

ENFORCEMENT OF ANTI-CORRUPTION LAWS: TURKEY

UNCAC CIVIL SOCIETY REVIEW 2015

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Turkey signed the United Nations Convention against Corruption (UNCAC) on 10 December 2003, and ratified it on 9 November 2006.

This report reviews Turkey's implementation and enforcement of selected articles in chapters II (Preventive measures), III (Criminalisation and Law Enforcement) and IV (International Co-operation) of the United Nations Convention against Corruption (UNCAC) subject to the first cycle¹. The report is intended as a contribution to the UNCAC implementation review process currently under way covering chapters III and IV. However, considering its importance and relevance to the chapters (III and IV) subject to review, selected articles in chapter II are also referred to and reviewed. A draft of this report was provided to the government of Turkey.

Scope. The UNCAC articles that receive particular attention in this report are those covering the following: preventive anti-corruption policies and practices (Article 5(1)); codes of conduct for public officials (Article 8(4)); public procurement and management of public finances (Article 9); private sector (Article 12(2)(e)); bribery as well as a selection of criminalisation and enforcement articles currently under review including (Article 15); foreign bribery (Article 16); embezzlement (Article 17); trading in influence (Article 18); abuse of functions (Article 19); illicit enrichment (Article 20); bribery in private sector (Article 21); embezzlement of property in the private sector (Article 22); money laundering (Article 23); liability of legal persons (Article 26); witness protection (Article 32); protection of reporting persons (Article 33); specialized authorities (Article 36); extradition (Article 44); and mutual legal assistance (Article 46 (9)).

Structure. Section I of the report is an executive summary, which concisely outlines the findings, conclusions and recommendations in regards to the review process and the availability of information; as well as about implementation and enforcement of selected UNCAC articles. Section II covers, in more detail, the findings of the review process in Turkey as well as issues related to access to information. Section III reviews the implementation and the enforcement of the convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practices. Section IV covers recent developments and section V elaborates on recommended priority actions.

Methodology. The report was prepared by Transparency International Turkey and funded by Transparency International. The group of experts who prepared the report made efforts to obtain information from government offices and engage in dialogue with government officials. As part of this dialogue, a draft of the report was made available to them.

The report was prepared using guidelines and a report template designed by Transparency International for use by CSOs. These tools reflected but simplified the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good practice and areas in need of improvement in selected areas, namely with respect to UNCAC Articles 5, 8, 9, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 32, 33, 36, 44 and 46.

¹ The mechanism for the review of implementation of the UNCAC includes an intergovernmental review process. This mechanism foresees review phases composed of two review cycles of five years each and that one fourth of the States parties will be reviewed in each of the first four years of each review cycle. The review during the first cycle chapters III (Criminalization and law enforcement) and IV (International cooperation) and during the second cycle chapters II (Preventive measures) and V (Asset recovery).

Executive Summary

This is the executive summary of Transparency International Turkey's October 2015 report,¹ which reviews Turkey's implementation and enforcement of selected articles in the United Nations Convention against Corruption (UNCAC). It is a contribution to the first cycle of the UNCAC implementation review process (2010-2015), covering chapters III and IV. However, selected articles in chapter II are also covered due to their importance and relevance to the examined articles in chapters II and IV. A draft of this report was provided to the government of Turkey.

In recent years Turkey has become a party to all major anti-corruption conventions and instruments, to demonstrate its willingness to bring its policy on anti-corruption up to European and international standards. In addition to the UNCAC, Turkey is a party to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.² However, the OECD Working Group on Bribery has raised serious concerns about the convention's implementation in Turkey.³ In its progress reports, the EU Commission has also expressed concerns in the *anti-corruption policy* and *fight against organized crime* sections associated with UNCAC articles.⁴ It should be noted that Turkey has made amendments based on the recommendations of the OECD and EU progress reports, but there are still areas in which further clarification and modification of existing legislation is necessary. This report indicates that Turkey's legal regime generally fulfils UNCAC requirements.

Turkey has not made public its self-assessment checklist, or consulted with civil society organisations (CSOs) during the review process. Moreover it did not respond to Transparency International Turkey's information requests. TI Turkey was however invited to the country visit and was given the opportunity to brief the reviewers in a separate meeting. Therefore, this report presents the overall picture of the legal regime and highlights both good practices and areas of deficiency in Turkish law in chapters II (preventive measures), III (criminalization and law enforcement) and IV (international cooperation) of the UNCAC.

1 The full report is available at: www.uncaccoalition.org/en/uncac-review/cso-review-reports.html. Its authors are Özlem Zingil and Pelin Erdoğan (Transparency International Turkey). The full report will be used to continue dialogue and engagement with stakeholders, including the government, beyond the first cycle of the country review process.

2 Ratification of this Convention by Turkey was authorised by Law No. 4518 of 1 February 2000 (see Turkish Official Gazette (*Resmi Gazete*) of 6.2.2000, No. 23956). In accordance with this Law, it was approved by Council of Ministers Decree No. 2000/385 of 9 March 2000, see Turkish Official Gazette of 10 May 2000.

3 In particular, the latest (Phase 3) report called on Turkey to meet the convention standards regarding corporate liability, recommended that Turkey safeguard the independence of its judiciary and prosecution authorities and ensure adequate protection to whistleblowers (see: <http://www.oecd.org/daf/anti-bribery/turkey-oecd-anti-briberyconvention.htm>).

4 In particular, the reports see issues with respect to (1) the institutional capacity and functional independence of the Prime Ministry Inspection Board, (2) the Council of Ethics for Public Servants' lack of power to enforce its decisions, (3) insufficient control over and verification of assets declared by the elected public officials, appointed public officials and political figures, and (4) financing of political parties and election campaigns and immunity for MPs (see http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm).

ASSESSMENT OF THE REVIEW PROCESS

Conduct of the Process

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	No
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	No
Did the government agree to a country visit?	No
Was a country visit undertaken?	No
Was civil society invited to provide input to the official reviewers?	No
Has the government committed to publishing the full country report?	No

Availability of Information

Transparency International Turkey made requests to obtain information from government offices, and to engage in dialogue with government officials during the self-assessment period. Relevant public institutions did not provide the information that was requested. Therefore, information on cases was collected from several media channels, as the Turkish Criminal Law restricts disclosure of information about the details of on-going investigations.

IMPLEMENTATION INTO LAW AND ENFORCEMENT

Turkish law generally addresses the requirements of the UNCAC. There are elaborate domestic laws intended to combat corruption, but in practice there are shortcomings, especially regarding judicial enforcement for violations of the laws. These shortcomings can be exemplified by the Deniz Feneri case (described in the full report).

Auditing is one of the most important components of anti-corruption. The Turkish Court of Accounts (TCA) plays a vital role in this area by detecting inefficient management in the public sector, and misuse and loss of public resources. However, the TCA faces serious challenges in carrying out its tasks. The role of the institution in auditing and improving the financial management of the public sector has been restrained by a narrow definition of performance audits, which was introduced in a new law adopted in 2010. The scope of performance auditing is limited to monitoring the realisation of performance targets, which are set by the public institution being audited, thereby restricting the authority of the TCA. There are also certain areas which do not fall within the scope of the TCA's authority, such as public services provided in the name of metropolitan municipalities. Moreover there are criticisms regarding censorship experienced during the quality control processes of the audit team's reports.

Turkey adopted a national strategy for enhancing transparency and strengthening the fight against corruption, which included an action plan (2010-2014). Within the national strategy and action plan there are several items that are designed to meet the UNCAC principles. However, as of the end of 2014, no information had been provided to parliament or civil society

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about the results of the plan. CSOs had limited opportunity to contribute to the development of the action plan, and, presently, they as well as the public lack knowledge of the government's plans for the period after 2014.

In mid-January 2015, Prime Minister Ahmet Davutoğlu announced the “Program for Transparency in Public Administration” (known as the *Transparency Package*). It included compulsory asset declarations for a wide range of office-holders of political parties, executives of radio and television channels, and senior judges. However, only two weeks after the prime minister disclosed the content of the package at a press conference in Ankara, the ruling Justice and Development Party (AKP) postponed the implementation of the package until after the June 2015 general election.

