



TURKEY: PHASE *2bis*

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS
IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

This Phase *2 bis* report was approved and adopted by the Working Group on Bribery in International Business Transactions on 18 June 2009.

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EXECUTIVE SUMMARY

The Phase 2bis Report on Turkey evaluates progress on Turkey's implementation of the OECD Anti-Bribery Convention since the Phase 2 examination in December 2007 in the following three main areas: (1) investigating and prosecuting allegations of bribing foreign public officials; (2) re-instating the liability of legal persons; and (3) awareness-raising by the Turkish Government.

In summary, the Phase 2bis examination was largely a success. Since Phase 2, and particularly since the Phase 2bis on-site visit in January 2009, Turkey has made progress in investigating cases. An investigation that had been terminated by the time of Phase 2 was re-opened in February 2008, and a criminal investigation in a second case was opened in May 2009. Progress on the allegations against 139 Turkish companies in the 2005 Final Report of the Independent Inquiry Committee into the Oil-for-Food Programme (IIC Final Report) was noted but to a lesser degree. Moreover, in January 2009, a draft law was introduced in Parliament to establish the liability of legal persons for the offence of bribing a foreign public official. It is also remarkable that Phase 2bis resulted in the highest level of private sector participation so far in any on-site visit, given that a major issue in Phase 2 was inadequate participation of the private sector.

Despite this progress made, Turkey remains in non-compliance with Article 2 of the Convention as long as the current situation continues. Moreover, the Working Group believes that progress investigating transnational bribery cases may have been somewhat impeded as follows: (1) the allegations in the 2005 IIC Final Report were not given sufficient priority, at least before March 2009; (2) in one case, the public prosecutors' office is not applying coercive investigative measures while waiting for a response to a limited MLA request, because the Turkish authorities believe that the level of suspicion is not high enough to be sure that jurisdiction can be applied in Turkey; and (3) inspection boards, which are not law enforcement bodies and do not have the authority to apply coercive investigative measures, were, until after the Phase 2bis on-site visit, being used to collect information needed to open a criminal investigation of the bribery of foreign public officials in a second case, even though a foreign court document raised sufficient suspicions of the bribery of a foreign public official.

Due to these remaining issues, the Working Group re-states its Phase 2 Recommendation for Turkey to "urgently" re-establish the liability of legal persons, and will undertake a peer review analysis of the new law in conjunction with Turkey's Phase 2 written follow-up report in December 2009. It also recommends a detailed report by Turkey on progress on the two ongoing investigations and the UN Oil-for-Food Programme cases in December 2009, and that Turkey follow-up closely its request for information from the UN Office of Legal Affairs on the OFFP cases. The recommendations also call for an assessment by Turkey of the level of suspicion needed in practice to open investigations of foreign bribery cases, and limiting the role of inspection boards in such cases to supporting public prosecutors.

This Phase 2bis report, which reflects findings of experts from Bulgaria and Germany, was adopted by the Working Group on Bribery in June 2009. It is based on information obtained by the evaluation team during its four day visit to Ankara and Istanbul to meet with representatives of various government bodies including the Ministry of Justice and Ministry of Foreign Affairs, police, prosecutors, the private sector and civil society, and laws and other materials provided by Turkey.

The Working Group will continue to monitor Turkey's implementation of the Convention through regular follow-up reports, beginning with a written follow-up report on implementation of the Phase 2 and Phase 2bis recommendations in December 2009.

Introduction

1. Purpose and Parameters of Phase *2bis* Examination

1. In Phase 2, the Working Group on Bribery concluded that Turkey was not giving adequate priority to the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and related OECD anti-bribery instruments. The Phase 2 Report on Turkey¹, which was adopted by the Working Group in December 2007, recommends that Turkey undergo a further Phase *2bis* examination within one year primarily due to the following weaknesses in Turkey's application of the Convention²:
 - a. Inadequate awareness-raising on the foreign bribery offence within government and vis-à-vis the private sector and civil society;
 - b. Insufficient participation by the private sector and civil society in the Phase 2 on-site visit to Turkey from 7 to 11 May 2007;
 - c. Inadequate responses by law enforcement authorities to allegations of transnational bribery; and
 - d. The repeal of the liability of legal persons for foreign bribery, and replacement with "special security measures", which do not meet the standards in the Convention.
2. The parameters of the Phase *2bis* examination by the Working Group are circumscribed by the Phase 2 recommendations in this respect. As a result, the examination is limited in scope to the following issues:
 - a. Awareness-raising by the Turkish Government;
 - b. Progress in investigating and prosecuting allegations of transnational bribery; and
 - c. Progress in re-instating the liability of legal persons for the offence of bribing a foreign public official.
3. In addition, due to inadequate participation of the private sector and civil society in Phase 2 (i.e. only one company, two business associations, one lawyers' association and two representatives of civil society), the on-site visit to Turkey was to involve panels with a broad spectrum of representatives from those areas to discuss issues that should have been addressed at the Phase 2 on-site visit (e.g. awareness, priority given by the Turkish Government to combating foreign bribery, conducting international business in corrupt environments, and the liability of legal persons).

2. Overview of Findings in Phase *2bis*

¹ The full title of the Phase 2 Report on Turkey is: "Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions", which can be accessed at: <http://www.oecd.org/dataoecd/13/46/39862163.pdf>.

² The full text of the Working Group on Bribery's recommendations in the Phase 2 Report on Turkey is provided in Annex A to this report.

4. From 19 to 22 January 2009 an examination team composed of lead examiners from Bulgaria and Germany, along with representatives of the OECD Secretariat³, conducted the Phase *2bis* on-site visit to Turkey. The visit took place for two days in Ankara, and one-and-a-half days in Istanbul, during which the examination team met with a full range of participants, including representatives of all the relevant government institutions and bodies⁴, and a multitude of private sector and civil society representatives⁵. The examination team also met with Turkey's Minister of Justice, and the leadership of the Justice Commission of the Turkish General Assembly.
5. In summary, the level of participation by relevant government bodies and institutions, the private sector and civil society was excellent. Organisation of the on-site visit by the Ministry of Justice, which also acted as the main contact point for the examination team leading up to and following the on-site visit, was impeccable. At all junctures of the Phase *2bis* examination process, the Turkish Government provided full transparency and cooperation to the examination team. The Turkish Permanent Delegation to the OECD in Paris actively supported all aspects of the examination⁶.
6. The overall assessment by the lead examiners of progress made by the Turkish Government in applying the Convention since Phase 2 is quite positive. In particular, significant steps have been taken to increase awareness of the offence of bribing a foreign public official within the public sector and vis-à-vis the private sector and civil society. These efforts have translated into a high level of awareness by many of Turkey's large companies involved in international business. As is the case for many Parties to the Convention, awareness is still low amongst small and medium-sized enterprises.
7. The lead examiners are cautiously optimistic about progress made in re-instating the liability of legal persons for the bribery of foreign public officials. The Turkish authorities acted quickly following Phase 2 to draft a law for this purpose, and the draft law was already before Parliament by the time of the on-site visit. The Turkish Government was attentive to the examination team's analysis of the draft law, and the Minister of Justice and the Parliamentary Justice Commission invited the examination

³ The lead examiner from Bulgaria was Nadya Hringova, Chief Expert, International Legal Cooperation and European Affairs Directorate, Department of Justice. The lead examiner from Germany was Stephan Husemann, Judge, Regional Court (Landgericht) Nürnberg-Fürth. The OECD Secretariat was represented by the following members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs: Christine Uriarte, General Counsel; Melissa Peerless, Communications Officer; and Dmytro Kotliar, Project Manager. In addition, the examination team is grateful for the invaluable advice provided by Rauf Gonenc, Senior Economist, Country Studies Branch, OECD Economics Department.

⁴ The Turkish Government institutions and bodies included the following: National Task Force, Ministry of Justice, Ministry of Foreign Affairs, Ministry of Finance, Ministry of Finance Inspection Board, Ministry of Internal Affairs, National Police from Ankara and Istanbul, Ankara Public Prosecutors' Office, Istanbul Public Prosecutors' Office, Financial Crimes Investigation Board (MASAK), Prime Ministry Inspection Board, Ministry of Trade and Industry, Inspection Board of Ministry of Trade and Industry, Under Secretariat for Foreign Trade, Board of Foreign Trade Controllers, Revenue Administration, Department of External and EU Affairs, Ministry of Labour and Social Security, State Planning Organisation, Turkish Employment Organization, Turkish International Cooperation and Development Agency, Public Procurement Authority, Export Credit Bank of Turkey, Privatisation Administration, State Personnel Presidency and Small and Medium Enterprises Development Organization.

⁵ The private sector was represented by approximately 14 business associations, 25 Turkish companies, and 5 Turkish subsidiaries of foreign parent companies. Civil society was represented by approximately 6 NGOs, and several academics and lawyers. Note that Turkish Government officials were not present during the meetings with the private sector and civil society.

⁶ The Turkish Permanent Delegation to the OECD was represented throughout the process by Ertan Yalçın, who also accompanied the examination team during the on-site visit to Turkey.

team to provide its comments on the draft law in writing following the on-site visit⁷. These comments summarised concerns that the examination team had about certain features of the draft law that might not comply with the Convention. The lead examiners welcome that the Justice Commission took this feedback into account and partially amended the draft law that was submitted for plenary debate in Parliament.

8. Regarding the investigation and prosecution of allegations of transnational bribery, progress has been made since Phase 2 and particularly since the Phase *2bis* on-site visit in January 2009. The case discussed in the Phase 2 report (Case #1 in this report), concerning an investigation that had been dismissed for reasons that did not satisfy the Working Group, has been reopened. Progress has also been made concerning the allegations against Turkish companies in the 2005 Final Report of Independent Inquiry Committee into the Oil-for-Food Programme (IIC Final Report). In addition, an investigation has been opened since the Phase *2bis* on-site visit in January 2009 regarding a new case (Case #2 in this report). However, the lead examiners consider that more progress could have been made on Case #1 and Case #2, and until very recently sufficient priority was not given to the allegations in the IIC Final Report.
9. The lead examiners consider that certain features of the Turkish legal system may have impeded progress on these cases, including the use of inspection boards where this might not be appropriate, and requiring too high a level of suspicion for opening an investigation by the Public Prosecutors' Office. However, since progress on investigating cases has increased since the Phase *2bis* on-site visit, the lead examiners are inclined to wait until Turkey's Phase 2 written follow-up report, which is due in just six months (December 2009), to reconsider whether these concerns remain valid.

