

Bribery in the Private Sector under Turkish Law and The Comparative Analysis of This Crime with Other National Regulations

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This report has been drafted on 30 September 2021 by the below listed persons, upon the request of the Board of Directors of the Ethics and Reputation Society (TEID) by comparing the relevant international conventions and commercial bribery legislation of other countries with Turkish commercial bribery legislation to identify deficiencies in Turkish law and practice.

Contributors: Yalın Akmenek

Associate Professor Dr. Güçlü Akyürek

Dr. Kaan Karcıloğlu

Gökçe Serez

Dilara Kaçar

Introduction

Transparency International defines corruption as "the abuse of entrusted power for private gain."¹ As can be easily understood from this definition, there is no distinction between corruption in the private sector and corruption in the public sector. However, in the past, consideration has more often given to corruption in the public sector.² Moreover, in many countries, criminal laws have regulated corruption in the public sector for centuries but there were far fewer laws regulating commercial bribery. However, this trend has been changing in recent years, and various countries have now adopted more regulations prohibiting commercial bribery.

The *actus reus* of commercial bribery is the act of a natural person (bribor) offering the opportunity to obtain a personal benefit to another (bribee), in return for the bribee improperly performing or not performing their duty. Therefore, when a person offers a bribe in the private sector, the employee/representative is faced with a risk of violating their obligation to act for the benefit of the employer/principal with whom they are in a contractual relationship. When the bribee accepts a bribe or the promise of a bribe, in addition to violating their contractual obligation, they also cause a deterioration of the overall competition in the market, which in turn, among other things, results in competitors abandoning the market and a decrease in the quality of goods and services provided within the market, thus creating dire consequences for the end consumer. Moreover, many services that can be considered "public services" in a traditional sense are no longer provided by public institutions but rather by private companies. Therefore, it is unacceptable for private sector employees to allow themselves to be influenced, by obtaining personal benefits in exchange for improperly performing their duties while providing these services to the public. This would be contrary to the general public's interests at the same level as when a public official acts contrary to their duties.

In essence, the only difference between commercial and public bribery is the identity of the person receiving the bribe. In public bribery, the recipient of a bribe is a public official, while, in commercial bribery, the recipient of a bribe is a person who is not a public official. Apart from this, obtaining personal benefits in

¹ Anon, What is corruption? Transparency.org. Available at: <https://www.transparency.org/en/what-is-corruption> [Last access date: 17 September 2021].

"We define corruption as the abuse of entrusted power for private gain."

² Anon, 2018. Transparency international knowledge hub. Knowledge Hub. Available at: <https://knowledgehub.transparency.org/helpdesk/regulating-private-sector-corruption> [Last access date: 17 September 2021].

return for improperly performing one's duties is typical in both public and commercial bribery. In addition, public and commercial bribery regulations aim to prevent market disruption and violations of unfair competition rules as a result of bribery.³ As a matter of fact, the legal interest protected by commercial bribery is not the company's or their assets' interest (this will be explained in detail below through an examination of explanatory reports and guides to the many international conventions regulating commercial bribery). In practice, the victim of commercial bribery is not a company, but rather the competitive market.

Even though this is the case, governments chose to approach public and commercial bribery differently. The history of public bribery goes back centuries and almost every country has banned and criminalized the offense of public bribery. In comparison, commercial bribery regulations are relatively new, and the scope of these regulations and the definition of the offense of commercial bribery differ from country to country. In countries prohibiting commercial bribery, the prosecution rate is generally lower than that for public bribery.⁴