Table 2: Implementation and enforcement summary table

UNCAC ARTICLE ⁶	STATUS OF IMPLEMENTATION (IS THE ARTICLE FULLY / PARTIALLY / NOT IMPLEMENTED?)	HOW ARE THESE PROVISIONS ENFORCED IN PRACTICE? (GOOD/ MODERATE/ POOR)
Art. 15 (bribery)	Fully implemented	Poor
Art. 16 (foreign bribery)	Fully implemented	Poor
Art. 17 (embezzlement)	Fully implemented	Poor
Art. 18 (trading in influence)	Fully implemented	Poor
Art. 19 (abuse of functions)	Fully implemented	Poor
Art. 20 (illicit enrichment)	Fully implemented	Poor
Art. 21 (bribery in the private sector)	Partially implemented	Poor
Art. 22 (embezzlement in private sector)	Partially implemented	Poor
Art. 23 (Money laundering)	Fully implemented	Moderate
Art. 26 (Liability of legal persons)	Partially implemented	Poor
Art. 32 and 33 (protection of witnesses, and whistleblowers)	Not implemented	Poor
Art. 36 (specialized authorities)	Partially implemented	Poor
Art. 44 (extradition)	Partially implemented	Poor
Art. 46(9)(b) & (c) (mutual legal assistance)	Partially implemented	Poor

⁵ The table refers to the articles of the chapters in the first review cycle. The content of UNCAC's Article 17 and Article 23 is covered in Turkish Law. However, statistics and detailed information regarding the implementation are not available.

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RECOMMENDATIONS FOR PRIORITY ACTIONS

- ▶ A structured and continuous consultation and dialogue scheme with CSOs should be established and ensured by the government.
- ▶ A system for data collection, analysis and open access for the public should be established.
- ▶ A new anti-corruption action plan is needed. There should be a multi-stakeholder process for developing and implementing the action plan. The effectiveness of the measures adopted for implementing the UNCAC must be periodically assessed.
- ▶ Shortcomings in the legal framework related to *illicit enrichment, liability of legal persons, private sector, protection of witnesses, experts and victims* and *specialized authorities* should be addressed.
- ▶ In cases where Turkish domestic laws are compatible with the UNCAC, effective enforcement is in need of improvement as it is indispensable for successfully curbing corruption. Thus, capacity-building initiatives should be undertaken to strengthen the investigation and prosecution capacity of the relevant authorities. Furthermore, coordination among various law enforcement agencies should be strengthened.
- ▶ Corruption must be punished and the law must not be subject to political or any other form of influence or intervention. Key institutions of democratic governance – particularly the public service, law enforcement institutions and the judiciary – must be allowed to function independently and professionally with the highest standards of integrity, free from any influence. Measures should be taken to curtail political or other forms of interference in the due process.
- ▶ Adopt laws to provide TCA with broader scope of authority to conduct its audits

Assessment of the Review Process for Turkey

A. CONDUCT OF PROCESS

While the basic documents of the UNCAC Implementation Review Mechanism provide for consultation with stakeholders in connection with the government's self-assessment, this provision is not mandatory. The Turkish government did not consult with CSOs and did not make the self-assessment checklist public.

After the self-assessment, peer reviewers for the Turkey evaluation process from Belgium and Malaysia carried out a country visit in December 2014. TI Turkey was invited to participate in the meetings with the reviewers and provided feedback on the on implementation and enforcement of the articles subject to review process.

TI Turkey informed the peer reviewers of the outline of this report and the lack of consultation with the CSOs.

Table 3: Transparency of the government's UNCAC review process

Did the government disclose information about the country focal point?	No	No. Prime Ministry Inspection Board has been identified as the country focal point. However on the website of the institution, the role of the Board was not defined as the focal point, rather defined in general by pointing out the tasks related to anti-corruption.
Was the review schedule known?	Yes	The review carried out on time.
Was civil society consulted in the preparation of the self-assessment?	No	Despite TI Turkey's requests to provide inputs, the self-assessment was prepared without involving CSOs.
Was the self-assessment published online or provided to civil society?	No	
Did the government agree to a country visit?	Yes	
Was a country visit undertaken?	Yes	
Was civil society invited to provide input to the official reviewers?	Yes	Transparency International Turkey, the Union of Chambers and Commodity exchanges of Turkey (TOBB) were invited to participate the meeting with the official reviewers in December 2014.
Was the private sector invited to provide input to the official reviewers?	Unknown	
Has the government committed to publishing the full country report?	Unknown	

B. AVAILABILITY OF INFORMATION

The Prime Ministry Inspection Board was designated as the focal point for UNCAC Review process. Such information has been obtained through our data request from the Ministry of Justice. The Prime Ministry Inspection Board was established in 1984 originating from the oversight and inspection authority of the Prime Minister (PM) on the Ministries as stated in Article 112 of the Turkish Constitution. Prime Ministry Inspection Board Inspectors are assigned upon approval of PM and they carry out their duties on behalf of PM.

Transparency International Turkey submitted information requests to the Prime Ministry Inspection Board both through e-mail and official letters on 10 April 2014, 9 May 2014 and 9 June 2014. According to the Law on Access to Information, public institutions have to provide an answer within 15 days, and provide feedback in case of a delay which could again be maximum 15 days. However, the Prime Ministry Inspection Board neither provided information, nor replied to the information requests. Transparency International Turkey was unable to find the requested information through other sources.

In addition to challenges in obtaining information on the self-assessment, it was also difficult to obtain statistical data and information on cases. Statistical data was requested from the Directorate General for International Law and Foreign Relations in the Ministry of Justice since the body provided data regarding foreign bribery cases and investigations in connection with the preparation of Transparency International's Exporting Corruption Report. However, the Directorate General responded to the information request by stating that the focal point for the UNCAC Review Process is the Prime Ministry Inspection Board.

Access to information on the details of corruption cases is quite limited. Judicial (court) statistics do not include detailed data on these issues since the Ministry of Justice discloses the statistics in non-standardised and aggregated form. Moreover, due to the restrictions defined by the Criminal Law, details of the cases are not disclosed. However, the investigations of December 17 and 25 were covered widely in the media. More information on those investigations will be provided in the next parts of this report, however it should be noted that a press ban was declared regarding investigations in January 2014 and also regarding the parliamentary inquiry into corruption allegations in November 2014.

Implementation and Enforcement of the UNCAC

Regarding chapters III (Criminalization and Law Enforcement) and IV (International Cooperation) of the UNCAC that are subject to first cycle review, all UNCAC provisions that are addressed except articles 41, 46, 47, 48, and 49 are covered under Turkish law. For the purpose of this report, special attention is given to articles 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 32, 33, 36, 44, and 46 (9) of the UNCAC of chapters II and IV to note the good practices and deficiencies. Selected articles in chapter II (i.e., 5, 8, 9, and 12) are also referred herein considering their importance and relevance to chapters subject to first cycle review.

A. KEY ISSUES RELATED TO THE LEGAL FRAMEWORK

1. Areas Showing Good Practice

ARTICLE 15

Bribery of national public officials

- Bribery of national public officials is criminalized under the scope of Article 252 of the Turkish Penal Code dated September 26, 2004 and numbered 5237 (hereinafter “TPC”). The article addresses both active and passive bribery, where active bribery refers to the promise, offering or giving an undue advantage to the public official and passive bribery refers to the solicitation or acceptance of an undue advantage by the public official.

Under Article 252 of the TPC, in case the parties agree, even just in principle, to a bribe, the perpetrators shall be punished as if the offence was completed. However, in the event that the public official solicits the bribe and the counter party does not accept it, or the person offers to provide an advantage to the public official, and such public official does not accept it and therefore the act of bribery is not committed, then the offenders will receive punishments in the half amount of the original punishment if the bribe was committed. Intermediaries in communicating the proposal or request of bribery to the other party, or agreeing on a bribe or providing the bribe, shall be punished as a co-perpetrator. Also, third persons providing an advantage or the authorised person of a legal person who accepts the advantage shall also be treated as a co-perpetrator. A person who acts in a judicial role, as an arbitrator, expert witness, public notary, professional financial auditor and who either receives requests, or agrees to a bribe, will be punished from to ½ more. Finally, under certain circumstances, an *ex officio* investigation shall be conducted in Turkey against bribers and bribe-takers, provided that they are located in Turkey, even if the offence is committed abroad by a foreigner. This is the case when the bribe concerns a dispute to which Turkey, a public institution in Turkey, a private law legal person established under Turkish laws, or a Turkish national, is party, or when the crime has been committed for the performance or non-performance of an act connected with these.