3. Structure of Phase *2bis* Report

10. This report is divided into two main parts. Part I presents the findings and commentaries of the examination team based on the Phase *2bis* on-site visit and materials provided by the Turkish authorities. Part I is divided into the following subtopics: A. Progress investigating and prosecuting cases; B. Re-instatement of the liability of legal persons; and C. Awareness-raising. Part II contains the Phase *2bis* recommendations of the Working Group on Bribery to the Turkish Government regarding the issues covered in this report.

I. Findings from Phase *2bis* On-Site Visit

A. Progress Investigating and Prosecuting Cases

1. Case #1

11. In Phase 2, the Working Group was not satisfied with the reasons given by the Turkish authorities for dismissing an investigation into allegations of bribing a foreign public official by Turkish nationals. The early dismissal of this case in the absence of any investigative measures having been taken was one of the reasons that the Working Group recommended a Phase *2bis* examination within one year of adoption of the Phase 2 Report on Turkey. During Phase 2 and more recently Phase *2bis*, the Turkish authorities provided a high level of disclosure concerning this case.
12. To summarise, in Phase 2 the Working Group learned that the relevant acts, which allegedly took place from August 2003 to December 2005, came to the attention of the Turkish authorities through a

⁷ The comments of the examination team on the draft law on the liability of legal persons, which were provided to the Justice Commission of the General Assembly, are included in Annex B to this report.

request for mutual legal assistance (MLA) in May 2006. According to the Turkish authorities, the investigation was dismissed in Turkey because the crimes were allegedly committed by directors of a foreign subsidiary of a Turkish parent company who were not Turkish nationals. In addition, they believed that the foreign subsidiary was acting independently. The Working Group felt that the Turkish authorities had not been sufficiently proactive to confirm the nationality of the suspects or whether the Turkish parent company participated in the alleged crimes. In addition, the Turkish authorities did not appear interested in the proceedings in the foreign country, which could have potentially disclosed relevant information about links between the Turkish parent company and the foreign subsidiary.

13. Following the Phase 2 examination in December 2007, the lead examiners discovered that the relevant criminal proceedings in the foreign country were concluded in September 2007 with convictions against two board members of the foreign subsidiary who were also senior managers of the Turkish parent company. The order of the foreign court states that these individuals were Turkish nationals. They were convicted in the foreign court of misusing their positions in order to appropriate substantial state property through fraudulent means.
14. The investigation by the relevant Turkish prosecutors' office was re-launched in February 2008 due to additional information received from the media and new evidence, such as some bank records and witness statements. The Turkish nationality of the two suspects was confirmed by obtaining birth certificates and trade registry records. The public prosecutor initiated an MLA request to the foreign country in May 2008. The request was not for the whole file but only those documents that specifically relate to the bribery of foreign public officials by the suspects. This raises concerns since the focus of the investigation in the foreign country does not appear to have been to uncover the bribery of its officials. In addition, no further investigative steps to uncover foreign bribery have been taken by Turkey while waiting for a response to the MLA request, including the search and seizure of company and bank records, and cooperating with MASAK, the financial intelligence unit, and the tax administration.
15. The Turkish authorities explain that proactive investigative steps cannot be taken while waiting for a response to the MLA request because there is a doubt that jurisdiction can be applied in Turkey. Under Article 11 of the Criminal Code, nationality jurisdiction can only be applied if the suspect is found in Turkey. Article 11 provides jurisdiction for a broad range of offences, including foreign bribery and embezzlement. However, it cannot apply in Case #1 because the suspects are not present in Turkey. On the other hand, universal jurisdiction under Article 13 of the Criminal Code, applies even if the suspect is not present in Turkey. Article 13 applies to certain offences including the bribery of a foreign public official, but not to embezzlement, which the Turkish authorities equate to the offences for which convictions were obtained in the foreign court. Since the order of the foreign court does not refer specifically to the bribery of a foreign public official by the suspects, the Turkish authorities feel that there is not sufficient suspicion to take investigative steps at this stage.
16. The Turkish authorities explain that the Criminal Procedure Code does not have any specific provision requiring credible evidence that an offence for which Turkey has jurisdiction has been committed in order to apply coercive investigative steps. Rather, the competent public prosecutor prefers to be sure that there is a reasonable suspicion that the acts committed in the foreign country fall within the scope of Article 13 of the Criminal Code, due to the concern that if the acts do not constitute the foreign bribery offence for a Turkish national, search and possible seizure might violate the individual's personal rights and freedoms.
17. The lead examiners question whether the public prosecutor is being overly cautious, as it appears that the foreign court order could provide sufficient information to use coercive investigative measures in Turkey. The foreign court order documents significant anomalies in the tendering procedure and

execution of the relevant public works contract, which could raise serious suspicions that the relevant foreign public officials were bribed. These anomalies include the failure to do the following: use a tender procedure as required by the foreign law, perform a preliminary cost analysis of the work, and research whether other companies may have offered the work at a lower cost or higher quality. In addition, the company was reportedly substantially overpaid for its work. The lead examiners also recall that in Phase 2, the Turkish authorities stated that the Turkish criminal system is based on mandatory prosecution, and that it is compulsory to open an investigation if there is an “initial suspicion”.

18. During the Phase 2*bis* on-site visit, the lead examiners did not perceive that the failure to act more proactively in this case arose from negligence or because enforcing the foreign bribery offence is not a sufficient priority in Turkey. The Turkish authorities seemed sincere that they would diligently investigate the case if the MLA response from the foreign country were to produce credible evidence of foreign bribery. The lead examiners are therefore concerned that some other feature of the Turkish legal system, such as jurisdiction, might be an obstacle to the proactive investigation of suspicions of foreign bribery in the absence of clear evidence of such bribery. However, the scope and length of the Phase 2*bis* on-site visit did not permit a meaningful analysis of this issue. In particular, to fully assess whether these features impede foreign bribery investigations in Turkey, it would be necessary to evaluate the laws themselves, as well as their implementation in practice.

Case #2

19. A second case concerns allegations that appeared in the press in September 2007 about a public works contract in a foreign country won by a joint venture that included a Turkish company. Throughout the Phase 2*bis* examination process, the Turkish authorities provided a high level of disclosure regarding this case.
20. The case was brought to the attention of the Ministry of Foreign Affairs by the relevant Turkish embassy. In turn the Ministry of Foreign Affairs informed the Ministry of Justice about the case. The Ministry of Justice did not refer the case to the relevant prosecutors’ office because it felt that “there was not any credible suspicion, not even any piece of information regarding foreign bribery”. Instead, it referred the case to the Under Secretariat for Foreign Trade in November 2008, which interviewed executives from the Turkish company. In addition, the Ministry of Justice referred the case to the Inspection Board of the Ministry of Trade and Industry in October 2008 and the Inspection Board of the Ministry of Finance in November 2008. The former was tasked with detecting any violations of the Code of Commerce, and the latter with performing a tax audit. The two inspection boards worked together on the case and the Ministry of Finance acted as the coordinating body.
21. In early December 2008, the Ministry of Justice downloaded from the Internet and translated the indictment from the foreign country accusing two of its public officials of “malfeasance” and “violation of equity in public procurements”. The indictment was forwarded to the two inspection boards along with press articles. Shortly before the on-site visit in January 2009, the inspectors interviewed representatives of the Turkish company and asked them to “prepare its expenses” and submit other relevant documents such as balance sheets and external audit reports. If in the process of their inspections they uncover any evidence of a criminal offence, including the bribery of foreign public officials, they will report it directly to the prosecutors’ office as required by Article 279 of the Criminal Code.
22. The inspection boards have the authority to interview witnesses and request access to documents and records. On the other hand, only the public prosecutors’ office has the authority to request coercive investigative measures, such as the search and seizure of bank and company records – and mutual legal

assistance can only be requested by the judicial authorities. Inspection boards can, however, ask these authorities to undertake these actions. The lead examiners were therefore concerned that the inspection boards would not necessarily have the opportunity to uncover evidence of foreign bribery by the Turkish company.

23. The Ministry of Justice did not refer the case to the prosecutors' office because it felt that there was not sufficient suspicion to do so, and in the absence of sufficient suspicion such a referral would amount to a "wrongful denunciation". According to representatives of the Ministry of Justice, because the foreign indictment does not state that the Turkish company bribed the officials, there was not sufficient suspicion to refer the case for investigation.
24. The lead examiners questioned whether the Turkish authorities were applying too restrictive an interpretation to the level of suspicion needed to open an investigation. They note in particular that the foreign indictment documents significant anomalies in the tendering procedure and execution of the relevant public works contract, which could raise serious suspicions that the relevant foreign public officials were bribed. These anomalies include the following: payment of an excessive amount for the contract, payments to the Turkish company that amount to illegal payments, the making of an unlawful and unclaimed proposal by the Turkish company for undertaking the contract, failure by the foreign public officials to negotiate the price of the contract, acceptance of the contract proposal without a cost analysis, and preparation of a government report that does not reflect the negotiations of the contract including the price of the contract.
25. Indeed, the Inspection Board of the Ministry of Finance acknowledges significant anomalies in the tendering procedure and execution of the relevant public works contract, which could raise serious suspicions. However, it does not believe that these anomalies raise suspicions of bribery because the source of the anomalies is not clear. The foreign indictments do not document the difficult circumstances under which the public works project had to be undertaken, or the costs involved.
26. The lead examiners did not perceive that the failure to open an investigation and the decision to refer the case to the Inspection Board of the Ministry of Trade and Industry and the Inspection Board of the Ministry of Finance reflected insufficient prioritisation of foreign bribery in Turkey. The lead examiners were persuaded that in the event that the inspection boards detect such bribery, they would report it directly to the prosecutors' office, which would open an investigation if the suspicion were deemed sufficiently credible. Instead, in the absence of other explanations, the lead examiners believed that Turkish defamation laws might have been an obstacle to the proactive investigation of suspicions of foreign bribery in the absence of clear evidence of such bribery. The lead examiners therefore welcomed the news following the on-site visit that based on the final report of the inspections boards, which was issued on 14 April 2009, the competent public prosecutor's office opened a criminal investigation on 11 May 2009. The inspection boards concluded in their report that they could not find any information or document regarding the bribery of foreign public officials. However, they stressed in their findings that the Public Prosecutors Office has the primary competence in corruption cases.