Law No. 6352 on the Amendment of Certain Laws Actuating the Judicial Services and on Postponement of Lawsuits and Penalties for Crimes Committed through Media,⁵ was adopted in 2012, as an amendment Turkish Penal Code No. 5237 ("Turkish Penal Code") and it expanded the scope of the offense of commercial bribery. The amendment was adopted as paragraph 8 in Article 252 of the Turkish Penal Code. However, even though it was the first entry brought into force concerning commercial bribery regulations, there has been no data indicating the existence of any prosecution brought before a court or case law on commercial bribery. One reason for the lack of case law on commercial bribery might be because bribery, both commercial and public, is very difficult to prove. In addition, according to Article 252, paragraph 1 of the Turkish Penal Code, a person convicted of bribery is punished with "a prison sentence of four to twelve years." Considering that the penalty for public and commercial bribery is the same, the lack of effective prosecution might be because the minimum penalty is seen to be too high or there is a perception that such a penalty is too high for matters related to the private sector. It can be said that, due to the two reasons described above, commercial bribery regulation has not had an effective field of application.

In this report, we will provide information regarding commercial bribery regulation adopted by Turkey, other countries, and international organizations, as well as the penalties for the offense of commercial bribery in Turkey and other countries.

1. Commercial bribery in Turkey

In a traditional sense, the offense of bribery is an agreement between a non-public official and a public official on providing illicit benefits to the public official in return for them to then improperly perform, or to not perform, their duties.

With the amendment in 2012, the scope of commercial bribery regulated under Article 252 of the Turkish Penal Code was expanded and reorganized. According to the newly adopted Article 252, paragraph 8 of the Turkish Penal Code:

(8) The provisions of the present article shall also apply when, a person who is not a public official, directly or through intermediaries, offers or promises an undue advantage to another acting on behalf of:

³ Jeffrey R. Boles, The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes, 35 MICH. J. INT'L L. 673 (2014) page 675.

⁴ Jeffrey R. Boles, The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes, 35 MICH. J. INT'L L. 673 (2014) pages 681-686.

⁵ See Law no 6352 on the Amendment of Certain Laws Actuating the Judicial Services and on Postponement of Lawsuits and Penalties for Crimes Committed through Media: <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6352.pdf>.

- a) occupational organization in the character of public entity,
- b) corporations established in association with public institutions or organizations or occupational organizations in the character of public entity,
- c) foundations acting within the body of public institutions or organizations or occupational organizations in the character of public entity,
- d) public benefit associations,
- e) cooperatives,
- f) public joint stock companies,

to perform or not to perform a task with regard to their duties; and where an undue advantage is requested or accepted by these persons, mediating these acts; and when through these acts an undue advantage is provided for another.

According to this regulation, representatives of institutions, such as companies and institutions creating public value through their activities, as well as public companies in which people have financial interests, regardless of whether they are public officials or not, can be punished under Article 252, paragraph 8 of the Turkish Penal Code when they receive benefits, directly or indirectly, through intermediaries in exchange for improperly performing or not performing an action related to the execution of their duties.

For example, A is a board member of a public company, and A also serves on the committee designated for determining a new office space that the company plans to build. B is the owner of the land next to the land that A's company is considering for the new office space. If B offers TRY 250,000 to A in exchange for A voting in favor of selecting B's land, and if A accepts this offer, A and B will be deemed to have committed commercial bribery under Article 252, paragraph 8 of the Turkish Penal Code.

Although Article 252, paragraph 8 of the Turkish Penal Code regulates commercial bribery, following the 2012 amendment, we were unable to find any new case law on commercial bribery. Therefore, it is not possible to say that commercial bribery is effectively prosecuted under Article 252, paragraph 8 of the Turkish Penal Code.

The Group of States against Corruption's (GRECO) third evaluation round's report on Turkey was prepared before the 2012 amendment of the Turkish Penal Code. Before the 2012 amendment, Article 252 paragraph 4 of the Turkish Penal Code, regulated commercial bribery as "The provision of the first paragraph⁶ also applies in cases of providing benefits to the persons acting on behalf of the professional organizations in the nature of public institutions, companies established with the participation of public institutions or organizations or professional organizations in the nature of public institutions, foundations operating within them, associations working for public benefit, cooperatives or public joint stock companies, during the establishment of a legal relationship or continuation of an established legal relationship and in violation of the requirements of their duties." After considering this paragraph, GRECO stated that the scope of application only covers a limited number of private sector actors acting as bribees.⁷ Going one step further, we can also state that GRECO's criticism of the former commercial bribery regulation will continue to be

⁶ Article 252, paragraph 1 of the Turkish Penal Code before the 2012 amendment: "A public official who takes a bribe is punished with imprisonment from four to twelve years. The person who gives the bribe is also punished like a public official. If an agreement is reached on the bribe, is punished as if the crime is committed."