A development worthy of notice is that so-called “simple bribery” (corresponding to *facilitation payments*), which is described as obtaining an advantage in order to perform an action that should be performed, or in order not to perform an action that should not be performed, was reintroduced within the scope of the crime of bribery in 2012. The original version of the TPC had treated such actions as constituting “abuse of office”, thus requiring a more lenient sentence, and, even more important, only allowing for the public official to be punished.

Additionally, with the amendment made in 2012, the old terminology used under the sub paragraph 8, for instance “by breach of duty” and “during the establishment of legal relationship or within the frame of current legal relationship” for the persons acting on behalf of publicly traded joint stock companies, are replaced with “with the aim of performing or not performing an action related to the exercise of the duty”, which is a positive improvement. See also the section “Areas with deficiency”.

ARTICLE 16

Bribery of foreign public officials and officials of public international organizations

- Bribery of foreign public officials and officials of public international organizations is addressed under Article 252 of the TPC. This article was amended twice, in 2005 and 2012, in order to comply with the international standards for bribery of foreign public officials as envisaged under the UNCAC as well as the OECD Convention and the Council of Europe Criminal Law Convention on Corruption. Active and passive bribery are both criminalized in this respect. The scope of application of such crime is designated as, (a) public officials elected or appointed in a foreign state, (b) judges, jurors or other officers serving in international or supranational courts or foreign state courts, (c) members of international or supranational parliaments, (d) persons conducting public activity for a foreign country, including public entities and public enterprises, (e) nationals or foreign arbitrators appointed within the procedure of arbitration applied for the resolution of a legal dispute, (f) officers or representatives of international or supranational organizations constituted on the basis of an international convention. Although the article was amended twice in order to comply with international standards, it should be noted that it has not been applied even in highly controversial cases as also noted by the OECD¹.

ARTICLE 17

Embezzlement, misappropriation or other diversion of property by a public official

- Article 247 of the TPC fully covers the content of the above UNCAC Article 17. Article 247 of the TPC criminalizes the embezzlement of an asset entrusted to the public official by virtue of his/her duty. As explained in the rationale of article 247, the term “asset” referenced in such article includes both movable and immovable properties. The rationale also suggests the definition of embezzlement as “disposing of a property as if he/she is the owner”. Therefore, the types of actions within the scope of embezzlement can be consuming the asset, transferring the ownership of it and misusing it, as well as selling or giving such asset to another third person.

¹ As stated in the OECD Phase 3 Report on Turkey “The [OECD] Working Group notes that there has not been one foreign bribery conviction in the 11 years since the entry into force of the Convention in Turkey, despite the size of Turkey’s economy and its geopolitical importance. Of the ten allegations of foreign bribery that have come to light since 2003, Turkish authorities have taken limited investigative steps in six cases. Of these six cases, one led to an acquittal, two investigations are ongoing pending outstanding MLA requests, and three were terminated at the investigative stage when foreign authorities failed to supply sufficient evidence. Turkey has taken no investigative steps in two cases and was unaware of a further two allegations, although these were publicised in both Turkish and foreign news.”

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ARTICLE 18

Trading in influence

- Article 255 of the TPC criminalizes “trading in influence”. The penalty is greater in the event that such person is a public official. The person who solicits or accepts the undue advantage as a result of such act is also to be punished.

The article was amended in 2012² and the new definition of the crime now covers both active and passive trading in influence and covers the content of the UNCAC article. The undue advantage is obtained in return of an unlawful action by the civil servant/public official. TPC envisages that the perpetrator can also be a public official, in which case, the punishment is aggravated. It suffices to reach an agreement to receive full punishment. In case the undue advantage is requested or offered, but not accepted, half of the relevant punishment shall be imposed. This is a special provision on attempt. There is also a special provision on participation: a person who acts as an intermediary to the commission of this crime shall be treated as a co-perpetrator, thus receiving the full punishment. If a third person indirectly procures an advantage through the crime, he/she will also be treated as a co-perpetrator; the same holds true for authorized representatives of a legal entity who accept the advantage. Turkey also amended its law to punish the traffic of influence in an international business transaction.³ See also the section “Areas with deficiency”.

ARTICLE 23

Laundering of proceeds of crime

- With regard to money laundering, Turkey has passed in 1996 the Law no. 4208, providing, inter alia, for the establishment of a special agency to prevent this phenomenon. This Law was later supplemented to some extent by the Law No. 4422 of 30 July 1999 concerning the fight against organised crime⁴. With the entry into force of the new Penal Procedure Code, on June 1, 2005, the latter Law was repealed since its provisions were incorporated into the Procedure Code. Similarly, in October 2006, all provisions of the Law on Money Laundering, apart from the ones on controlled delivery, were repealed since the TPC provides in Article 282 for the crime of Laundering Assets Deriving from a Crime.

Currently, the predicate offences to be included within the scope of the laundering of proceeds of crime are determined in Article 282 of the TPC, that is crimes punished with an imprisonment of a threshold of six months and higher. This provision hence covers all instances of corruption offences.

Additionally, the Regulation on the Examination of Laundering Crime published in the Official Gazette dated August 4, 2007 and numbered 26603; the Regulation on Measures for Preventing the Laundering of Proceeds of Crime and Financing of Terror published in

² The former version of the Article was “Any public officer who gives the impression that he is capable to perform a work which is beyond the scope of his duty, or has the power to convince others to perform the same although they are not entitled to do so, is punished with imprisonment from one year to five years.”

³ Art. 255 (7) of the Turkish Penal Code (as amended in 2012).

⁴ Cf. Official Gazette (*Resmi Gazete*) of 1.8.1999.

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the Official Gazette dated January 9, 2008 and numbered 26751; and the Regulation on Adjustment Program for the Obligations Relating to Laundering of Proceeds of Crime and Financing of Terror published in the Official Gazette dated September 16, 2008 and numbered 26999, are the other legislations regulating the laundering of proceeds of crime.

In the 15th Follow-Up Report, the Financial Action Task Force (FATF) noted that Turkey has made significant progress in addressing the deficiencies in its anti-money laundering/countering the financing of terrorism (AML/CFT) measures, as identified in the mutual evaluation report of February 2007. The report states that in particular, Turkey has (i) amended the money laundering offence in the Criminal Code, by lowering the threshold for predicate offences and including elements required by the relevant UN conventions; (ii) adopted new regulations and amendments to existing regulations, which strengthen the requirements on customer due diligence, beneficial ownership, risk and simplified/enhanced due diligence; (iii) strengthened the reporting requirements for suspected terrorist financing transactions; and (iv) adopted a new regime on the Prevention of the Financing of Terrorism⁵.

ARTICLE 44

Extradition

The compliance of the Turkish law with the content of the UNCAC Article 44 is adequate. Extradition is regulated under Article 18 of the TPC⁶. However, Turkey is party to the 1957 'European Convention on Extradition'. Therefore its provisions have to be taken into primary account by virtue of last paragraph of the Article 90 of the Turkish Constitution. In this respect, extradition is possible under the following conditions:

- (i)** Dual criminality (the act should also constitute a criminal offence under Turkish law).
- (ii)** The offence must be punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a minimum period of at least one year or by a more severe punishment. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment imposed must have been for a period of at least four months.
- (iii)** The criminal offence must not be of a political or military nature⁷.
- (iv)** The offence must not be against the security of the Turkish state or must not cause damage to the Turkish state, a Turkish citizen or a legal entity established under Turkish law, otherwise Turkey would have jurisdiction over the crime in question (TPC Art. 18/1 (c) (d)).
- (v)** No amnesty or pardon shall apply to the crime in question, and the statute of limitations shall not have been expired.

5 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/Turkey-FUR-2014.pdf>

6 'An alien, against whom a prosecution has been initiated or against whom a conviction has been entered because of a crime committed or alleged to have been committed in a foreign country, may be extradited, upon request, for the purpose of proceeding with the prosecution or for enforcing the punishment imposed'.