3. United Nations Oil-for-Food Program Cases⁸

Situation at time of Phase 2

⁸ The description of the handling of the allegations against Turkish companies in the IIC Final Report into the Oil-for-Food Programme does not relate in any way to steps taken by the Turkish Government during the OFFP to ensure that operations of Turkish companies in Iraq followed the relevant United Nations Security Council resolutions.

27. The Phase 2 Report addressed in some depth the treatment by the Turkish authorities of allegations against 139 companies in the Final Report of the Independent Inquiry Committee (IIC) into the Oil-for-Food Programme (IIC Report), published in October 2005⁹. The Working Group did not presuppose that the transactions in the Final Report concerned the bribery of foreign public officials as prohibited under Article 1 of the Convention. Rather the Group felt that given that the allegations concerned transnational corruption, how the Turkish authorities addressed the allegations was an important signal of the level of priority being given to the enforcement of the Convention.
28. During the Phase 2 on-site visit in May 2007, except for the Ministry of Finance, the Turkish authorities were generally not aware of the allegations in the IIC Final Report. In August 2007, between the Phase 2 on-site visit and the Phase 2 examination in the Working Group in December 2007, the Board of Foreign Trade Controllers (BFTC), an inspection body under the authority of the Under Secretariat of Foreign Trade, launched a pre-examination into the allegations against the Turkish companies in the IIC Final Report. During the Phase 2 examination, the Turkish authorities explained that the Ministry of Justice requested information about the allegations from the UN Office of Legal Affairs on 21 November 2007, following a request on the same day from the BFTC to do so. The Working Group welcomed these developments, but remained concerned that it had taken two years for the Turkish authorities to follow-up on the allegations in the IIC Final Report. The Group felt that this indicated that Turkey was not giving transnational bribery sufficient priority, and was one of the reasons that it recommended a Phase *2bis* examination.

Situation following Phase 2 up to early March 2009

29. During and following the Phase *2bis* on-site visit, the Turkish authorities provided a continuous high level of disclosure regarding progress in handling these allegations. The Ministry of Justice informed the lead examiners that the allegations were referred to the Board of Foreign Trade Controllers rather than the public prosecutors' office mainly because the IIC Final Report does not provide sufficient evidence to open investigations. It is therefore premature to involve public prosecutors. However, if the inspection by the BFTC uncovers evidence of any crime including foreign bribery, pursuant to Article 279 of the Criminal Code, the crime must be reported directly to the public prosecutors' office. The BFTC has the authority to examine for breaches of foreign trade legislation. Like other inspection boards, it can interview witnesses and request relevant documents; however, it does not have the authority to apply coercive investigative measures such as the search and seizure of bank and company records, or request mutual legal assistance, and must rely on the public prosecutors' office and the Ministry of Justice, respectively, for taking such steps.
30. The Turkish authorities provided the examination team with all documentation regarding contacts between the Ministry of Justice and the United Nations concerning the allegations in the IIC Final Report, and information about internal discussions on the issue to the greatest extent possible. Through this disclosure the lead examiners discovered that the contact person at the Ministry of Justice sent a message to the IIC email account on 21 November 2007 requesting "additional information and documents supporting the allegations...to use in pending examinations of relevant Turkish

⁹ The IIC was established in 2004 to investigate and report on the administration and management of the UN Oil-for-Food Program. It was chaired by Paul Volcker, and Committee members were Dr. Mark Pieth and Richard Goldstone. The Final Report of the IIC documents the payment of illegal kickbacks in the form of after-sales-service fees and inland transportation fees in relation to the contracts of 2 253 companies for the sale of humanitarian goods to the Iraqi Government, as well as a complicated and vast network of illegal surcharge payments to the Iraqi Government in connection with the oil contracts of 139 companies. The allegations against Turkish companies are contained in Table 8 and Table 5 of the Final Report of the IIC regarding the humanitarian and oil contracts, respectively (<http://www.iic-offp.org/story27oct05.htm>). 138 of the allegations concern humanitarian contracts and one concerns an oil contract.

institutions”. The IIC email address was obtained from the IIC website. However, the website stated that requests for IIC documents and information following the closure of the IIC office on 31 December 2006 should be sent by post or fax to the Legal Counsel of the UN Under-Secretary for Legal Affairs, and provided the name and contact information for the Legal Counsel.

31. Post-December 2006 procedures for requesting access to the IIC documents and information were also posted on the IIC website. These procedures were addressed to “law enforcement bodies” and required inclusion of specific information in the request, including confirmation that the request was “in furtherance of an official investigation, action, or prosecution”, and the names of the “specific persons, companies and contract numbers” relevant to the investigations. The Turkish authorities point out that this procedure also required that requests be organised by document type, including the following: (1) identification of the contract number; (2) Government of Iraq ministry data (identified by ministry and contract number); (3) company records; (4) bank records; (5) correspondence; and (6) other records.
32. On 28 January 2008, the Ministry of Justice informed the Ministry of Foreign Affairs and the Under Secretariat for Foreign Trade that it had not received a reply from the IIC, and requested that the Ministry of Foreign Affairs request the documents via diplomatic channels. On 4 February 2008, the Ministry of Foreign Affairs responded to the Ministry of Justice that the contact person should remind the IIC about the original request dated 21 November 2007. Afterwards, the contact person sent a message to the same IIC general email account on 8 February 2008 requesting information about the status of the original request. Again there was no response from the IIC; and so on 14 March 2008 the Ministry of Foreign Affairs sent an official letter to the Ministry of Justice, enclosing the information which was downloaded in March 2008 in an annex to the letter. The Ministry of Foreign Affairs never made the request because the IIC procedural document annexed to its letter was only addressed to law enforcement authorities, and the Ministry of Foreign Affairs believed that this meant that only law enforcement authorities were entitled to make requests.
33. In addition, by early March 2009, no further contact with the IIC had been attempted by the Turkish Government, and it had not checked the IIC website since March 2008 to see if the procedures for requesting information had changed. Up until that time, the Turkish Government had also never initiated contact with the UN Under-Secretary for Legal Affairs on this matter. Until notification by the OECD Secretariat on 10 March 2009 about the new procedure for requesting information from the UN, the work of the BFTC had been based on the procedure to be followed by law enforcement authorities.
34. According to the procedures for requesting access to the IIC documents and information which were posted on the IIC website in November 2007, the main task of the BFTC was to research the names of the individuals and companies, and the contract numbers and dates of the contracts. It was believed that collecting this information would serve two goals – form a database for further inquiries, and support an eventual request for access to the IIC archives. As of the time of the on-site visit, 48 companies had been requested to provide relevant information and ten companies had responded.¹⁰ The BFTC was waiting to complete its report before sending it to the Management Board of the BFTC, but so far it had not detected any crimes. The report will contain the findings and conclusions of the BFTC, and will be transferred to the relevant public prosecutors’ offices.

¹⁰ The Turkish authorities point out that the BFTC is collecting documents from companies through an ongoing process, and the number of companies asked to provide documentation as well as the number responding is on the increase.

35. However, the research by the BFTC was based on information on the IIC website which changed on 13 May 2008, and remained essentially the same ever since¹¹. In summary, the new procedures for requests to access IIC documents and information are no longer addressed specifically to “law enforcement bodies” but to any party if submitted through and endorsed by the Permanent Mission to the UN of the requesting party’s Member State. In addition, the requirements for specific information in the request now only apply “if the request emanates from a national investigative or law enforcement authority”.
36. On 2 March 2009, the examination team contacted the Legal Counsel for the UN Under-Secretary General for Legal Affairs requesting clarification of the procedure for obtaining access to documents and information supporting the allegations in the IIC Final Report. A response was sent on the same day by the Senior Legal Officer from the General Legal Division of the UN Office of Legal Affairs, in which he explained that “any authority or individual may make a request for IIC information or documents, provided that the written request is addressed to the UN’s Legal Counsel and endorsed by the Member State’s Permanent Mission to the UN”. He also clarified that the procedure for requesting documents and information on the IIC website sets out the “ideal level of detail” for making a request, but that it is sufficient to request information by simply referring to the related allegation as identified in the relevant table in the IIC Final Report. The examination team forwarded this information to the Turkish authorities forthwith, and met with them to discuss this development further in the margins of the March 2009 Working Group on Bribery meeting.
37. Since early March 2009, through contacts with the examination team, the Turkish authorities realized that the original and follow-up requests for documents and information from the IIC were not sent to the appropriate person. In addition, they realized that the research undertaken by the BFTC to support a request for access to IIC documents and information had not been necessary, at least since 13 May 2008. The lead examiners are satisfied that the Turkish authorities did not intentionally fail to ensure that they were taking the correct steps at the various junctures. However, they feel that if sufficient priority had been given to these allegations, the Turkish authorities would probably have made efforts early on to determine why the IIC was not responding to the original and follow-up requests for documents and information, and whether a less onerous procedure for obtaining access to the documents was available.

Situation following early March 2009

38. On 20 April 2009, the Turkish authorities informed the Secretariat that, on 16 April 2009, the Turkish Permanent Delegation to the United Nations sent an official note to the UN Office of Legal Affairs requesting information on allegations in the IIC Final Report concerning Turkish companies. The Turkish authorities stated in correspondence with the Secretariat that this initiative was taken after receiving information from the examination team on how to obtain information on the allegations in the Final Report. The request for the information through diplomatic channels was initiated by the BFTC.
39. The examination team recognises that due to allegations regarding a large number of Turkish companies in the IIC Final Report, which is likely due to the proximity of Turkey to Iraq, the Turkish authorities face a formidable task in addressing the allegations. The 139 companies are located in different jurisdictions within Turkey, and therefore it is necessary to identify the competent Public Prosecutor’s Office for each allegation. There is also significant work involved in translating and

¹¹ The examination team is grateful to the Senior Legal Officer of the General Legal Division of the UN Office of Legal Affairs, for providing the relevant website history and clarifying the current procedures for obtaining access to IIC documents and information.

summarising the massive IIC Final Report, including technical legal language, into Turkish. The Turkish authorities believe that centralising these preliminary tasks before involving the individual prosecutors' offices will facilitate the judicial process.