⁷ You can find detailed information about the Third Evaluation Round of the Group of States Against Corruption report on Turkey [here](#).

relevant after the 2012 amendment, as the new paragraph 8 Article 252 of the Turkish Penal Code regulating commercial bribery also covers the same private sector actors as bribes.

Another criticism stated in GRECO's report was that the commercial bribery laws did not explicitly regulate bribes given or received through intermediaries and for the benefit of third parties. The new Article 252, paragraph 8 of the Turkish Penal Code states that it is "applied if an undue advantage is obtained by, offered or promised or requested or accepted by them directly or through intermediaries." The new regulation includes bribes that are given through intermediaries within its scope. Thus, Turkey took GRECO's criticism in the third evaluation round into account and amended the commercial bribery regulations accordingly.

Finally, GRECO criticized the scope of the former commercial bribery legislation as being limited to bribes given "during the establishment of a legal relationship or in the continuation of the established legal relationship." The amendment in 2012 removed the criticized statement from the article.

In addition to the GRECO reports, the Organization for Economic Co-Operation and Development (OECD) criticized Turkey in their various development reports for the lack of effective enforcement action taken against the offense of bribery.

2. Commercial bribery in International Law

2.1 The United Nations

- (a) The United Nations General Assembly Resolution No 3514 (XXX) dated 15 December 1975

In its resolution in 1975, the United Nations General Assembly condemned all kinds of corrupt activities, including bribery, committed by international companies, other companies, their intermediaries, and other relevant persons. To this end, the United Nations encouraged states to adopt the necessary regulations prohibiting and penalizing all kinds of corrupt activities, including bribery committed by international companies, other companies, their agents, and other relevant parties.⁸

This decision did not differentiate between public and commercial bribery. However, the fact that it is the first decision indicating, albeit implicitly, the contribution of global companies operating in numerous countries to general corruption increases its importance.

- (b) United Nations Convention Against Corruption

The United Nations Convention Against Corruption is one of the most important instruments regulating commercial bribery. This convention considers the effects of commercial bribery on society and the economy, while recognizing that international cooperation is essential to prevent and combat commercial bribery. The United Nations Convention Against Corruption was drafted as a result of a need to adopt an international regulation.

Article 12 of the United Nations Convention Against Corruption states what is expected from the signatory states within the scope commercial bribery:

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate, and dissuasive civil, administrative, or criminal penalties for failure to comply with such measures.

⁸ You can click [here](#) for more details.

2. Measures to achieve these ends may include, inter alia:

- (a) Promoting cooperation between law enforcement agencies and relevant private entities;
- (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honorable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;
- (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;
- (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licenses granted by public authorities for commercial activities;
- (e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;
- (f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offenses established in accordance with this Convention:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offenses established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.⁹

⁹ You can find further information on the United Nations Convention Against Corruption [here](#).

Moreover, Article 21 of the United Nations Convention Against Corruption regulates bribery in the private sector as follows:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally in the course of economic, financial or commercial activities:

- (a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;
- (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Article 26 of the United Nations Convention Against Corruption regulates the liability of legal persons as the following:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil, or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offenses.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate, and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Turkey signed the United Nations Convention Against Corruption on December 10, 2003 and ratified it on November 9, 2006. In addition to the importance of the United Nations Convention Against Corruption described above, this convention is also significant because it refers to accounting standards and mentions the importance of increased control of accounting and auditing in the private sector.