7 In addition, Art. 5 of the European Convention provides that extradition shall be granted for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.

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(vi) If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and in respect of such offence, the death-penalty is not provided for by the law of the requested Party or is not normally carried out; extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

2. Areas with Deficiency

ARTICLE 8 (4)

Codes of conduct for public officials

- Article 8 (4) of UNCAC provides that the State Parties shall consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions. However, there are insufficient regulations regarding such provision. Although there are indirect regulations under article 279 of TPC and under the Law No. 4483, the deficiencies regarding Public Official Law numbered 657 remain. In fact, it is not possible to refer to a system established in terms of Article 8 (4) of UNCAC.

ARTICLE 8 (5)

Declaration of assets for public officials

- For the purpose of preventing corruption among politicians and civil servants, under the Law on Declaration of Property and Combat against Bribery and Corruption dated April 19, 1990 and numbered 3628 (“Law numbered 3628”) it is obligatory for certain persons to declare their assets.⁸ In this respect, the public officials must make a declaration of wealth within certain time periods. In fact, such declaration of wealth is deemed to be mandatory by both Article 71 of the Turkish Republic Constitution dated November 7, 1982 and numbered 2709 (“Turkish Constitution”) and Article 14 of the Public Officials Law.

Article 5 of the Law numbered 3628 provides that the subject matter of declaration of property is the immovable property of officials, their spouses and children under their guardianship, and separately for each of them more than five times the amount of the monthly net payment made to the official, or in case of officials not paid, more than five times the amount of monthly net payment made to Public Servants of the 1st degree, money, shares, debentures and gold, jewellery and other movable property, rights, receivables and incomes and resources, debts and reasons thereof. The Regulation on the Asset Declaration sets out the form to be filled out for the subject matters.

However, pursuant to Article 9 of the Law numbered 3628, the declarations made in accordance with such law are kept in the public official's personal file, the contents of decla-

⁸ Those obliged to declare their assets are, firstly, central, regional and government officials, and, secondly elected public office holders (MPs, elected ministers, mayors, municipal councillors, regional councillors), ministers who are not MPs, and presidents of political parties. The same obligation applies, inter alia, to administrators of public institutions, professional organisations and foundations, presidents and administrators of co-operatives and unions, company inspectors, administrators and auditors of public interest associations, newspaper owners (individuals or, in the case of corporations, members of boards of management and auditors) and also newspaper editors and journalists.

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rations are not released to the public, in other words, considered confidential. Therefore, such provision hinders the public monitoring of such declarations. Two exceptions of the confidentiality rule are (i) the information requests made by judicial authorities and certain legal entities under the Ministry of Finance; and (ii) the authority of the Public Officials Ethic Board to examine the declarations of wealth, which is usually the case for the investigations. Otherwise, the declarations are confidential.

Moreover, there is no public body that checks the veracity of the declarations. An asset declaration can be audited only if there is an investigation about the public official.

Law numbered 3628 states, those continuing duties within the scope of the Law shall renew their declarations every five years. Considering the office term for MPs is four years, if a MP is not elected for a second term, by virtue of the confidentiality and the renewal term of the asset declarations, it is impossible to scrutinize the assets of a MP, gained in office unless there is an investigation.

ARTICLE 9

Public procurement and management of public finances

- Article 9 (1) of UNCAC provides that each State Party shall take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.

Public procurement is regulated and monitored by the Public Procurement Authority (*Kamu İhale Kurumu*), that is an administratively and financially autonomous entity at the central governmental level. However, although institutions and administrative capacity are in place, public procurement policy coordination and possible external influence on public tenders are issues of concern.⁹ An increasing percentage of public procurements are conducted outside the scope of Public Procurement Law numbered 4734. The Turkish Public Procurement Law (numbered 4734) consisting of 70 articles in total, which entered into force in 2003, has been amended 81 times in the past 12 years, with a total of 113 amendments, including secondary legislation. All of the amendments contain deviations from the generally applicable public procurement system. There are 25 exemptions from the Law No. 4734 whereas when the law was first enacted exemptions numbered at only 3. Besides that, other amendments are made in some other legislation, which debilitate transparency and competition in the public procurement system.

It should be noted that the EU also states “Turkey needs to ensure a more consistent legal framework for concessions and public-private partnerships to increase transparency and efficiency. There have been various allegations of political influence on public tenders.”¹⁰

In addition, even though the Article 9(1) of UNCAC is a preventive provision, the provisions in Turkish law are relating to criminal offences¹¹.

9 European Commission Turkey Progress Report 2014, page 30. See http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf

10 European Commission Turkey Progress Report 2014, page 30.

11 Article 235 (Bid Rigging) and 236 (Involvement in fraudulent act during fulfilment of obligations) of the TPC.

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It should be noted that, in addition to a lack of specific regulation which governs anti-corruption compliance control in companies, the procurement authorities during the tendering process do not consider the existence of internal controls, ethics and compliance programmes to prevent and detect corruption. Recently, Turkish Contractors Association (*Türkiye Mühendisler Birliği* - TMB), an independent, non-profit professional organization representing the leading construction companies in Turkey, prepared a report containing recommendations pertaining to the problems plaguing the construction sector¹². TMB raises criticism of Public Procurement Laws and characterizes the law as unfair and lacking transparency, paving the way for projects that are costly, often unfinished, lacking proper quality and frequently the site of deadly accidents. The criticism of the legal framework in this area by the professional organization representing leading construction companies should be taken into consideration.

ARTICLE 12 (2 (e))

Private Sector

- Article 12(2)(e) aims to prevent conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure.

The Law Concerning Prohibited Activities of Former Public Officials dated 1981 and numbered 2531 is in force. The said law aims to prevent and reduce conflict of interest; however, cannot be enforced due to vague conditions stipulated within the scope of such law related to the “prohibition and its term.” In Article 2 (Prohibition and its term) of the law stipulates that, unless otherwise provided by law, former government officials are prohibited for a period of three 3 years from the date of their retirement or resignation from acting as broker, representative or consultant, directly or indirectly, towards government agency(ies) that they have served in the last 2 years before their date of retirement or resignation, with regards to the activities falling within the scope of their past duty.

Until today, there have been only 6 court cases regarding such law and all were concluded with either lack of grounds for legal action or exculpation.

ARTICLE 15

Bribery of national public officials

- There are deficiencies with respect to the incrimination under the TPC. As regards the personal scope it should be noted that the term “public official” is defined under Article 4 of the Public Official Law dated July 14, 1965 and numbered 657; the public official is the person assigned to conduct the essential and perpetual duties of the state and other public entities. For the purpose of penal law, a different understanding applies; “public official” is defined in a broader scope under Article 6 of the TPC. The approach adopted in TPC resulted in the extension of the category of persons qualifying as public officials¹³. The new criterion

¹² The report can be viewed at http://www.tmb.org.tr/doc/file/bildirge_tmb.pdf

¹³ TPC Article 6 (1) (c) defines a public official (*kamu görevlisi*) as any person who, whether permanently, for a specific period or temporarily, participates to the carrying out of a public activity by virtue of appointment, election or

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is whether the activity performed by the perpetrator bears a “public” nature or not. Hence, those participating in the performance of any public service now qualify as public officials, insofar as those services are run according to administrative law principles. Thus, services offered through private law instruments, such as contractors hired through tenders, do not qualify as public officials. However, application of these provisions is highly problematic, as these have not been applied so far in practice even in highly controversial court cases.

In addition, it must be noted that some laws¹⁴ regulating specific institutions establish that those who commit crimes against the property of the institution shall be treated as public officials. Other laws further determine that those committing certain crimes shall be treated as public officials even if they do not bear the requisite characteristics.¹⁵ Finally, there are also laws which indicate that crimes that can normally only be committed by public officials shall apply to certain acts.¹⁶

Besides, it is observed that unilateral bribes i.e. declined bribe offers, promises or demands are not subject to the same sanctions as bribery offenses in agreement under sub paragraph four of Article 252 of TPC. In fact, GRECO’s Second Evaluation Report on Turkey dated March 28, 2014 includes criticisms against such dual treatment as well as that officials are invited to regulate the sanctions coherently.