Use of Inspection Boards

40. During the discussions about Case #2 and the United Nations Oil-for-Food Program cases, the lead examiners made every effort to determine whether the use of inspection boards had been an obstacle to the effective enforcement of the offence of bribing a foreign public official in Turkey. They were conscious that the use of inspection boards in relation to potential criminal offences was a unique feature of the Turkish legal system. They were also conscious that the inspection boards were mainly involved in these cases at one stage or another because the Turkish authorities did not consider that there was sufficient suspicion in practice (i.e. not due to legal requirements) for the public prosecutors' office to open investigations.
41. In Turkey, inspection boards have powers within their scope of jurisdiction. They can request information from all persons, institutions and foundations; send memos directly to relevant institutions or ministries; take statements under oath from accused persons and witnesses; obtain and analyse all relevant documents; hire experts for technical issues; temporarily suspend civil servants from office; and in specific cases, request information on financial assets, real estate and vehicles from banks and other institutions. Inspection boards can examine cases on their own volition, at the request of their relevant ministries, or at the request of the public prosecutors' office to assist with investigations.
42. Every ministry has an inspection board, and its tasks depend on the specialisation of the relevant ministry. Although inspection boards have the authority during their inspections to address all kinds of allegations and crimes – regardless of their size, severity and significance – in general they examine less severe crimes, and often crimes involving public officials. At one time inspection boards were only used to audit relevant government agencies. However, their scope has broadened over time, and, for instance, 85 % of the examinations by the Inspection Board of the Ministry of Trade and Industry involve privately operated corporations, cooperatives and professional associations.
43. If an inspection board uncovers evidence of a crime, pursuant to Article 279 of the Criminal Code, it is required to inform the public prosecutors' office immediately. Inspection boards have the authority to request access to documents and interview witnesses; however they do not have the authority to apply coercive investigative measures such as the search and seizure of company and financial records, and they cannot make MLA requests. However, they can request the competent public prosecutor or the court to impose these measures when it is necessary. They are not auxiliary prosecution bodies.
44. At the Phase *2bis* on-site visit, the lead examiners tried to determine if inspection boards could be subject to political influence since they are part of the executive branch of the Turkish Government. However, the examination team did not find any evidence in this regard, including during their meetings with the relevant inspection boards, prosecutors, the Ministry of Justice, the private sector and civil society. Instead they discovered that the role of inspection boards is well-accepted by Turkish society. With 129 years of experience, the role of the Inspection Board of the Ministry of Finance is particularly entrenched. According to representatives of the Ministry of Finance, it is also shielded from political interference, because it does not take instructions from any authority. It has broad audit and inspection powers regarding financial operations, and access to tax audit information and money laundering information held by MASAK.
45. Given the explanation by Turkey, the lead examiners concluded that relevant inspection boards could play an important role in detecting the bribery of foreign public officials when there is not enough

evidence for the public prosecutors' office to open an investigation, or by collaborating and assisting public prosecutors with their investigations when there is a need for specialised expertise. For instance, the Inspection Board of the Ministry of Finance can offer expertise on tax audits, and the BFTC and the Inspection Board of the Ministry of Trade and Industry regarding trade transactions. On the other hand, the lead examiners do not believe that inspection boards can take the place of the public prosecutors' office when it is appropriate to open an investigation, which they believed to have been the situation in Case #2.

46. In relation to the allegations against 139 Turkish companies in the IIC Final Report on the Oil-for-Food Program, the lead examiners are of the opinion that it is appropriate for the BFTC to assist in obtaining information about the companies, especially given the large number of companies and because they are located in various parts of Turkey. They also feel that the BFTC could continue to play an important role if the public prosecutors' office opens investigations, by assisting and collaborating in the investigations.
47. It appears that, at least between 13 May 2008 and early March 2009, the BFTC was carrying out unnecessary work researching the companies and the contract information referred to in the IIC Final Report, since access to the documents was available by requesting the information by simply referring to the allegations in the relevant table in the Report. It is unfortunate that the Turkish authorities lost time during this period, because they did not realize that this background information was not necessary to request documents from the United Nations. However, the lead examiners believe that the information that was compiled will facilitate and accelerate any investigations that might be done by prosecution authorities.
48. The lead examiners also believe that even when inspection boards are used to examine cases because there is not sufficient suspicion for the public prosecutors' office to open an investigation, their potential for uncovering evidence of the bribery of foreign public officials is limited given that they cannot apply coercive investigative measures. Inspection boards cannot therefore satisfactorily compensate for the investigative gap resulting from the high evidentiary burden that is required in practice by the Public Prosecutors' Office to open an investigation.

Commentary

The lead examiners believe that, overall, since Phase 2 and particularly since the Phase 2bis on-site visit in January 2009, increased priority has been given to the enforcement of the offence of bribing a foreign public official in Turkey. They welcome the re-opening of an investigation into Case #1, which was terminated by the time of the Phase 2 examination. They also welcome that an investigation has been opened in a new case (Case #2) since the Phase 2bis on-site visit. In addition, steps have been taken by the Board of Foreign Trade Controllers regarding allegations against 139 Turkish companies in the Final Report of the Independent Inquiry Committee into the Oil-for-Food Programme (IIC Final Report).

Nevertheless, the lead examiners do not believe that the allegations against Turkish companies in the IIC Final Report were being given sufficient priority, at least before early March 2009. The Turkish authorities were not using up-to-date information about the procedures for obtaining access to the documents and information of the IIC on the allegations, and lost more than one year waiting for a response from the IIC due to having requested access through the wrong contact point. The lead examiners are therefore encouraged by the recent formal request through diplomatic channels by the Turkish authorities for information about the allegations from the UN Office of Legal Affairs.

In addition, the lead examiners are concerned that inspection boards, which are not law enforcement bodies and do not have the authority to apply coercive investigative measures, were, until after the Phase 2bis on-site visit, being used to collect information needed to open a criminal investigation of the bribery of foreign public officials in Case #2, even though a foreign court document raised serious suspicions of the bribery of a foreign public official. In Case #1, the public prosecutors' office is not applying coercive investigative measures while waiting for a response to a limited MLA request, even though a foreign court order already raises serious suspicions of foreign bribery.

The lead examiners therefore recommend that Turkey:

- i. Due to continuing concerns about: the non-use of coercive investigative measures in Turkey in Case #1, the initial referral of Case #2 to inspections boards rather than opening an investigation, and the procedural delays in the UN OFFP cases:
 - a. Report in detail in its Phase 2 written follow-up report, which is due in December 2009, on progress in Case #1, Case #2 and the United Nations Oil-for-Food Program cases.*
 - b. Continue to inform the Working Group on Bribery on developments in the investigation and prosecution of Case #1, Case #2 and the allegations against Turkish companies in the IIC Final Report, for instance, during the Working Group's tour de table discussion.**
- ii. Maintain contact with the UN Office of Legal Affairs to ensure the timely receipt of the requested information on allegations in the IIC Final Report concerning Turkish companies, and that relevant Turkish authorities consider visiting the UN Office of Legal Affairs following receipt of the information to discuss the authentication of documentary evidence.*
- iii. Ensure the effective investigation and prosecution of foreign bribery cases by assessing the level of suspicion necessary to open an investigation, and by limiting the use of inspection boards in foreign bribery cases to assisting the public prosecutors' office in ongoing investigations and locating evidence of the offence when there is not a sufficient suspicion for the public prosecutors' office to open an investigation.*
- iv. .*

B. Liability of Legal Persons

1. Situation in Phase 2

49. One of the principal reasons that the Working Group on Bribery recommended a further Phase 2bis examination of Turkey was the repeal of the liability of legal persons in 2005 with the enactment of a new Penal Code. Article 60 of the new Penal Code established "special security measures" for legal persons, which include the following two relevant measures: i) revocation of a legal entity's operating license, if the legal person misuses the permission conferred by such license and through the participation of the organs or representatives of the legal entity; and ii) confiscation regarding offences committed for the benefit of such entities. In Phase 2, the Working Group assessed these measures as not in compliance with the Convention essentially due to their limited scope and because they do not include monetary sanctions. The Working Group therefore recommended that Turkey "urgently re-establish" the liability of legal persons in compliance with Article 2 of the Convention.

2. Steps taken since Phase 2

50. Following the Phase 2 examination in December 2007, the Turkish Government acted quickly to try to comply with the Working Group's recommendation to re-establish the liability of legal persons. In January 2008, it established a working group comprised of judges from different departments of the Ministry of Justice to draft legislative amendments to implement recommendations on anti-corruption and anti-money laundering from the following bodies: OECD, Financial Action Task Force (FATF), and the Group of States against Corruption (GRECO). It produced an omnibus draft law for this purpose (Draft Law), which it sent to the Prime Ministers' Office for approval in July 2008. The Draft Law, which includes a provision on administrative monetary sanctions for legal persons, was submitted to the Turkish Parliament on 7 January 2009. During the on-site visit, the Draft Law was being considered by the Parliamentary Justice Commission.
51. In preparing the Draft Law, the working group from the Ministry of Justice consulted academics involved in drafting the new Penal Code and Criminal Procedure Code. The Draft Law was published on the website of the Ministry of Justice when it was sent to the Prime Minister's Office.
52. The examination team believes that the Turkish authorities have made a sincere attempt to act positively on the Working Group on Bribery's recommendation. Moreover, the Turkish authorities, including the Minister of Justice and the Parliamentary Justice Commission, were receptive at the on-site visit to comments from the examination team on the Draft Law. The Minister of Justice stated that he intended to present the lead examiners' concerns to the Justice Commission, and the Justice Commission invited the team to submit its suggestions for improving the Draft Law following the on-site visit. The examination team's suggestions to the Justice Commission were sent to the Turkish Government on 27 February 2009 (see Annex B). The lead examiners welcome that the Justice Commission took some of their comments into account in amending the Draft Law in April 2009.¹²
53. Nevertheless, since the Draft Law has not yet been enacted, Turkey remains in non-compliance with Article 2 of the Convention; this is probably not surprising given that it has been just over one year since the Phase 2 examination. Therefore, at this stage the Phase 2 recommendation to urgently re-establish such liability has not been implemented.
54. However, the examination team believes that in addition to reinforcing the recommendation in Phase 2 to re-establish the liability of legal persons for the foreign bribery offence, the Phase 2*bis* Report also provides an important opportunity to give the Turkish Government input on whether, if adopted, the provision in the Draft Law on the liability of legal persons meets the standards under the Convention. This is particularly the case given that the Turkish authorities have been open to constructive input in this regard.