2.2 The Council of Europe

- (a) Criminal Law Convention on Corruption

The signatory states signed the Criminal Law Convention on Corruption to emphasize that corruption poses a threat to the rule of law, democracy, and human rights, fundamentally undermines the principles of equity and social justice, distorts competition, and jeopardizes democratic institutions' stability and the moral foundations of society. The Criminal Law Convention on Corruption underscored that an effective fight against corruption requires improved, speedy, and well-functioning international cooperation in criminal matters.

The Criminal Law Convention on Corruption regulates various crimes, including bribery, trading influence and corruption, as well as the sanctions stipulated in committing these crimes. GRECO monitors the signatory states' compliance with the Criminal Law Convention on Corruption.¹⁰

Articles 7 and 8 of the Criminal Law Convention on Corruption regulate commercial bribery.¹¹

Article 7 of the Convention reads as follows:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

Article 8 of the Convention reads as follows:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.

In accordance with the above-mentioned regulations, the Criminal Law Convention on Corruption intended for signatory states to regulate commercial bribery as a crime in their domestic laws and penalize both the briber and the bribee as they see fit. Furthermore, violation of a duty by the employee or the person managing the organization was necessitated as an element of commercial bribery. The scope of potential perpetrators is regulated broadly and every employee and manager, from the lowest to the highest level, including the board of directors' members, and representatives and consultants of the company, even if they are not regarded as company employees, can be a perpetrator of commercial bribery. However, shareholders cannot be perpetrators of commercial bribery. This is because the relevant regulation requires a breach of duty for the offense of bribery to occur, and the scope of this crime is limited to such duty.

The Council of Europe published an explanatory report on the Criminal Law Convention on Corruption. The report underlined that often competition and employment laws regulate the offense of commercial bribery rather than criminal law regulations. The report further stated that the criminalization of commercial bribery is essential to prevent and combat the offense of commercial bribery. Thus, through the criminalization of commercial bribery, the competitive market environment can be protected. Additionally, the report underscored that, due to an increase in privatization in recent years, the private sector has started to provide a greater variety of public services; thus, the public should also be protected from commercial bribery. Therefore, the report also emphasized that regulations on commercial bribery should be modified to protect the interests of the private sector, bearing in mind the relations with employees and the public in general.¹²

Turkey is obliged to criminalize commercial bribery in its domestic law because it is a signatory state to the Criminal Law Convention on Corruption of the Council of Europe.

¹⁰N. Özalp, Bribery in Turkish Penal Code, page 72.

¹¹You can find further information on the Criminal Law Convention on Corruption [here](#).

¹²The Criminal Law Convention on Corruption explanatory report, pages 11-12.

2.3 The European Union

- (a) Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

Before globalization, consumers often received goods and services produced within the same country that they lived in. However, following globalization, companies producing goods and services started to surpass the borders of the countries in which they operate. Thus, the increase of cross-border trade transformed commercial bribery committed in one country from a domestic problem to a global problem. With the need to make a regulation at the European level, the Council of the European Union adopted the Joint Action 98/742/JHA on commercial bribery. In 2003, Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector ("**Framework Decision**") regulated commercial bribery regulations in more detail and thus abolished the Joint Action 98/742/JHA.¹³

Member states attribute particular importance to combating corruption in both the public and the private sector. The Council of the European Union considered that bribery in both sectors threatens law-abiding societies and distorts competition with regards to the purchase of goods or commercial services, while it hinders healthy economic development. It has been stated that the purpose of this Framework Decision was to ensure that both active and passive commercial bribery is penalized effectively and proportionately by all member states.

Article 2 of the Framework Decision defines bribery as follows:

1. Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offense, when it is carried out in the course of business activities:
 - (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;
 - (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.

The regulation referred to above applies to business activities of for-profit and non-profit entities. In addition, the Framework Decision regulates the criminalization of instigating, aiding, and abetting the offense of commercial bribery in member states.