ARTICLE 18

Trading in influence

- As stated above under Areas Showing Good Practice, Article 255 of the TPC now covers the content of UNCAC Article 18. However, there is a concern with regard to distinguishing the crime of “aggravated fraud” under article 158/2 of the TPC from the Article 255 of the TPC. This concern has vital importance since the provider of the advantage is regarded as “victim” of the crime under Article 158/2, and not punished. On the other hand, the crime under article 255 is one with multiple perpetrators- the person providing the advantage is also punished. The difficulty in distinguishing the elements of these two offences may mean that certain acts which should be treated under Article 255 are instead punished under Article 158/2, hence leaving one of the actors unpunished.

ARTICLE 19

Abuse of functions

- Abuse of functions is addressed in the Article 257 of the TPC. In addition to the criteria of the offence as described in the UNCAC Article as “obtaining an undue advantage for himself or herself, or for another person or entity”, Article 257 includes such criteria as well as optional norms such as “causing the loss of the public or unjust treatment of persons”.

in any other manner. The key to this rather obscure definition is the meaning of “public activity” (*kamusal faaliyet*).

14 For example, Law no. 132 on the Establishment of the Turkish Standards Institution.

15 For example, Law no. 1163 on Cooperatives, treating the members of the Executive Board as public officials with regard to crimes committed to the detriment of the cooperative.

16 For example, Law no. 2860 on Charity Collection, establishing that the crime of embezzlement shall apply to those who embezzle the property and money obtained from the charity collection activities. Also see the comments regards Article 22 of UNCAC herein.

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Abuse of office in its primary form occurs when a public official, acting in violation of the requirements of his duty, causes victimization to individuals, harm to the public, or provides an unlawful advantage to individuals. However, the Court of Cassation is of the view that if one of these “objective conditions for punishment” does not occur, the perpetrator cannot be punished at all. Causing victimization to individuals covers all acts, which result in the violation of political, civil and social rights belonging to the victim. Harm to the public requires the existence of a financial damage. Finally, providing an unlawful advantage to individuals refers not only to material gain, but to all acts improving the personal, social, economic conditions of an individual. The crime may also be committed by way of omission, by delaying or neglecting altogether the performance of the duties. This is penalized by a term of imprisonment (3 months - 1 year) under the same conditions.

The offense stipulated under article 257 of TPC as “gaining unfair advantage, causing public loss or causing unjust treatment to persons by misconduct against the performance of duty”, is included within the scope of corruption practices stipulated under UNCAC, and therefore should be exempted from the Law No. 4483 which requires permission by administrative bodies to launch criminal prosecutions.

ARTICLE 20

Illicit enrichment

- Illicit enrichment of public officials is addressed in the Article 4 and 13 of the Law on Declaration of Property and Combat against Bribery and Corruption dated April 19, 1990 and numbered 3628 (“Law numbered 3628”), but it is not criminalised. The expenses made by the designated public officials, which are inconsistent with the income and social life of such public official or properties, which cannot be explained in consistency with law and public decency are defined as illicit enrichments¹⁷.

The European Commission, in its 2014 Turkey Progress Report, has also pointed to the insufficient control over and verification of assets declared by elected public officials, appointed public officials and political figures. The Progress Report refers to Article 20 of the UNCAC and recommends that “Turkey should consider criminalising illicit enrichment. No changes were made on the immunity of Members of Parliament and certain public officials regarding corruption-related offences. The Council of Ethics for Public Servants had no power to enforce its decisions with disciplinary measures. Codes of ethics do not exist for military personnel or academics. Legal loopholes (disclosing gifts, financial interests and shares, foreign travel paid for by outside sources, etc.) in the code of ethics for parliamentarians remained.”¹⁸

Furthermore, the general rule that investigation against civil servants may only be initiated after obtaining the permission of the relevant administrative authority does not apply to the investigation of these crimes, save for ministers and their under-secretaries, and provincial and district governors. In addition, investigations concerning members of the armed forces are conducted by military prosecutors.

¹⁷ See Art.4: “Goods which cannot be proved to have been provided in accordance with law and public morale or increases revealed as expenses which cannot be considered commensurate with the income of the concerned in terms of the social life of the concerned are considered unjust acquisition of property within the context of the implementation of this Act.”

¹⁸ http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf

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ARTICLE 21

Bribery in the private sector

- Article 252 of the TPC refers to bribery of both public officials and certain private sector actors. Accordingly, as per 252 (8) these provisions shall also apply to the persons acting on behalf of one of the following legal entities: a) public professional institutions, b) companies incorporated by the participation of public institutions or public corporations or public professional institutions, c) foundations operating within the framework of public institutions or public corporations or public professional institutions, d) associations acting in the public interest, e) co-operatives, f) public joint stock companies. Therefore, corruption in the private sphere has been criminalized to a certain extent, but the scope of the private sector actors is considerably narrow, in comparison with the wording of the UNCAC Article 21.

In fact, GRECO expressed its concern that bribery in the private sector is limited to the extent of institutions characterised either by public participation or public interest only.¹⁹ It is stated that the punishment for bribery in the private sector shall be applied to every position in private sector institutions.

ARTICLE 22

Embezzlement of property in the private sector

- In contrast to the scope of the offence under the UNCAC Article 22, Turkish Law does not suggest a general criminalization of embezzlement of property in the private sector. Instead, Article 155 of the TPC regulating the crime of “abuse of trust” shall be applied in the event of embezzlement of property in the private sector. This is a crime that applies when a person has been given possession of a moveable property to store it or to use it in a specified way, but that person denies to return it to the owner of the property, or uses it for a purpose outside that agreed upon. Therefore, different from embezzlement, possession of the property has not been transferred to another person in connection with his or her duty, but due to an agreement based on personal trust. In other words, it is a general crime applicable to any person, and that does not require any link with economic, financial or commercial activities. At least, Art. 155 (2) provides for an aggravating circumstance when the crime has been committed over property handed over in connection with the performance of a profession, art, or business.

Turkish legislation also creates an extraordinary situation for bank personnel due to their engagement with wealth. However, the related crime is limited to the finance sector, the scope of it should be improved and expanded. Article 160 of the Banking Law dated October 19, 2005 and numbered 5411 (“[Banking Law](#)”) provides that the embezzlement offence committed by a bank personnel will be imposed an imprisonment from six (6) to twelve (12) years, judicial fine and compensation of the loss of the bank. In addition, the statute of limitations under the Banking Law, which was applied retroactively in accordance with the Temporary Article 16 of the Banking Law, has been subject to objections. The objection was that the retroactive application of a provision is against rule of law prin-

¹⁹ Third Evaluation Round Interim Compliance Report on Turkey http://www.uhdigm.adalet.gov.tr/greco/greco_turkiye_raporlar/GrecoRC3%282014%2924_Turkey_Interim_EN.pdf

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ciples, specifically equal protection of the law. In fact, the Constitutional Court's decision numbered 2014/85-2014/103 and published in the Official Gazette dated September 12, 2014 and numbered 29117 annulled such retrospective application of the twenty (20) years of statute of limitations rule. However, such resolution created public concern, considering the fact that certain former bank owners, who are being tried for criminal offences such as embezzlement, will have the possibility to take advantage of the annulment and circumvent paying for the loss they have caused. This is because the annulment means that shorter periods are now applicable as regards statute of limitations.

ARTICLE 26

Liability of legal persons

- Liability of the legal persons attracts criticism by many organizations such as the OECD Working Group on Bribery and the EU Commission. Article 38 of the Turkish Constitution and Article 20 of the TPC refer to the principle of individual criminal responsibility. Furthermore, Article 20 of the TPC states that legal persons may not be criminally liable in Turkish law.

However civil or administrative liabilities may be imposed on legal persons. In fact, Article 60 of the TPC provides that certain sanctions may be imposed on legal persons involved in a crime under the TPC. Moreover, certain administrative sanctions are envisaged to be imposed on legal persons under the TPC for specific crimes including, but not limited to, bribery. According to the TPC Article 60, two measures can be imposed on legal persons on account of criminal activities centred on them: (i) Revocation of their licence to operate (ii) Confiscation of property²⁰.