3. Summary of the Draft Law

55. Article 8 of the Draft Law introduces a new Article 43/A in the Turkish Code of Misdemeanours establishing the liability of legal persons for certain offences, including bribery defined in Article 252 of the Penal Code, which includes the bribery of foreign public officials (see Article 8 of the Draft Law in Annex C, which compares the Draft Law when it was submitted to Parliament on 7 January 2009, and later when it was submitted by the Justice Commission to the Presidency of the Turkish Grand National Assembly on 16 April 2009). The administrative liability of the legal person is triggered where the natural person who commits the offence is an "an organ or a representative of a civil legal

¹² The Parliamentary Justice Commission amended the text of the Draft Law and sent it, along with a report, to the Presidency of the Parliament on 16 April 2009. The Draft Law was also put on the Parliament's agenda.

person” or “not the organ or representative, but undertakes a duty within the scope of the legal person’s operational framework”. When the Draft Law was originally submitted to Parliament, the lead examiners identified the following three main areas in which Article 8 might not have fully complied with the Convention: i) the link between the liability of the natural person and the liability of the legal person; ii) the level of monetary sanctions; and iii) the procedures for investigating offences under the Code of Misdemeanours. These areas are discussed below, and are followed by a discussion of other features of Article 8 of the Draft Law that might impede effectiveness.

Link between the Liability of the Legal Person and the Natural Person

56. Following the submission of the Draft Law to Parliament, the Justice Commission deleted the statement that an administrative fine for a legal person is available at the end of a trial for a natural person. Article 8 now states that administrative fines for legal persons will be applied by the court that has the authority to try the offences in Article 8. However, since the Draft Law still states that a fine shall “also” be applied to a legal person, there would appear to be some risk of interpreting the provision as requiring the conviction and sanctioning of a natural person in order to sanction a legal person.
57. The Working Group has always insisted that to effectively implement Article 2 of the Convention, the liability of legal persons must be available even when it is not possible to identify, prosecute or convict the natural person who perpetrated the bribery act. This is because decision-making in a legal person is often diffuse, and when collective decision-making is involved it might not be possible to identify individual wrongdoers. It might also be more practical and appropriate to proceed against the legal person alone, rather than a mere agent or low level employee who may have bribed due to corporate pressure.

Monetary Sanctions

58. Before the examination team provided its suggestions to the Justice Commission, the Draft Law stated that an administrative fine of 10 000 Turkish Lira (about 4 500 Euros)¹³ to 1 million Turkish Lira (about 450 000 Euros) should “also” be applied to a legal person, where a natural person commits the bribery of a foreign public official, and the offence benefits the legal person. In response to the examination team’s feedback, the Parliamentary Justice Commission suggested raising the maximum fine to 2 million Lira (about 900 000 Euros).
59. The lead examiners believe that in particular the two following major aspects of the Turkish economy provide opportunities for substantial international business contracts in neighbouring countries, thus necessitating a high maximum monetary sanction: 1. Turkey’s unique position as a gateway for doing business in the Middle East and Central Asia; and 2. Turkey’s proximity to substantial oil and gas markets in the Caspian and Central Asia. They also believe that the maximum level of sanctions should reflect that Turkey has a very large and successful construction sector, which is active in the region and globally. Companies from this sector often compete for major infrastructure and public works projects, particularly in neighbouring countries.
60. The “special security measure” of confiscation under Article 60 of the Penal Code does not complement the monetary sanction for two reasons. First, it does not apply directly to legal persons, but only in relation to offences committed for their benefit. Thus the natural person must first be convicted for an offence in favour of the legal person for it to apply. In addition, confiscation as a

¹³ The calculation into Euros is based on the exchange rate on 1 April 2009.

“special security measure” has not so far been used in Turkey, and there is not supporting authority for the application of the general confiscation measures in the Penal Code to legal persons.

Investigative procedures under the Code of Misdemeanours

61. The use of the Code of Misdemeanours for re-establishing the liability of legal persons raises issues about the procedure involved for enforcing the provision, and whether it is effective. The Turkish authorities explain that the Code of Misdemeanours was chosen because the Penal Code is reserved for criminal offences, and according to the Turkish Constitution, criminal liability for legal persons is not possible in the Turkish legal system.
62. At the on-site visit the Turkish authorities explained that the Code of Misdemeanours is reserved for “less serious” offences. In addition, due to the nature of its scope, coercive investigative techniques are not available for offences covered by it. In their written comments to the draft Phase *2bis* report the Turkish authorities explained that the criminal offences covered by draft Article 8 will be investigated by public prosecutors according to the Criminal Procedure Code and therefore all criminal investigative measures can be applied to legal persons. However, they explain that the coercive measures will be available because the investigation of the natural and legal person will be combined. It therefore appears that in order to impose monetary sanctions under the Code of Misdemeanours, coercive measures would not be available when the natural person who perpetrated the offence has not been identified.

Features of Article 8 of the Draft Law that might Impede Effectiveness

63. Three further features of Article 8 of the Draft Law might impede effectiveness of the liability of legal persons. First, it appears that the liability might not apply to the case where a legal person bribes on behalf of a related legal person, such as a subsidiary (including a foreign subsidiary), holding company, or member of the same industrial group. Concerns in this regard arise due to the formulation of the provision, which states that liability applies for offences committed “to the benefit of that legal person”. The Turkish authorities believe that it would be possible to prosecute the legal person who bribed on behalf of a related company through complicity provisions. Supporting authority for the application of these provisions would likely be requested by the Working Group if this provision were to be adopted by Parliament.
64. Second, the liability under Article 8 of the Draft Law applies in relation to “civil legal persons”, a term which might not necessarily appear to include state-owned or state-controlled enterprises. Although the Turkish authorities firmly believe that this terminology would include a private company or entity wholly or partly owned by the Turkish State, this would be another area in which the Working Group would likely request supporting authority if this provision were to be adopted by Parliament.
65. Third, the terminology regarding the level of authority in the legal person of the natural person whose conduct triggers the liability of the legal person might appear confusing. It is not necessarily clear who would constitute “an organ or a representative of a civil legal person”, or a person who is “not the organ or representative, but undertakes a duty within the scope of the legal person’s operational framework”. Nevertheless, the Turkish authorities state that the terminology is meant to apply as follows: “organ” denotes any decision-making or supervisory body within the company’s structure; “representative” covers any agent of the company who is legally authorised to represent the company, even if not an employee of the company; and “a person [...] who undertakes a duty within the scope of that legal person’s operational framework” should be understood as any employee of the company, regardless of his/her position, seniority, type of functions, part-time/full-time employment, etc. Given this explanation, the provision would appear very broad in scope, including in its coverage the foreign

bribery acts of any employee. However, if this provision were to be adopted by Parliament, this also would be an area in which the Working Group would likely request supporting authority.

Commentary

The lead examiners welcome the progress made so far by the Turkish authorities in acting on the Phase 2 recommendation to re-instate the liability of legal persons in compliance with Article 2 of the Convention. The lead examiners believe that Turkey's swift action to draft a new provision for this purpose and submit it to Parliament as part of an omnibus draft law shows that Turkey sincerely desires to comply with the Convention in this regard. The lead examiners also appreciated the opportunity to provide their preliminary suggestions on the Draft Law to the Justice Commission, and welcome the Commission's decision to revise the Draft Law in two important ways due to their suggestions.

Nevertheless, as long as the current situation continues in which the "special security measures" for legal persons are the only available measures for holding legal persons responsible for the bribery of foreign public officials, Turkey remains in non-compliance with Article 2. The lead examiners therefore restate the Phase 2 recommendation to "urgently" re-establish the liability of legal persons in conformity with Article 2. They also recommend that Turkey further consider the comments in this report on areas of Article 8 of the Draft Bill that might not comply with the Convention, and those areas that might be an impediment to the effectiveness of the liability of legal persons. Moreover, the lead examiners recommend that once a new law comes into force re-establishing the liability of legal persons for the bribery of foreign public officials, the law undergo a peer review analysis in conjunction with Turkey's Phase 2 written follow-up report, which is due to be given in December 2009, assuming that the law will have been passed by then.

C. Awareness-Raising

1. Overall Progress

66. The Turkish government has made significant efforts to raise awareness of the Convention and the foreign bribery offence in Turkey. Following the adoption of the Phase 2 report and the Working Group's recommendations, the Turkish Government established an inter-institutional National Task Force (NTF) to address these issues. Members of the NTF include the Prime Ministry Inspection Board, Undersecretariat for Foreign Trade, State Personnel Presidency, Ministry of Justice, Ministry of Foreign Affairs, National Police, TIKA (Turkish International Development and Co-operation Agency), the Ministry of Finance Inspection Board, Revenue Administration, Public Procurement Authority, Ministry of Trade and Industry, Turkish Eximbank, Privatization Administration, and MASAK. The Government strategy for creation of the NTF and implementation of the OECD Convention was included in the National Program for the Adoption of the EU Aquis, approved by the President on 31 December 2008. The NTF has met regularly since this time.
67. After the Phase 2 examination, the Ministry of Justice was designated as the lead agency for awareness-raising initiatives; the Ministry, along with other government agencies, implemented a broad range of programs for both the public and private sectors.
68. By all accounts, these projects have resulted in increased levels of awareness. Government officials overall are knowledgeable about the Convention and the foreign bribery offence, and seem to be making efforts to incorporate compliance with the Convention into their work. A change in perception also seems to have occurred in the private sector: companies now seem to understand that bribery is unacceptable, even when doing business in countries where such corruption is widespread.