The Framework Decision also envisages the minimum penalties that member states should consider when penalizing commercial bribery. Accordingly, commercial bribery is punishable by one to three years of imprisonment. Member States should also take the necessary actions in their domestic laws to guarantee that legal persons can also be punished. In this context, the following penalties have been proposed for legal entities: (i) exclusion from entitlement to public benefits or aid; (ii) temporary or permanent disqualification from the practice of commercial activities; (iii) placement under judicial supervision; or (iv) a judicial winding-up order.

¹³ You can find further information on the Framework Decision by following this [link](#).

3. Comparative analysis of commercial bribery legislations in other countries

3.1 The United States of America

In the US, both federal and state laws regulate the offense of bribery. Regarding the offense of commercial bribery, while federal laws do not explicitly regulate it, most states have adopted commercial bribery laws; however, the definition and scope of these state regulations differ from state to state. Enacting commercial bribery regulation at the US federal level has been a topic of discussion for years. In 1930, the chair of the Federal Trade Commission, Hon. Garland S. Ferguson Jr, delivered a speech at the Conference on Commercial Bribery to be Held Under Auspices of the Commercial Standards Council and the Better Business Bureau of New York City. During his speech, he defined commercial bribery as the act of a seller giving a commission or gratuity to a buyer's agent or employee without the buyer's knowledge or consent to influence the agent or employee in favor of the seller's goods. He deemed such behaviors immoral and fraudulent. Moreover, during his speech, he cited Horace Harmon Lurton, former associate justice of the Supreme Court of the United States, by stating that a man cannot have two masters and commercial bribery produces a conflict of interest between the private interest of the employee/representative and their duty toward the employer/principal. In the same speech, he stated that commercial bribery is an immoral practice. In addition to the fact that commercial bribery violates unfair competition rules, it also eradicates competition based on quality and service, resulting in the decline of the quality of the goods and services provided to the market. Therefore, Hon. Garland S. Ferguson Jr encouraged states to adopt provisions penalizing such an immoral act that hinders competition.¹⁴

Even though no federal laws openly regulate commercial bribery, prosecutors may investigate or prosecute commercial bribery by using different sets of federal laws, such as the Travel Act and mail and wire fraud statutes, as well as accounting regulations prohibiting willful violations of the accounting provisions.^{15 16 17}

The Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley Act" or SoX) was prepared in response to the Enron and WorldCom financial scandals¹⁸ to audit companies better and consequently combat corruption in the private sector.¹⁹ The Sarbanes-Oxley Act increased financial audit costs compared to the previous legal scheme; consequently, various companies welcomed the new regulation's increased auditing cost by surprise and hesitation.²⁰ However, it is intended that good quality auditing will benefit both companies and the economy in the long run.²¹ Before enacting the Sarbanes-Oxley Act, there were regulations preventing corruption and bribery; however, the main problem was their

¹⁴ G. Ferguson, address delivered at the Conference on Commercial Bribery to be Held Under Auspices of the Commercial Standards Council and the Better Business Bureau of New York City, Inc. (1930).

¹⁵ Meyer, J., Tomczak, P. & Devaney, W., 2017. Anti-Corruption in the United States. *Global Compliance News*. Available at: <https://www.globalcompliance news.com/anti-corruption/anti-corruption-in-the-united-states/> [Last Accessed on 17 September 2021].

¹⁶ Jensen, D. & Williams, A., Bribery & corruption laws and regulations: Usa: Gli. *GLI - Global Legal Insights - International legal business solutions*. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/usa> [Last Accessed on 17 September 2021].

¹⁷ Mendelsohn, M., 2020. The anti-bribery and Anti-Corruption REVIEW: USA. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/usa> [Last Accessed on 17 September 2021].

¹⁸ Green, Scott "A Look at the Causes, Impact and Future of the Sarbanes-Oxley Act," *Journal of International Business and Law*: Vol. 3: Iss. 1, Article 2, (2004) page 33.

¹⁹ Coates IV, John C., "The Goals and Promise of the Sarbanes-Oxley Act" (2007), *Journal of Economic Perspectives* - Volume 21, page 91

²⁰ Schmidt, Timothy W., "Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines" (2009). *Minnesota Law Review*. Volume 542, page 1134.

