be put off by a country's corruption rankings, but they are not deprived of the tools that could solidify the ground for their investments and the establishment of a sustainable business. Below are examples of tools that investors or companies may use to prevent corruption when conducting business in emerging economies.

Once entering the business scene in an emerging economy, investors should conduct in-depth third-party due diligence and establish their own compliance programmes to avoid the risks of corruption.

### Know the culture

At the initial stage of investment, investors should first conduct the necessary research. Familiarising themselves with the culture of the local company they intend to invest in should not be neglected, for instance in Turkey, an investor should know that gift giving is a cultural concept and the perception of corruption may differ among individuals. This familiarisation will also be useful to ensure compliance with the anti-corruption programme and the training stage that will be explained below.

### Due diligence

It is common for a foreign investor to merge with or acquire a successful or promising local company and enter the market through that channel. Prior due diligence and risk analysis are crucial before any transaction. Conducting adequate merger and acquisition due diligence may suppress, or at least decrease, the risks of merging with or acquiring a corrupt company and suffering the consequences in both the local and foreign arena. The due diligence investigation should include the review and assessment of the target company's credentials and, most importantly, its public procurement history, if applicable. The background check of its shareholders, managers and

employees to detect any proximity with persons carrying out public duties or to assess their ability to adapt to corporate compliance is a significant stage and a good indicator of the target company's business manners.

Due diligence investigations and background checks are not specific to the initial stage of merging or acquiring. They are of use at the subsequent stages of conducting business with third-party business counterparts, for instance in specific projects or joint ventures, to identify the risks that may be associated with a particular third party. Moreover, obtaining anti-corruption undertakings from third-party business counterparts may provide a safety net against corruption. Especially in the case of public procurement contracts, running a check for conflicts of interest between the third-party business counterpart and the relevant public official would be considered prudent.

### Anti-corruption compliance programmes

Foreign investors should issue their own anti-corruption compliance programmes and guidelines to strengthen their position and ensure better anti-corruption protection. The programmes and guidelines should be tailored to meet the needs of the local culture in order to make sure that no act falls through the cracks (ie, the guidelines should be prepared in the local language and respond to every question an employee might have regarding a certain type of conduct). Programmes and guidelines should be adapted and compatible with the geography of the country, the size, sector, industry and type of the company. The managers and employees who will represent the company in the field and act on the company's behalf should gain an in-depth understanding of the company policies as well as risks and consequences of corrupt acts. The implementation of the compliance policies should be the responsibility of all levels of the company. The tone adopted from the top should be enforced, internalised and encouraged by the mid-level officers who work closely with the employees in the field. The managers and mid-level officers will thereby contribute to the introduction of a corporate culture of anti-corruption.

### Training

Another step towards securing a corruption-free business is the training of the employees of the target company or those of the third-party business counterparts. For the sake of efficiency, training should include a thorough presentation of the definition, risks and consequences of corrupt acts and real-life examples to discourage

employees against corrupt acts embedded in everyday business transactions that may be wrongfully considered standard practices. Face-to-face training with the employees' input is always more effective than online training, which may be preferred due to cost efficiency. Training should inform employees of the requests that could be made by third parties that they should ignore.

### Controls and monitoring

Investors should also set up robust control and monitoring mechanisms to supervise the implementation of the corporate anti-corruption policies in place. Companies should carry out thorough and periodic audits to check that the risks have not materialised. Using technology as a preventive control mechanism may be time-efficient: having automated systems that reject transactions unless controlled and approved by an upper level officer may reduce the risk of corruption. Implementing whistleblower protection is another method of control: employees may disclose what they consider to be against the company's anti-corruption policies without fearing retaliation or disciplinary action by the company. The corporate guidelines should clearly indicate how and whom to approach in case of a suspected act of corruption. Establishing an anonymous hotline where the employees and third parties can report corrupt acts of company employees could constitute a useful control and warning mechanism.

It is important to have the above-mentioned mechanisms in place to reduce the consequences of potential risks that foreign investors may face while doing business in any emerging economy.

### Notes

- 1 [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016).
- 2 [www.transparency.org/cpi2015](http://www.transparency.org/cpi2015).
- 3 [www.oecd.org/daf/anti-bribery/WGB-Enforcement-Data-2015.pdf](http://www.oecd.org/daf/anti-bribery/WGB-Enforcement-Data-2015.pdf).
- 4 [www.transparency.org/exporting\\_corruption/Turkey](http://www.transparency.org/exporting_corruption/Turkey).
- 5 [www.oecd.org/turkey/oecd-seriously-concerned-about-turkey-s-level-of-detection-and-investigation-of-foreign-bribery.htm](http://www.oecd.org/turkey/oecd-seriously-concerned-about-turkey-s-level-of-detection-and-investigation-of-foreign-bribery.htm).
- 6 [www.resmigazete.gov.tr/eskiler/2016/04/20160430-13.pdf](http://www.resmigazete.gov.tr/eskiler/2016/04/20160430-13.pdf).
- 7 [www.opengovpartnership.org/country/turkey](http://www.opengovpartnership.org/country/turkey).
- 8 [www.opengovpartnership.org/blog/open-government-partnership/2016/09/21/turkey-made-inactive-open-government-partnership](http://www.opengovpartnership.org/blog/open-government-partnership/2016/09/21/turkey-made-inactive-open-government-partnership).



**Gönenç Gürkaynak**  
ELIG, Attorneys-at-Law

Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 70 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School and is qualified to practise law in Istanbul, New York, Brussels, and England and Wales (currently as a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the regulatory and compliance department of ELIG, Attorneys-at-Law with a significant practice in Turkey focusing on internal investigations and white-collar criminal matters and the practice advises clients in connection with Turkish corporate compliance issues under the relevant OECD Convention, FCPA, the UK Bribery Act and under the Turkish anti-corruption laws.

Mr Gürkaynak frequently speaks at international and national conferences on anti-corruption matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.



**Ç Olgu Kama**  
ELIG, Attorneys-at-Law

Ms Ç Olgu Kama graduated from Istanbul Bilgi University Faculty of Law in 2002, and was called to the Istanbul Bar in 2003. She obtained her first LLM degree from Galatasaray University Faculty of Law in 2006 in law of economics and her second LLM degree from Fordham Law School, New York, in 2008 in banking, corporate and finance law. Ms Kama has been working in the regulatory and compliance practice of ELIG for over eight years, following her years of practice at reputable law firms, and has been a partner at ELIG since January 2014. She has extensive experience in corporate compliance matters and white-collar irregularity projects, contracts law, commercial law, general corporate law and real estate law. Ms Kama has also authored and co-authored many articles in relation to corporate compliance and white-collar irregularities matters and frequently speaks at international and national conferences on anti-corruption matters.



Çitlenbik Sok. No: 12 Yıldız Mahallesi  
Beşiktaş  
34349 Istanbul  
Turkey  
Tel: +90 212 327 17 24

**Gönenç Gürkaynak**  
gonenc.gurkaynak@elig.com

**Ç Olgu Kama**  
olgu.kama@elig.com

www.elig.com

ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

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ELIG, Attorneys-at-Law has conducted numerous internal investigations, advised its clients on the matter and authored many articles on the subjects of compliance, white-collar crime and investigations.



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