In addition, the recently amended Article 43/A of the Misdemeanours Code provides for administrative fines to be applied to legal persons in case of certain corruption-related crimes committed to the benefit of the legal entity by its' organ or representative, or any person who performs a duty in the framework of the activities of the legal person. The amount of the fine is 10000 to 2 million Turkish Liras (US\$ 3600 to 730000). The crimes in question are the following:

- Swindling
- Bid-rigging
- Fraud during the discharge of contractual obligations with public institutions
- Bribery
- Laundering of proceeds deriving from a crime
- The crime of embezzlement in Article 160 of the Banking Law

²⁰ It should be noted that one of the particular criticism raised by the OECD Working Group on Bribery regarding Turkey's implementation of the Convention is the failure to introduce corporate liability for the bribery of foreign public officials and to effectively enforce the foreign bribery offence. Turkey repealed corporate criminal liability for the offence of foreign bribery in 2005 and replaced it with so-called "security measures". This was found not to meet the standards of the Convention. In addition, the existence of a provision on "effective remorse", that is, the non-application of penalties to cases of bribery of domestic and foreign public officials when the bribe-giver reports the offence to the competent authorities, was criticised. Following the necessary amendments, in 2010, the Working Group praised Turkey for "implementing all but one of the recommendations made by the OECD Working Group on Bribery". The effective remorse provision has been removed, and Article 43/A of the Misdemeanours Code provides for administrative fines to be applied on legal persons in case of certain corruption-related crimes being committed to the benefit of the legal entity in question.

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- Smuggling crimes defined in the Law no. 5607 on the Fight against Smuggling

In this respect it should be noted that Article 43/A of the Misdemeanours Code (CM) applies to “a civil legal person”. As stated in the OECD Turkey’s Phase 3 Report; “[i]n the responses to the Phase 3 Questionnaire, Turkey indicates that the terminology “civil legal person” is intended to cover private law legal persons, which include “associations, foundations, unions, confederations, political parties, commercial companies (collective, limited, commandite and joint stock companies) and attorney partnerships”. Article 43/A of the CM does not, however, apply to companies which are under the audit of the Court of Accounts. Companies that are over 50% state-owned are audited by the Court of Accounts and fall outside the remit of article 43/A. During the on-site visit, representatives of the Ministry of Justice further explained that private law legal persons do not include any company in which the State owns more than 50% of the shares.”²¹ Nevertheless, Article 60 is not yet tested before the courts and its wording is criticized because it is not clear as to how the license cancellation penalty will be imposed. Furthermore, the enforcement of Article 60 in the near future as well is not anticipated, as a result no established practice exists. Similarly, its interaction with crimes like bid rigging and bribery are not clear which may be one of the causes as to why this Article is not yet tested in practice by courts.

Currently, there is no specific regulation which governs anti-corruption compliance control in companies. Corruption is a matter of personal criminal liability, save for the exceptions indicated above that is if the actions result in crimes defined under the TPC.

The Code of Obligations and the Labour Law require workers/employees not to engage in any action which would harm the employers²². Accordingly, these laws indirectly oblige employees to refrain from corrupt acts while performing their work, or to take precautions against corruption to the extent they are or can be aware of it. In this respect, at the moment, anti-corruption compliance control in Turkish companies rather relies on individual initiative than a solid system formed to comply with certain rules or regulations.

In regards to obligations of companies under national law to prevent corruption, likewise, there is no explicit obligation stipulated by law. However, the existence of individual criminal liability is a major risk for companies in specific sectors because certain sector specific regulations prohibit individuals who are convicted of certain corruption-related crimes from taking part in management of companies, for instance companies operating in the electricity market.

ARTICLE 30 (2)

Prosecution, adjudication and sanctions

The Law No. 4483 on the Law on Trial of Civil Servants and Other Public Servants requires administrative authorisation from the superiors to launch an investigation against a public officer. However, Article 17 of the Law on Asset Declaration, Fight Against Bribery and Corruption defines the provisions of the Law No. 4483 as not applicable for those accused of crimes such as bribery, embezzlement, smuggling on duty or due to duty, bid rigging, disclosure of state secrets or causing disclosure. Yet there is still an exception for governors, undersecretaries, and district governors. In order to prevent legal exception mechanisms

²¹ <http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf>

²² See Article 396 of the Code of Obligations, Article 25/II of the Labour Law

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to result in impunity, and ensure equality before the law, related phrase in the article 17 of the Law 3628 should be abolished.

Another legal provision serving for impunity is member of parliaments' immunity by the Article 83 of the Constitution. According to the Article 83 legislators are not be liable for their votes and statements during parliamentary proceedings and for the views they express. A member of parliament who is allegedly committed an offence before or after election cannot be detained, interrogated, arrested or tried unless the parliament decides otherwise. A recent example was the voting in the parliament related to four former ministers facing corruption charges. The parliament voted for not sending the ex-ministers to the high court (*Yüce Divan*) by the majority votes of the ruling party and raised questions regarding the parliament's capability to hold public officials accountable²³.

ARTICLE 32

Protection of witnesses, experts and victims

- The protection of witnesses is addressed under the Law on Protection of Witnesses dated December 27, 2007 and numbered 5726 ("Law on Protection of Witnesses"). This law includes the witnesses, victims giving testimony as witnesses and reporting persons.

However, there is a threshold envisaged under the Article 3 of the Law on Protection of Witnesses, which states that the protection may only be implemented in relation to crimes having a penalty of imprisonment more than ten (10) years. Unfortunately, this threshold is insufficient to cover the crimes established under UNCAC.

The Ministry of Justice is preparing a draft law for the rights of victims of crime. However, there is no information available about when such law will be enacted.

In addition, there is no legislation envisaging the protection of experts under Turkish law.

ARTICLE 33

Protection of reporting persons

- Whistleblower protection in Turkey is limited and the limited protection does not meet the UNCAC requirements. There is no comprehensive law in either public or private sectors. Turkey still has not established comprehensive measures to protect public and private sector employees from discriminatory or disciplinary action when an employee reports suspected acts of bribery. The Law on Protection of Witnesses includes the witnesses, victims giving testimony as witnesses and reporting persons. Reporting persons are protected under the Law on Protection of Witnesses as per Article 22, where the "reporting persons" are deemed to be informants and private/anonymous investigators working for the police forces only. Also, the law states that the protection may only be implemented in relation to crimes having a penalty of imprisonment more than ten (10) years, where bribery is not listed under such crimes. The threshold envisaged under the law is insufficient to cover the crimes established under UNCAC.

Since whistleblower protection is quite weak (almost non-existent), private sector em-

²³ <http://www.radikal.com.tr/politika/meclisten-yuce-divana-ret-1276661/>;
<http://www.hurriyetdailynews.com/parliament-acquits-four-ex-ministers-on-corruption-but-vote-stirs-ruling-akp.aspx?PageID=238&NID=77188&NewsCatID=338>

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employees are practically excluded from witness protection, where no leniency policies exist either. On the other hand, Article 278 of the TPC regulates the obligation of persons to report crimes they are aware or witness of, and Article 279 introduces the same obligation with heavier sanctions to public officials. However, Art. 279 covers any crime which is prosecutable *ex officio*, and which the person came to know in connection with his or her duty. On the other hand, Art. 279 does not apply to all crimes committed in the past, but only to those which are being committed, and, to those which have been committed but where the harmful consequences of the crime may still be reduced or limited. Debates persist among both academics and practitioners about these provisions as they are hardly enforceable in practice. Further, as reported by OECD, the existing laws are not consolidated, thereby making them difficult to access and to understand.²⁴

ARTICLE 36

Specialized authorities

- The institutional structure of anti-corruption and ethics is complex and there is not a specialised anti-corruption agency or court in Turkey, rather there are various public institutions working in this field. Inspection boards (inspection boards) stand at the centre, considering their role in identifying and investigating corruption in public sector. However, the independence of inspection boards is a matter of debate since they are directly attached to the prime ministry, ministries, general administration or regulatory bodies. Moreover, gaps in the regulations, setting transparency and accountability standards for inspectorates and lack of effective monitoring mechanisms are serious deficiencies preventing access to information on anti-corruption progress. Their limited competences in terms of proactive investigation, law enforcement and lack of coordination among inspectorates are also major problems to be resolved in order to ensure effectiveness of these institutions.