²¹ Coates IV, John C., "The Goals and Promise of the Sarbanes-Oxley Act" (2007), *Journal of Economic Perspectives* - Volume 21, page 92.

enforceability. Thus, the Sarbanes-Oxley Act's main aim was to make financial auditing more effective, consequently making enforceability more effective.²²

The Sarbanes-Oxley Act established the Public Company Accounting Oversight Board (PCAO) based on the finding that companies fail to conduct financial auditing properly and that the main problem was not about financial auditing standards but how well the companies applied them in financial audits. The PCAO is intended to be a board that audits companies and regulates how companies themselves conduct financial audits. In other words, the PCAO was established to serve a gatekeeper function by auditing the auditors.

One of the most significant changes that the Sarbanes-Oxley Act brought was affording legal protection to whistleblowers. It paved the way for employees to secretly and anonymously share their concerns with the financial auditors. Moreover, by criminalizing retaliation, the Sarbanes-Oxley Act prevented employers from retaliating against whistleblowers when the employers became aware of the reporting. Lastly, regarding whistleblowers, the Sarbanes-Oxley Act gave employees the right to claim compensation.

Section 302 of the Sarbanes-Oxley Act also expanded the liability of company directors, board members and financial auditors for fraudulent activities occurring in the company by regulating it as criminal liability. Within this context, in addition to monetary fines, companies' managers might be sentenced to imprisonment if the necessary conditions are met.²³ The intention is to better protect companies' shareholders.²⁴ As a result, corruption and financial crimes decreased.²⁵ One year later, following the implementation of the Sarbanes-Oxley Act, a survey that PricewaterhouseCoopers (PwC) prepared revealed that 84% of companies changed their auditing controls and compliance approach.²⁶

The Sarbanes-Oxley Act is not essentially about criminalizing bribery. Instead, it is about financial auditing of the companies and holding managers responsible for failing to keep financial records and books properly. Thus, at first glance, it can be said that the Sarbanes-Oxley Act is not about preventing and combating the offense of bribery. However, the stricter regulations and increased oversight that the Sarbanes-Oxley Act introduced helped detect the commission of bribery. As a result, with the implementation of the Sarbanes-Oxley Act, the number of enforcement actions significantly increased. For example, the Foreign Corrupt Practices Act (FCPA) regulates the prevention of bribery, and between 1978 and 2011, 103 enforcement actions were initiated due to bribery — 90 of them being initiated after the entry into force of the Sarbanes-Oxley Act. This rate corresponds to approximately 87% of all enforcement actions. Therefore, it can be said that there is a positive correlation between the increased financial oversight and detecting the offense of bribery.²⁷

Even though federal laws do not put a limit on the hospitality expenses provided between private parties, extravagant dinners, entertainment, or gifts can be subject to an investigation or prosecutorial action when appropriate circumstances occur. Generally, hospitality expenses (i) provided openly and transparently, (ii)

²² Coates IV, John C., "The Goals and Promise of the Sarbanes-Oxley Act" (2007), Journal of Economic Perspectives - Volume 21, page 96.

²³ Cascini, K., Delfavero, A., & Mililli, M. (2012). The Sarbanes Oxley Act's contribution to curtailing corporate bribery. The Journal of Applied Business Research, 28(6), 1127-112. doi: 10.19030/jabr.v28i6.7329 page 1128.

²⁴ Coates IV, John C., "The Goals and Promise of the Sarbanes-Oxley Act" (2007), Journal of Economic Perspectives - Volume 21, page 92.

²⁵ Anon, 2020. Sarbanes Oxley Act. *Corporate Finance Institute*. Available at: <https://corporatefinanceinstitute.com/resources/knowledge/other/sarbanes-oxley-act/> [Last Accessed on 17 September 2021].

²⁶ Green, Scott (2004) "A Look at the Causes, Impact and Future of the Sarbanes-Oxley Act," Journal of International Business and Law: Vol. 3: Iss. 1, Article 2, page 33.