2. Public Sector

69. Trainings for police, prosecutors and judges have been particularly plentiful, some using innovative technology to reach large numbers of people. For example, police officers throughout Turkey viewed an Interactive Smart Study lecture on investigating foreign bribery. Additionally, the UYAP National Judicial Network has been used to disseminate information to more than 10 000 judges and prosecutors. The Ministry of Justice's Justice Academy and Training Department have included foreign bribery information in their regular training program as well. For example, in June 2009, a presentation on "The OECD Convention and Turkey's Evaluation Process" was delivered to 16 judges and 12 prosecutors during an in-service seminar. A further 39 judges and prosecutors who deal with corruption offences attended a presentation on the OECD Convention during a seminar on Combating Corruption and Cyber Financial Fraud on 8 June 2009.
70. In September 2008, the Ministry of Foreign Affairs held a successful training event for officials stationed abroad. More than 50 people attended the seminar, including Economic Counsellors at Turkish foreign embassies. In addition to helping Turkish companies operating in foreign countries understand and follow local law and rules, Economic Counsellors are also charged with monitoring the press for bribery allegations against Turkish companies. They are required to report any allegations they discover. The Ministry also provides information on foreign bribery through its Diplomatic Academy.
71. The Ministry issued a circular in December 2008 to provide Ministry staff and diplomatic personnel assigned to Turkish missions (Embassies, Permanent Delegations to international organisations, and Consulates) with information about the OECD Convention and the new articles in the Turkish Penal Code related to combating foreign bribery. The circular informed the staff, inter alia, of their duty to report foreign bribery, and included penalties in cases of failure to report.
72. TIKA, the Turkish International Development and Co-operation Agency, has also made significant outreach efforts for its staff stationed abroad; more than 20 TIKA Program Coordinators in "high-risk" countries received targeted training. TIKA also issued a circular on bribery within international technical agreements.
73. Two circulars aimed at prosecutors and judges – one on international co-operation on criminal matters, and one on combating foreign bribery – should also bring more attention to the foreign bribery issue. In addition, more than 300 judges and prosecutors attended an in-service training on foreign bribery and the Convention sponsored by the Ministry of Justice, and an additional 459 participated in a conference on Organised Crime and Corruption Offences in the Turkish Criminal Justice System, which included discussion of the Convention.
74. The inspection boards are also an important target for training on the foreign bribery offence. All inspectors of the Ministry of Finance Inspection Board are considered well-informed on the foreign bribery offence. They have received the OECD Convention, and many have written articles on this topic. The Inspection Board also organised a series of seminars (2 held in 2008, and another 2 planned for 2009) for all stakeholders within the Ministry of Finance to raise awareness.
75. The Inspection Board of the Ministry of Trade and Industry issued Circular 2008/2 to inform its members about the OECD Convention, including actions to follow when they detect foreign bribery. A training program for assistant inspectors organised in early 2009 also provided information about detection. The Inspection Board will include information about the OECD Convention and foreign bribery in all future trainings. The Prime Ministry Inspection Board, which plays a co-ordination role for all the Turkish inspection boards, held a seminar on "The OECD Anti-Bribery Convention,

Combating Foreign Bribery and Reporting Obligations” on 28 May 2009; 32 of the 40 inspectors attended this session.

76. MASAK (Turkey’s financial intelligence unit) has provided training to 790 individuals on reporting suspicious transactions. The official export credit support agency, Turk Eximbank, has included foreign bribery on the agenda of its regular annual training program.
77. The Ministry of Trade and Industry’s Central Legal Person System Project, a comprehensive registry of company information, should help trace transactions by legal persons. It will be available at the end of 2009.

3. Private Sector

78. The government has also offered a diverse array of awareness-raising initiatives for the private sector. These efforts seem to have reached a significant number of companies (particularly large companies), and to effectively show that the government takes foreign bribery seriously and expects companies to do so as well.
79. Other policies demonstrate the consequences for companies that engage in corrupt acts – both the Public Procurement Authority and the Privatization Administration exclude companies that have been convicted of foreign bribery from their tender processes.

Large Companies

80. Large companies, across the board, are aware of the Convention and the foreign bribery offence. Many representatives said they had learned about these issues within the past several months, through programs sponsored by the Ministry of Justice, the Under Secretariat of Foreign Trade (Ministry of Foreign Affairs) or the Privatization Administration.
81. The Under Secretariat of Foreign Trade has been very active. It led a collaborative effort to create a booklet on foreign bribery that includes definitions and reporting obligations, along with a hypothetical case. This publication was widely distributed to businesses and business organisations.
82. The Under Secretariat also sponsored seminars stressing the supply-side effects of bribery. Events during the 11th Foreign Trade Week targeted the high-risk geographical areas of *Geresun*, *Rize* and *Aydin* provinces. Another meeting was organised jointly with the Turkish Contractors Association to target the construction sector. Turkey intends to use it as a model for similar programs geared towards the textiles/clothing, automotive and exporting sectors.
83. There is evidence that increased awareness has led to more preventive action by companies. A large Turkish holding company now requires all new employees to sign a code of conduct including a pledge that they will not bribe, and annually confirm that they have abided by this code. Another holding company includes foreign bribery in its training sessions for all new employees.
84. Turkish subsidiaries of foreign companies have also taken significant steps. One company organised a seminar for all of its business functions in Turkey, while another requires all contracts with any foreign (or local) government entities to be approved by the Turkey-based compliance officer. The company believes that “no business deal is worth putting the company’s reputation at risk”.

Small and Medium-Sized Enterprises

85. Efforts to raise awareness among small and medium-sized enterprises (SMEs) have not been as widespread or successful. The Small and Medium Enterprises Development Organization, a public agency affiliated with the Ministry of Trade and Industry, administers most programs to support SMEs in Turkey. In 2008, the Small and Medium Enterprises Development Organization organised two seminars for SMEs involved in exporting, but attendance was low. However, the agency posted information about the Convention on its website, and is planning to send detailed material via email to some 90 000 SMEs in 2009.
86. The majority of business associations in Turkey have informed their members about the Convention and the foreign bribery offence, mostly through broadcast emails or by putting information on their websites. Representatives of some of the large companies felt that business associations could play a larger role in providing supplemental information and training on preventing and detecting foreign bribery to their members. For example, by encouraging the development of codes of conduct which include strong anti-bribery standards.
87. The lead examiners were pleased to learn that the Council of Ethics covers foreign bribery in its “Ethics for Prevention of Corruption Project”, including assisting companies in incorporating the standards of the Convention in their organisational ethical principles.

4. Civil Society

88. Civil society participants demonstrated an overall high level of awareness of the Convention and the foreign bribery offence. Most reported learning about these issues through programs sponsored by the Turkish government. However, most organisations said that they believe the bribery of foreign public officials by Turkish companies abroad should be prosecuted in the country where the crime was committed. They feel that this is less complicated and makes more sense.
89. One NGO involved in the fight against corruption worldwide said that there is no longer doubt in Turkey that foreign bribery is a crime, but giving bribes outside of Turkey is not taken as seriously as domestic corruption. The representative stated that Turkey has missed opportunities to prosecute foreign bribery cases and enforce the Convention. She added that, although the level of awareness has increased significantly since the Ministry of Justice took over the awareness-raising activities, many companies still feel pressure to pay bribes to facilitate foreign business transactions such as obtaining permits or moving equipment.
90. The lead examiners are satisfied that the Turkish authorities made best efforts to secure the attendance of media representatives at the on-site visit. However, no media representatives attended.

5. General Public

91. Some awareness-raising efforts have been directed towards the general public. The Ministry of Justice created a special website to disseminate information related to the Convention and the Turkish Government’s implementation efforts (www.uhdigm.adalet.gov.tr/oecd/oecd.htm). This site is placed prominently on the Ministry of Justice homepage, and includes a Turkish translation of the Working Group on Bribery’s Phase 2 report and information about all aspects of the Phase *2bis* examination process. The site also features a hotline for reporting foreign bribery allegations. All organisations participating in the National Task Force are linked to this site through their homepages.
92. Additionally, a press release about the review resulted in some media coverage. The booklet on foreign bribery referred to above was also widely distributed.

93. Some individual government organisations have also engaged in outreach to the general public. For example, the Revenue Administration translated the OECD Bribery Awareness Handbook for Tax Examiners into Turkish, and distributed it to 150 000 large taxpayers; the handbook was also presented to the public on national television. The Revenue Administration also issued a communiqué on the express denial of tax deductibility of bribes, aimed at clarifying this issue as set out in the Income Tax Law and Corporate Tax Law.

Commentary

The lead examiners congratulate Turkey for its impressive awareness-raising efforts on the Convention and the foreign bribery offence. These efforts appear to have had an impact in the public and private sectors, as well as civil society and the general public.

The lead examiners recommend that Turkey sustain these efforts and provide follow-up where appropriate, such as where companies and individuals might have questions about information provided by the Government.

Furthermore, the lead examiners recommend that Turkey increase its awareness-raising efforts vis-à-vis SMEs, and note that relevant business associations might be well-positioned to assist in this regard. The lead examiners note that the need to increase the awareness of SMEs is a horizontal issue affecting many Parties to the Convention.

RECOMMENDATIONS OF THE WORKING GROUP

The Working Group recognises that Turkey has made serious efforts to improve compliance with the Convention since the Phase 2 examination in December 2007, and believes that the Phase 2bis examination process has helped Turkey to increase the priority of the Convention. Pursuant to the Phase 2 Recommendation of the Working Group, the purpose of the Phase 2bis evaluation of Turkey was to assess progress concerning the following: (1) awareness-raising by the Turkish Government; (2) investigating and prosecuting allegations of bribing foreign public officials; and (3) re-instating the liability of legal persons. In addition, due to inadequate participation of the private sector and civil society in Phase 2, the on-site visit to Turkey was to provide a second chance for the examination team to meet with a broad spectrum of representatives from these areas, to discuss a variety of issues including awareness, and corporate liability.

The Phase 2bis on-site visit to Turkey by the examination team in January 2009 was successful in a number of areas. The team met with representatives from 30 companies and 14 business associations – the highest level of private sector participation so far in any Phase 2 or Phase 2bis on-site visit. These representatives largely demonstrated a high level of awareness of the prohibition in Turkish criminal law against the bribery of foreign public officials; although as in many Parties to the Convention, awareness amongst small and medium-sized enterprises was lagging. Progress in investigating cases was observed, in particular following the on-site visit, including the re-opening of an investigation that had been terminated at the time of the Phase 2 examination, and the opening of a new investigation. Work had also progressed on the allegations against 139 Turkish companies in the 2005 Final Report of the Independent Inquiry Committee into the Oil-for-Food Programme (IIC Final Report). Moreover, in January 2009, a draft law was introduced in Parliament to establish the liability of legal persons in the Turkish Code of Misdemeanours for the offence of bribing a foreign public official.