The Prime Ministry Inspection Board (*Teftiş Kurulu Başkanlığı*), which is an organ directly attached to the Prime Ministry, has been designated as the organ to provide coordination with OLAF. The same organ also serves as the *anti-fraud coordination service* (AFCOS), which is supposed to be an operationally independent national authority responsible for protecting the EU's financial interests from fraud.

ARTICLE 46 (9)

Mutual legal assistance in the absence of dual criminality

- The central authority for the provision of mutual legal assistance in Turkey is the Ministry of Justice. In this respect, the International Law and the Foreign Relations General Directorate under the Ministry of Justice implements mutual legal assistance processes.

However, there is no specific legislation regulating international mutual legal assistance under Turkish law. The Ministry of Justice is currently working on a draft law on this subject, which is expected to enter into force within less than two years, i.e. by 2017. The foregoing law will cover issues such as mutual legal assistance, extradition, transfer of sentenced persons, mutual recognition of criminal judgments and transfer of proceedings.

As far as international legal cooperation in criminal matters are concerned, Turkey is party

²⁴ <http://www.oecd.org/daf/anti-bribery/TurkeyPhase3ReportEN.pdf>

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to major international treaties, including European Convention on Extradition of 1957, the European Convention on Mutual Assistance in Criminal Matters of 1959, the European Convention on the International Validity of Criminal Judgments of 1970, the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, the European Convention on the Transfer of Sentenced Persons of 1983, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, and the Criminal Law Convention on Corruption of 1999. Furthermore, Turkey has bilateral agreements with certain states such as United States of America and People's Republic of China.

Specific to the requirement of dual criminality in the case of mutual legal assistance, there is no regulation under Turkish law, i.e. the dual criminality rule applies but its precise content is unclear.

B. KEY ISSUES RELATED TO ENFORCEMENT SYSTEM

Some of the main areas of concern are:

- **Independence of public prosecutors and other enforcement agencies and of the judiciary:** A high profile corruption investigation in 2013 implicated high-level government figures. Also, implicated in the investigation were amendments to the Law on the High Council of Judges and Prosecutors (HSYK is the Turkish acronym) as well as numerous reassignments, dismissals of judges and prosecutors. This investigation raised serious concerns over independence of judiciary²⁵. HSYK is responsible for the administration (the appointment, promotion and removal) of the judiciary. The independence of this Council from the executive branch is problematic. Article 3 of Law on HSYK stipulates that the president of the Council is the Minister of Justice and the Undersecretary of the Ministry of Justice is the previous office member of the Council. As provided by Article 6 of the Law on HSYK, the Minister has powers such as determining the agenda, the appointment of the Secretary General among three candidates selected by the General Assembly and he/she gives the ultimate decision whether or not an investigation proposed by the Council shall be opened or not.
- **Independence of anti-corruption agencies:** There are dedicated units established to combating corruption. These bodies are not enforcement bodies and their lack of independence from the Prime Ministry is problematic.
- **Complaint mechanisms:** Whistleblower protection in Turkey is limited and there is no comprehensive law in either public or private sectors²⁶. Anonymous reports are not possible. In addition to almost non-existent complaint mechanisms, impunity discourages the public from utilizing the limited opportunities²⁷.

25 The Venice Commission has also recently raised concerns about the independence of the Turkish judiciary: "Venice Commission Declaration on the Independence of the Judiciary in Turkey", June 2015. See www.venice.coe.int/files/turkish%20declaration%20June%202015.pdf; see also European Commission, 2014: 44.

26 For a report on whistleblower mechanisms of Turkey see "Whistleblower Protection Laws in G20 Countries" <http://pandora.nla.gov.au/pan/148392/20140917-0713/blueprintforreespeech.net/wp-content/uploads/2014/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf> page 58-59.

27 TI Turkey conducted public opinion survey "Corruption in Turkey: Why? How and Where?" with participation of overall 2,000 people in all regions of Turkey between February 2015 and March 2015. The findings of the survey point out that public see impunity as the major reason of the corruption that obstructs fight against corruption. In this context, it is worth considering that 88% of participants gave an answer as "no" to the question "Within the

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- **Lack of political will to implement anti-corruption strategies:** Turkey has developed anti-corruption strategies and action plans.²⁸ The National Anti-Corruption Strategy and Action Plan put into force in 2010 addressed measures such as developing mechanisms for transparency and effective auditing of political financing. However, no progress has been made regarding the gaps in the legislation. Under the Open Government Partnership, Turkey submitted a National Action Plan in 2011; however, Turkey has made no progress in open governance since joining the Open Government Partnership.²⁹

1. Statistics

In the process of drafting this report, we requested information and statistics from the Directorate General for International Law and Foreign Relations under the Ministry of Justice. The Directorate General replied to the information request by stating that the focal point for the UNCAC Review Process is the Prime Ministry Inspection Board. TI-Turkey made information requests to the Prime Ministry Inspection Board both through e-mail and official letters on 10 April 2014, 9 May 2014 and 9 June 2014, according to the Law on Access to Information. However, the Prime Ministry Inspection Board neither provided information, nor replied to the information requests. The Ministry of Justice disclosed annual statistics, however since the data published is not in a standardised and detailed form, analysis of official statistical data on particular corruption offences has proven very challenging.

2. Information on cases and investigations

The focal point for the UNCAC is the Prime Ministry Inspection Board. As stated above, the Board has neither made public Turkey's self-assessment checklist, consulted with CSOs, nor respond to our information requests. TI Turkey was however invited to the country visit and was given the opportunity to brief the reviewers in a separate meeting.

There are several prosecutions reflected in the press that fall into scope of the UNCAC articles under review such as the Deniz Feneri case, trial of the mayor and other officials of the İzmir Metropolitan Municipality³⁰; an investigation into the alleged corruption of officials of the Eskişehir Metropolitan Municipality³¹; and several other corruption cases against municipalities. However, there are no official and/or independent channels to monitor these prosecutions, due to the limited media presence and lack of available official sources. Therefore, we are not able to provide detailed information on these prosecutions. However, there are some major prosecutions that are monitored closely by the press. Information regarding the below stated cases are obtained from the press coverage.

last year, if making improper payments or giving gifts is requested, have you ever made a legal complaint or report?". When the reason behind was asked, 60% of participants stated that making a legal complaint would have no help. For the full report see http://www.seffaflik.org/wp-content/uploads/2015/04/Corruption-in-Turkey_Public-Opinion-Survey-Results.pdf

28 These strategies and action plans (in Turkish) can be viewed at <http://www.teftis.gov.tr/webform2.aspx?Show-Pageld=16>

29 See <http://www.opengovpartnership.org/country/turkey>

30 See (in Turkish) <http://www.memurlar.net/haber/221829/>; (in English) http://www.todayszaman.com/national_i-zmir-mayor-kocaoglu-testifies-for-six-hours-on-corruption-claims_267529.html

31 See (in Turkish) http://www.radikal.com.tr/turkiye/buyukersen_ve_ekibi_beraat_etti-1291086; (in English) http://www.todayszaman.com/national_kilicdaroglu-operation-in-eskisehir-boosted-buyukersens-reputation_305604.html

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Deniz Feneri Case: In May 2015, the Istanbul 6th High Criminal Court acquitted some of the suspects and ordered for non-prosecution for others in the case of the German-linked Deniz Feneri (Lighthouse) charity embezzlement case³². The investigation was launched after a court case in 2008 in Germany convicted three managers of the charity for embezzling millions of euros. The Turkish court acquitted Zahit Akman, the former head of the Radio and Television Supreme Council (RTÜK) of the allegations regarding channelling the charity funds into Turkey, having personal expenditures covered by Deniz Feneri, participating in forgery conducted by a public official and abuse of confidence. The Turkish court also acquitted the CEO of Kanal 7, Zekeriya Karaman, who faced charges of abuse of confidence, forgery and participation in forgery conducted by a public official.

Two prosecutors of the case had been previously dropped and acquitted in 2014 after being tried for “forgery of official documents and misfeasance.” In line with the December 2013 corruption investigations resulting in impunity for the subjects of corruption allegations, this last court decision raised concerns over the authority and the ability of the judiciary in investigating corruption. It should be noted that these ineffective investigations and trial processes damage public trust in judiciary and rule of law in the country.