²⁷ Cascini, K., Delfavero, A., & Mililli, M. (2012). The Sarbanes Oxley Act's contribution to curtailing corporate bribery. The Journal of Applied Business Research, 28(6), 1127-112. doi: 10.19030/jabr.v28i6.7329 pages 1135-1136

adequately recorded in the financial records and books of the giver, (iii) provided for gratitude rather than in return for acquiring business advantage and (iv) allowed under the local law can be categorized as usual.²⁸

In addition to the above-mentioned federal regulation, some states have adopted local commercial bribery regulations. California's and New York's commercial bribery regulations are examples.

California regulated commercial bribery as the following:

Any employee who solicits, accepts, or agrees to accept money or anything of value from a person other than his or her employer, other than in trust for the employer, corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for the benefit of that other person, and any person who offers or gives an employee money or anything of value under those circumstances, is guilty of commercial bribery.²⁹

For this legislation to be applicable, the monetary value of a bribe should be more than USD 250; otherwise, the legislation does not apply. Moreover, the *mens rea* of the crime requires the offender to commit the commercial bribery with a corrupt intent to defraud the employer.

The punishment for the offender changes depending on the monetary value of the bribe. If the value of the bribe is more than USD 250 but USD 1,000 or less, it is punishable by imprisonment in the county jail for up to one year. However, if the value of the bribe is more than USD 1,000, it is punishable by imprisonment in the county jail or the state prison for 16 months or two or three years.

As another example, in New York, commercial bribery is regulated as a felony and misdemeanor.

New York Penal Code Section 180.3 and 180.08 regulating commercial bribery as felony as follows:

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.³⁰

An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.³¹

According to the relevant regulation, the elements of the offense of commercial bribery are as follows:³²

²⁸ Meyer, J., Tomczak, P. & Devaney, W., 2017. Anti-Corruption in the United States. *Global Compliance News*. Available at: <https://www.globalcompliance-news.com/anti-corruption/anti-corruption-in-the-united-states/> [Last Accessed on 17 September 2021].

²⁹ 2011 California Code Penal Code Part 1 Crimes and Punishments, Chapter 2 Other and Miscellaneous Offenses Section 641.3, for further information please see: <https://law.justia.com/codes/california/2011/pen/part-1/639-653.2/641.3>

³⁰ New York Penal Code Section 180.03 Commercial bribing in the first degree for further information please see: <https://codes.findlaw.com/ny/penal-law/pen-sect-180-03.html>

³¹ New York Penal Code Section 180.08 Commercial bribe receiving in the first degree for further information please see: <https://codes.findlaw.com/ny/penal-law/pen-sect-180-08.html>

³² Spencer, N., 2021. What is Commercial bribery in New York? *Norman Spencer Law Group*. Available at: <https://www.nycriminallawyers.com/what-is-commercial-bribery-in-new-york/> [Last Accessed on 17 September 2021].

- An individual conferring, or offering or agreeing to confer any benefits upon a person who is an employee, agent, or fiduciary of a principal
- The value of the benefit conferred, or offered or agreed to be conferred exceeds USD 1,000
- The individual acted without the consent of the employer or principal
- The individual acted with intent to influence their conduct concerning their employer's or principal's affairs
- The individual causes economic harm to the employer or principal in an amount exceeding USD 250 (the suffered economic loss should be a loss that the principal/employer would not have incurred in the absence of the corrupt arrangement.)

New York Penal Code Section 180 and 180.05 regulating commercial bribery as misdemeanor as follows:

A person is guilty of commercial bribing in the second degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent, or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.³³

An employee, agent or fiduciary is guilty of commercial bribe receiving in the second degree when, without the consent of his employer or principal, he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.³⁴

Similar to the Turkish commercial bribery regulations, New York Penal Code penalizes the person giving (bribor) and receiving (bribee) the bribe in the same way.

3.2 The United Kingdom

The UK Bribery Act entered into force in the UK in 2010. This law regulates bribery, and the scope of its provisions is rather extensive. The relevant provisions criminalize both the person offering and the person accepting the bribe. However, no distinction has been made between public and commercial bribery.