Nevertheless, the Working Group has two principle remaining areas of concern. First, Turkey will continue to be in non-compliance with Article 2 of the Convention on the liability of legal persons as long as the current situation continues. Second, the Working Group believes that progress investigating transnational bribery cases may have been impeded as follows: (1) the allegations in the 2005 IIC Final Report were not given sufficient priority, at least before March 2009; (2) in one case, the public prosecutors' office has not applied coercive investigative measures while waiting for a response to a limited MLA request, because the Turkish authorities believe that the level of suspicion is not high enough to be sure that jurisdiction can be applied in Turkey; and (3) inspection boards, which are not law enforcement bodies and do not have the authority to apply coercive investigative measures, were, until after the Phase 2bis on-site visit, being used to collect information needed to open a criminal investigation of the bribery of foreign public officials in a second case, even though a foreign court document raised sufficient suspicions of the bribery of a foreign public official. **In view of these remaining concerns, the Working Group makes the following recommendations to Turkey:**

1. Recommendations

Recommendation on the investigation of allegations of transnational bribery

3. Regarding allegations of transnational bribery, the Working Group recommends that Turkey:
 - a. report in detail in its Phase 2 written follow-up report, which is due in December 2009, on progress in the two ongoing investigations and the United Nations Oil-for-Food Program cases, and continue to inform the Working Group on developments in these cases, for instance, during the Working Group's *tour de table*;
 - b. maintain contact with the UN Office of Legal Affairs as necessary to ensure the timely receipt of the requested information on allegations in the IIC Final Report concerning Turkish companies, and to discuss the authentication of documentary evidence if necessary following receipt of the relevant information; and
 - c. ensure the effective investigation and prosecution of foreign bribery cases by assessing the level of suspicion necessary to open a criminal investigation of such cases, and by limiting the use of inspection boards in foreign bribery cases to assisting the public prosecutors' office in ongoing investigations and collecting information needed to open a criminal investigation when there is not a sufficient suspicion for the public prosecutors' office to open an investigation.

Liability of legal persons

4. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group:
 - a. restates the Phase 2 Recommendation to "urgently" re-establish the liability of legal persons in conformity with Article 2, and further recommends that Turkey consider the comments in this report on areas of the Draft Bill on the liability of legal persons that might not comply with the Convention, and those areas that might be an impediment to the effectiveness of the liability of legal persons; and
 - b. recommends that once a new law comes into force re-establishing the liability of legal persons for the bribery of foreign public officials, the law undergo a peer review analysis in conjunction with Turkey's Phase 2 written follow-up report, which is due to be given in December 2009, assuming that the law will have been passed by then.

Awareness

5. Regarding efforts by the Turkish Government to raise the awareness of the private sector on the Convention and the offence of bribing a foreign public official, the Working Group recommends that Turkey, while sustaining its recent efforts and providing follow-up where appropriate such as through a mechanism for companies to ask questions about information provided by the Government, increase its awareness-raising efforts vis-à-vis small and medium enterprises, including through collaboration with business associations that represent SMEs.¹⁴

¹⁴ The lead examiners note that the need to increase the awareness of SMEs is a horizontal issue affecting many Parties to the Convention.

ANNEX A: PHASE 2 RECOMMENDATIONS

1. The Working Group on Bribery appreciates the preparations made by the Turkish authorities for the Phase 2 on-site visit in May 2007, and the Turkish authorities' dedicated efforts to provide feedback and follow-up materials up to the date of the examination in the Working Group. The Working Group also appreciates the openness and professionalism of the Turkish authorities throughout the examination process in responding to questions from the lead examiners, and presenting the Turkish government's position regarding the implementation of the Convention.
2. However, the Working Group recommends a Phase 2bis examination of Turkey within one year of adoption of the Turkish Phase 2 Report for the following main reasons:
 - a. Inadequate efforts of the Turkish authorities to secure the attendance of private sector and civil society representatives, depriving the Working Group of the perspectives that broad private sector and civil society participation would have afforded.
 - b. Serious inadequacy of public awareness-raising activities on the foreign bribery offence by the Turkish government, which likely explains the lack of awareness and engagement on the part of the Turkish private sector concerning foreign bribery issues.
 - c. Overall lack of priority in addressing the bribery of foreign public officials by Turkish companies, which, based on discussions at the on-site visit, appears to result from the general attitude articulated by some participants at the on-site visit that bribery in neighbouring countries where bribe solicitation seems to be common has to be accepted.
 - d. Repeal of the liability of legal persons for the foreign bribery offence in 2005 with the enactment of the new Criminal Code, and its replacement with "special security measures" that are limited in scope and do not include monetary sanctions.
 - e. The early dismissal of a foreign bribery investigation regarding allegations against a Turkish holding company, on grounds that raise substantive concerns in the Working Group.
 - f. Two-year delay in responding to the allegations of illicit payments to the Iraqi government against 139 Turkish companies in the 2005 Final Report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme.
3. The Working Group recommends a Phase 2bis on-site visit to give the Turkish authorities an opportunity to demonstrate progress on the above-mentioned issues. The Phase 2bis visit should include panels with a broad spectrum of relevant private sector and civil society representatives. Regarding substance, the visit should specifically focus on progress by the Turkish authorities in the following three areas: (i) raising public awareness of the Convention and the foreign bribery offence; (ii) the investigation and prosecution of foreign bribery cases, including an assessment of the reasons for terminating the investigation of one foreign bribery case that took place in a foreign country and the two-year delay in acting on the allegations against Turkish companies in the Independent Inquiry Committee's Final Report on the UN Oil-for-Food Programme; and (iii) the re-establishment of the liability of legal persons in compliance with Article 2 of the Convention.

4. In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Turkey, the Working Group (i) makes further recommendations to Turkey under Part 1, and (ii) will follow-up the issues under Part 2 where there has been sufficient practice in Turkey.

1. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

5. With respect to general awareness raising and training activities to promote the effective implementation of the Convention and the 1997 Revised Recommendation, the Working Group recommends that Turkey:

- a. Urgently establish and implement awareness-raising programmes for (i) public officials, particularly those in contact with Turkish companies operating in foreign markets, including staff involved in official development assistance (ODA)-funded procurement contracting; and (ii) companies, including SMEs, that are active in sectors or geographic locations prone to corruption [Revised Recommendation, paragraphs I, II v) and VI iii] ;
- b. Promptly raise awareness among its foreign representations, including embassy personnel, and ensure that foreign representations disseminate information to Turkish companies and individuals regarding the risks of foreign bribery [Revised Recommendation, paragraph I]; and
- c. Make further efforts to raise awareness of the non-tax deductibility of bribes to foreign public officials among tax officials, tax professionals and the private sector, as well as provide training to tax officials on the detection of such payments [Convention, Article 13; Revised Recommendation, paragraph IV; and 1996 Recommendation].

6. With respect to the general detection of foreign bribery and related offences, the Working Group recommends that Turkey:

- a. Issue specific instructions to its foreign representations, including embassy personnel, on the steps to take when credible allegations arise that a Turkish company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Turkey [Revised Recommendation, paragraph I];
- b. Provide training for staff involved in ODA-funded procurement contracting on detecting and reporting suspicions of foreign bribery [Revised Recommendation, paragraphs I, II v) and VI iii)];
- c. Strengthen measures to protect whistleblowers in the public and private sectors from retaliation and retribution by their employers [Revised Recommendation, paragraph I]; and
- d. Adopt as soon as possible the Draft Witness Protection Act currently before Parliament [Revised Recommendation, paragraph I].

7. Regarding the prevention of foreign bribery in relation to ODA-funded procurement contracting, the Working Group recommends that Turkey: (i) systematically include anti-corruption clauses in ODA-funded contracts; and (ii) consider establishing a mechanism for excluding individuals and companies

previously involved in foreign bribery from participating in such contracting opportunities [Revised Recommendation, paragraphs I, II v) and VI iii)].

8. With respect to the prevention and detection of foreign bribery through the tax system, the Working Group recommends that Turkey: (i) introduce an express denial of deductibility of bribe payments in the tax law or through another appropriate mechanism that is binding and publicly available; (ii) provide training to tax officials on the detection of bribe payments disguised as legitimate allowable expenses; and (iii) continue to include in existing and future tax treaties the Commentary to article 26(2) of the OECD Model Tax Convention, allowing for the reciprocal sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities in relation to corruption offences [Convention, Article 13; Revised Recommendation, paragraph IV; and 1996 Recommendation].

9. Concerning the prevention and detection of foreign bribery through systems for accounting and auditing and internal controls, the Working Group recommends that Turkey:

- a. Strengthen efforts to encourage companies including SMEs operating in foreign markets to adopt internal company controls, including codes of conduct and where appropriate ethics committees, specifically addressing foreign bribery [Revised Recommendation, paragraph V C]; and
- b. Broaden the scope of private companies subject to an external audit to include certain non-listed companies that operate in foreign markets, and broaden the scope of public entities subject to a state audit to include state-owned and controlled companies not subject to an external audit, and agencies involved in official export credit support, public procurement, privatisation, and ODA-funded procurement contracting [Revised Recommendation, paragraphs I and V B].

10. Regarding the prevention and detection of foreign bribery through the anti-money laundering system, the Working Group recommends that Turkey [Convention, Article 7]:

- a. Promptly issue the regulation submitted to the Prime Minister's Office for Issuance of a Council of Ministers' Decree establishing suspicious transactions reporting (STR) obligations for accountants and lawyers;
- b. Promptly issue the regulation drafted by MASAK requiring the provision of feedback to parties that make STRs, and provide improved guidance to reporting parties in the form of up-to-date money laundering typologies where the predicate offence is the bribery of foreign public officials;
- c. Assess the reasons for the low number of STRs made to MASAK.

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

11. Concerning the investigation and prosecution of foreign bribery offences, the Working Group recommends that Turkey [Convention, Article 5] intensify and ensure regular training on foreign bribery for the investigative authorities, prosecutors and members of the judiciary.

12. Concerning the requirement under article 13(2) of the Criminal Code that the Minister of Justice request the application of "universal jurisdiction" in the specific case where bribery of a foreign public official is committed by a Turkish national or company abroad, the Working Group recommends that Turkey either: (i) eliminate this requirement; or (ii) ensure that the Minister's discretion for requesting such application shall not be influenced by political interests including "the national economic interest, the

political effect upon relations with another State or the identity of the natural or legal persons involved” [Convention, Articles 4.2 and 5].

13. Regarding the implementation of the offence of bribing a foreign public official under article 252.5 of the new Turkish Criminal Code, the Working Group recommends that Turkey repeal the application of “effective remorse”, which has the effect of releasing an offender from liability for a penalty, to the foreign bribery offence [Convention, Article 1].

14. With respect to Turkey’s repeal of the liability of legal persons for the foreign bribery offence, the Working Group recommends that Turkey urgently re-establish such liability in compliance with Article 2 of the Convention [Convention, Articles 2 and 3.2].