Balyoz case: Obstruction of justice (Article 25 of the UNCAC) is addressed under 277 and 288 of the TPC. A recent application of Articles 277 and 288³³ was enforced related to the infamous “Balyoz” (Sledgehammer) case, where many military officials, as well as journalists and civilians were adjudicated on grounds of the claims to overthrow the government. The Balyoz Case is now being reheard after a decision to renew proceedings. Even though the case and the application of the respective articles is not related to corruption, it represents the evaluation of the Articles 277 and 288 of the TPC. The Executive Board of the Istanbul Bar Association raised their objections to the court that it did not provide a fair trial during one of the hearings in spring 2012. The public prosecutor of the Case filed a complaint on the ground of Article 288³⁴. Later, Konya Bar Association sent a written declaration to Ministry of Justice referring that such an act of İstanbul Bar Association falls under Article 288. Ministry of Justice regarded the declaration of Konya Bar Association as a denouncement and joined this application with the complaint. As a result of the investigation, criminal action has been filed against Istanbul Bar Association on the grounds of Article 277. Istanbul Bar Association shared its concerns highlighting that Article 288 was amended and the sanction for violation of the same article was changed to administrative fines; however, the sanction for Article 277 is imprisonment³⁵.

December 17th investigations: In December 2013, Istanbul prosecutors initiated a high-profile investigation which triggered arrests implicating ministers, relatives of Cabinet members, various public officials as well as a businessman on allegations of bribery, tender-rigging, misuse of state-owned land in real estate deals, forgery of documents, money laundering, gold smuggling and various other charges. Ten out of twenty-five ministers were replaced in a Cabinet reshuffle on 25 December 2013. The government considered these cases as part

32 <http://www.hurriyet.com.tr/ekonomi/28998561.asp>

33 Article 277 lays down attempting to influence the members of judiciary and Article 288 lays down the crime of attempting to influence fair trial.

34 http://www.radikal.com.tr/turkiye/istanbul_barosuna_balyoz_davasi_4_yil_hapis_isteniyor-1119410

35 <http://www.istanbulbarosu.org.tr/detail.asp?CatID=1&SubCatID=1&ID=7744>

3. Implementation and Enforcement of the UNCAC

of a conspiracy and attempt at a judicial coup³⁶. Starting in early 2014, several police officers and a number of judges and prosecutors, including those originally involved in the December 17th investigation, were reassigned, and the Turkish Parliament also passed a controversial law that increased the power of the executive over the judiciary. The government also sought to suppress discussion of and information about the corruption allegations that came to light in December 2013, including through press bans on YouTube and Twitter³⁷. Also the ruling party, AKP, prevented open discussion in the parliament on the case against the ministers and thwarted the progress of a parliamentary commission investigating the case³⁸. Before the completion of criminal investigations, all suspects arrested in connection with the corruption allegations were released on bail and on 1 September 2014, the Istanbul Chief Prosecutor's Office –the prosecutor newly assigned to the December 17th investigation- issued a verdict of non-prosecution against 96 suspects allegedly involved in the December 17th corruption case³⁹. A press ban on the parliamentary investigation into corruption allegations against four ex-ministers was announced by the court in November 2014. Sezgin Tanrikulu, a deputy from the main opposition Republican People's Party (CHP), along with Platform for Independent Journalism (P24), and Turkish Journalists' Association (TGC) applied to the higher court to lift the ban⁴⁰. TI-Turkey applied to the higher court to lift the ban as well⁴¹. All applications were rejected. Mahmut Tanal, a CHP deputy, journalists, academics as well as citizens also applied to the Constitutional Court to lift the controversial ban⁴². The Constitutional Court rejected all applications.

3. Examples of good practice or progress in enforcement

Yaptırma ilişkin iyi uygulama ve ilerleme örnekleri bulunmamaktadır.

4. Significant inadequacies in the enforcement system for UNCAC-related offences

Inadequacies of UNCAC-related offences mainly stem from the legal framework. Therefore, we could not assess the inadequacies in practice concerning the enforcement system, issues of independence, capacity, organization, resources. For inadequacies in the legal framework please see the previous section.

However, we should note that in cases where the Turkish domestic laws are compatible with the UNCAC, the enforcement lacks effectiveness. These inadequacies are mainly observed in respect of multiplicity and coordination of the authorities/institutions, deficiencies in the investigation and prosecution capacity of concerned authorities as well as implementation and monitoring of the effectiveness of existing laws.

36 http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf

37 http://www.hrw.org/sites/default/files/reports/turkey0914_ForUpload.pdf

38 http://www.hrw.org/sites/default/files/reports/turkey0914_ForUpload.pdf

39 See "Key corruption probe targeting President Erdogan's son dismissed" <http://www.hurriyetdailynews.com/key-corruption-probe-targeting-president-erdogans-son-dismissed.aspx?PageID=238&NID=71159&NewsCategoryId=338>

40 <http://www.hurriyet.com.tr/gundem/27656923.asp>; <http://t24.com.tr/haber/p24-yolsuzluk-haberlerine-yayin-yasagina-karsi-yargiya-gidiyor,278487>; <http://www.bianet.org/bianet/siyaset/160367-tgc-den-de-yayin-yasagina-itiraz>

41 <http://t24.com.tr/haber/uluslararasi-seffaflik-derneginden-yayin-yasagina-itiraz,279105>

42 http://www.cumhuriyet.com.tr/haber/turkiye/218757/Yedi_uye_yolsuzluk_gizlenmesin_dedi.html

Recommendations for Priority Actions

5. Recommendations for priority actions

- ▶ **A new action plan is needed:** Strong political commitment is an essential precondition for the effective implementation of the UNCAC. Turkey's national strategy for enhancing transparency and strengthening the fight against corruption, including an action plan (2010-2014) identifies a series of items to meet the UNCAC principles. Having reached the end of 2014, the government should inform the parliament, civil society and the public about the resulting impacts as well as the plans for the next period. A structured and continuous consultation and dialogue scheme with CSOs should be established and ensured by the government.
 - a. There should be a multi-stakeholder process for developing and implementing the action plan: Henceforth, initiatives and actions taken in compliance with the UNCAC provisions should be made available in the public domain, a multi-stakeholder consultation process involving the key actors i.e., governmental agencies, civil society, business community and relevant sectors should be engaged.
 - b. The effectiveness of measures adopted for implementing the UNCAC must be periodically assessed. Regular monitoring and evaluation of implementation of UNCAC provisions is therefore indispensable.
- ▶ **Address shortcomings in the legal framework related to definition of public official, abuse of functions, illicit enrichment, liability of legal persons, private sector, protection of witnesses, experts and victims and specialized authorities.** Future laws should be enacted to comply with the UNCAC regime. Also, laws that will provide TCA with broader scope of authority to conduct its audits should be adopted.
- ▶ **Improve enforcement:** In cases where the Turkish domestic laws are compatible with the UNCAC, effective enforcement needs improvement and is indispensable for successfully curbing corruption. Thus,
 - a. enforcement authorities should be strengthened and streamlined. Multiplicity of the authorities/institutions should be eliminated and an independent agency must be established to investigate and prosecute corruption-related offences,
 - b. capacity-building initiatives should be taken to strengthen the investigation and prosecution capacity of relevant authorities,
 - c. actions should be taken to raise awareness of the public officials on the UNCAC and its enforcement,
 - d. coordination among various law enforcement agencies should also be strengthened
 - e. implementation and monitoring of the effectiveness of existing laws should be realised.

- ▶ **Ensure independence:** Also, key institutions of democratic governance – particularly public service, law-enforcement institutions and the judiciary – must be allowed to function independently and professionally with the highest standards of integrity, free from any influence. Measures should be taken to curtail political or other forms of interference. Corruption must be punished and the law must be free from any political or other form of influence or intervention. Corruption cases must be handled according to judicial due process. Requests for cooperation from the Prosecutor’s Office to public and private institutions should be treated with high priority and be fulfilled with maximum speed and with the necessary resources.
- ▶ **Improve the criminal statistics system:** In addition, the collection and analysis of statistical information in the field of criminal and civil sanctioning of corruption should be systematized and a system for data collection, analysis and open access for the public should be established; open data standards should be adopted.