15. Regarding sanctions for the foreign bribery offence, the Working Group recommends that Turkey:

- a. Encourage prosecutors to seek confiscation upon conviction in foreign bribery cases whenever appropriate [Convention, Article 3.3];
- b. Maintain more detailed statistics on sanctions applied in domestic and foreign bribery cases [Convention, Article 3]; and
- c. Consider taking appropriate measures to exclude companies and natural persons convicted of foreign bribery from participating in privatisations, public procurement and ODA-funded public procurement contracting [Convention, Article 3.4; Revised Recommendation, paragraph II v)].

16. Regarding fraudulent accounting offences, the Working Group recommends that Turkey: (i) ensure that the penalties imposed for such offences are effective, proportionate and dissuasive; and (ii) compile more detailed statistics on the sanctions imposed for such offences, particularly those under article 359 of the Tax Procedure Code [Convention, Article 8; Revised Recommendation, paragraph V A iii)].

2. Follow-Up by the Working Group

17. The Working Group will follow-up the issues below, as practice develops:

- a. Procedures for combating foreign bribery by Türk Eximbank, including mechanisms for excluding individuals and companies with prior involvement in foreign bribery from participating in official export credit support contracting [Revised Recommendation, paragraphs I and II v)].
- b. The investigation of foreign bribery cases, including with regard to: (i) the sharing of competence between the Department of Anti-Smuggling and Organised Crime and the Public Order Department; and (ii) the absence of police authority to undertake an investigation except upon request of the public prosecutors;
- c. The number of investigations and prosecutions of the offence of money laundering;
- d. Developments regarding whether the following situations are effectively covered by the foreign bribery offence:

- i. Bribery to obtain an abuse of discretion, and bribery to obtain an act or omission that goes beyond the foreign public official's authority;
 - ii. "Simplified" bribery (i.e. bribery to ensure the performance or non-performance of a task);
 - iii. Bribery where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to a third party, such as a family member, political party or charity; and
 - iv. The person bribed exercises a public function for a foreign country or a public international organisation, but has not been appointed or elected or is not holding a legislative, executive or judicial office (e.g. an employee involved in awarding public procurement contracts); and
- e. Sanctions imposed in foreign bribery and money laundering cases [Convention, Articles 3 and 7].

**ANNEX B: EXAMINATION TEAM'S SUGGESTIONS ON DRAFT LAW SENT TO
PARLIAMENT**

SUGGESTION BY OECD EXAMINATION TEAM ON ARTICLE 8 OF THE DRAFT LAW AMENDING THE TURKISH CRIMINAL CODE (AND SOME OTHER ACTS)

27 February 2009

Further to the stated interest of the Justice Commission of the General Assembly, the OECD Phase 2bis Examination Team for Turkey – comprised of lead examiners from Bulgaria and Germany, and representatives of the OECD Secretariat – is pleased to share its views on Article 8 of the Draft Law Amending the Turkish Criminal Code and some other acts (hereafter: Draft Law).

The opinions expressed in this paper represent the views of the members of the Examination Team alone, and the views and recommendations of the OECD Working Group on Bribery on the Draft Law will not be available until the adoption of the Phase 2bis Report on Turkey by the Working Group on Bribery in June 2009. This input is provided at this time because the Turkish Government has informed the Examination Team that the Draft Law will probably be adopted and become Law before consideration and adoption of the Turkish Phase 2bis Report by the OECD Working Group on Bribery in June 2009.

1. The Examination Team expresses its sincere appreciation for the Turkish Government's efforts to rectify its non-compliance with Article 2 of the OECD Anti-Bribery Convention, which requires State Parties to establish the liability of legal persons for the bribery of foreign public officials, and Article 3, which requires that legal persons are subject to effective, proportionate and dissuasive sanctions for such bribery.
2. The rapid preparation of the Draft Law and its submission to the General Assembly following the Phase 2 examination of Turkey by the OECD Working Group on Bribery in December 2007 sends a clear message that the Turkish Government is seriously considering the Working Group's Phase 2 Recommendations.
3. The Draft Law, which provides for monetary sanctions for legal persons in certain situations and complements the "special security measures" currently available under Article 60 of the Criminal Code, appears to be an improvement over the current situation. In its Phase 2 report, the Working Group on Bribery deemed that the sanctions available under Article 60 were not in compliance with Articles 2 and 3 of the Convention because they do not include monetary sanctions, and only apply to a company upon conviction of a natural person who has bribed on its behalf.
4. However, the Draft Law may still not fully comply with Articles 2 and 3 of the Convention for the following reasons:

- a. The liability of legal persons appears to apply only if the natural person who bribed the foreign public official is identified, prosecuted and convicted/tried;
 - b. The investigative measures available under the Code of Misdemeanours do not include essential coercive techniques, such as the search and seizure of company and financial records; and
 - c. The monetary sanction of up to 1 million Turkish Lira (about EUR 500 000) is too low in view of the size of the Turkish economy, and the nature of the contracts being negotiated with foreign governments by Turkish companies, in particular public works contracts. In addition, the “special security measure” of confiscation under Article 60 of the Criminal Code does not adequately compensate for the low monetary sanction under the Draft Law because it is only available upon the identification, prosecution and conviction of the natural person who bribed the foreign public official.
5. It should be noted that the OECD Working Group on Bribery requires that the liability of legal persons not depend on the identification, prosecution and conviction of the natural person who bribed the foreign public official, for reasons including the following:
- a. It may not be possible to prosecute the natural perpetrator if he or she died, or remains in a foreign jurisdiction;
 - b. Due to the increasingly complex, decentralised and diffuse nature of corporate decision-making, it may be impossible to identify a specific individual or individuals within the management chain responsible for the bribery; and
 - c. Even where an individual can be identified, it may be deemed inappropriate to apportion blame to a particular person when a diffuse decision-making structure is involved.
6. Legal persons are frequently used for conducting bribery because their complex decision-making structures lend themselves as vehicles for hiding the chain of responsibility for illegal acts. Thus, it is imperative that the liability of legal persons for foreign bribery apply in Turkey, even where the natural perpetrator cannot be identified, prosecuted and convicted.
7. In addition to the above-mentioned factors, the Draft Law could be substantially improved by ensuring (through appropriate measures) that the liability of legal persons also apply as follows:
- a. Not only when the purpose of the bribe is to obtain an advantage for the benefit of the legal person from which the bribe emanates, but also when the purpose of the bribe is to obtain a benefit for an affiliated legal person, such as a subsidiary, including a foreign subsidiary, or a parent company.
 - b. To all legal persons, including state-owned or state-controlled enterprises set up or operating under private law.
8. If the Turkish authorities deem it appropriate and expedient, the Examination Team would be honoured to further explain its views on the Draft Law in greater detail and to respond to any questions.

**ANNEX C: ARTICLE 8 OF DRAFT LAW ON LIABILITY OF LEGAL PERSONS –
COMPARATIVE TABLE (PRE-AND POST-ON SITE VISIT)**

<p align="center"><i>Article 8 of the Draft Law Amending the Turkish Criminal Code and Some Other Acts (Draft Law prepared by the Ministry of Justice and submitted by the Government to Parliament on 7th January 2009)</i></p>	<p align="center"><i>Article 8 of the Draft Law Amending the Turkish Criminal Code and Some Other Acts (Draft Law submitted by the Justice Commission the Presidency of the Turkish Grand national Assembly on 16th April 2009)</i></p>
<p>Liability of Legal Persons</p>	<p>Liability of Legal Persons</p>
<p>ARTICLE 43/A</p>	<p>ARTICLE 43/A</p>
<p>(1) Where the act does not constitute a misdemeanour which requires more severe administrative fines; in the case that an organ or a representative of a civil legal person; or; a person, who is not the organ or representative, but undertakes a duty within the scope of that legal person's operational framework commits the following offences to the benefit of that legal person, the legal person shall also be penalized with an administrative fine of 10,000 (ten thousand) Turkish Lira to 1,000,000 (one million) Turkish Lira:</p>	<p>(1) Where the act does not constitute a misdemeanour which requires more severe administrative fines; in the case that an organ or a representative of a civil legal person; or; a person, who is not the organ or representative, but undertakes a duty within the scope of that legal person's operational framework commits the following offences to the benefit of that legal person, the legal person shall also be penalized with an administrative fine of 10,000 (ten thousand) Turkish Lira to 2,000,000 (two million) Turkish Lira:</p>
<p>a) Offences stated in the Turkish Penal Code numbered 5237:</p> <ol style="list-style-type: none"> 1) Fraud defined in Articles 157 and 158, 2) Rigging a bid defined in Article 235, 3) Rigging the performance of fulfilment defined in Article 236, 4) Bribery defined in Article 252, 5) Money laundering defined in Article 282. <p>b) Embezzlement defined in Article 160e of the Banking Code, dated 19/10/2005 and numbered 5411,</p>	<p>a) Offences stated in the Turkish Penal Code numbered 5237:</p> <ol style="list-style-type: none"> 1) Fraud defined in Articles 157 and 158, 2) Rigging a bid defined in Article 235, 3) Rigging the performance of fulfilment defined in Article 236, 4) Bribery defined in Article 252, 5) Money laundering defined in Article 282. <p>b) Offence of embezzlement defined in Article 160 of the Banking Code, dated 19/10/2005 and numbered 5411,</p> <p>c) Offences of smuggling defined in the Code on the Fight against Illegal Smuggling, dated 21/3/2007 and numbered</p>

<p>c) Offences of smuggling defined in the Code on the Fight against Illegal Smuggling, dated 21/3/2007 and numbered 5607,</p> <p>ç) Offence defined in Appendix 5 of the Oil Market Law, dated 4/12/2003 and numbered 5015,</p> <p>d) Offence of financing of terrorism defined in Article 8 of the Code on the Fight against Terrorism, dated 12/14/1991 and numbered 3713.</p> <p>(2) The court which makes the verdict at the end of the trial regarding the offences stated in paragraph 1, has the jurisdiction over verdicts on administrative fines in accordance with this Article.</p>	<p>5607,</p> <p>ç) Offence defined in Appendix article 5 of the Oil Market Law, dated 4/12/2003 and numbered 5015,</p> <p>d) Offence of financing of terrorism defined in Article 8 of the Code on the Fight against Terrorism, dated 12/14/1991 and numbered 3713.</p> <p>(2) The court which is commissioned to try the offences stated in paragraph 1, has the jurisdiction over verdicts on administrative fines in accordance with this Article.</p>
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