For the person offering the bribe, bribery consists of offering, promising, or giving financial or other advantages to another person to induce that person to improperly perform their duties or reward that person for improperly performing their duties. For the person accepting the bribe, bribery consists of requesting or agreeing to receive or accept financial or other advantages for the acts and purposes described above.

The UK Bribery Act's guideline issued by the Ministry of Justice explained that the distinguishing factor in evaluating whether an act would qualify as bribery is how a reasonable person living in the UK evaluates such an act. For example, to determine whether accommodation expenses or gifts are bribes, one will consider whether a reasonable person would evaluate that these expenses are provided with the expectation of violating or incentivizing the violation of certain behaviors/duties.³⁵ In this context, to determine whether inviting potential investors of a company selling sportswear to watch a Wimbledon tournament from the

³³ New York Penal Code Section 180. Commercial bribing in the second degree for further information please see:
<https://www.nysenate.gov/legislation/laws/PEN/180.00>

³⁴ New York Penal Code Section 180.05 Commercial bribe receiving in the second degree for further information please see:
<https://www.nysenate.gov/legislation/laws/PEN/180.05>

³⁵The Bribery Act 2010 Guidance about procedures that relevant commercial organizations can put into place to prevent persons associated with them from bribing. <https://www.gov.uk/government/publications/bribery-act-2010-guidance> page 10.

best seats would qualify as bribery, prosecutors will have to assess whether a reasonable person living in the UK would consider this invitation was made with the expectation of inducing improper behavior.

Unlike other countries' regulations, Chapter 7 of the UK Bribery Act criminalizes companies' failure to prevent bribery. According to this regulation, companies have a positive obligation to prevent their employees from getting involved in acts of bribery. Accordingly, companies that fail to meet the obligation to prevent bribery will incur criminal responsibility. Under the UK Bribery Act, all companies and partnerships duly incorporated in the United Kingdom, regardless of where they conduct their activities, and all companies and partnerships active in the United Kingdom, regardless of their seat of incorporation, are within the scope of these provisions. Whether a company is active in the UK will be assessed separately under the specific conditions of each case. For example, the fact that a company's shares are listed on the London Stock Exchange might indicate that the company is active in the United Kingdom. However, a subsidiary active in the UK does not necessarily mean that the parent company is also active in the UK.³⁶

According to the UK Bribery Act, to hold a company criminally liable Chapter 7, a person "associated" with the company must be acting on behalf of the company. The expression "associated" provided by Chapter 8 of the UK Bribery Act includes all natural and legal persons. Due to the rather extensive interpretation of "associated persons," persons who are in a contractual relationship with the company or acting on behalf of the company may equally fall within the scope of these provisions. However, every case must be evaluated separately within the context of its special circumstances. The UK Bribery Act's guideline issued by the Ministry of Justice explains that one should assess the relevant circumstances to decide whether co-venturers/partners and employees of joint ventures fall within the scope of the associated person definition and make a determination according to this assessment. Therefore, co-venturers/partners may not always be liable for the offense of bribery committed by other co-venturers/partners or the employees of a joint venture. On the other hand, if a co-venturer/partner commits bribery while acting for the benefit of or providing services to the other co-venturers/partners in the joint venture, it might be possible to hold those co-venturers/partners responsible. A joint venture agreement explaining each partner's responsibilities and duties will be considered while making the assessment described above. Similarly, one must assess the relevant circumstances of each case while evaluating whether a parent company should be held accountable for its subsidiary's act of bribery. In itself, it is not sufficient to establish that a parent company indirectly benefited from its subsidiary's bribe to hold the parent company liable. It is important to prove the relevant intention of the parent company to commit bribery.³⁷

Companies faced with charges of failing to prevent bribery might be able to defend themselves by asserting that they have adopted adequate procedures to prevent bribery, which were implemented on the date of the bribe, and despite these procedures, they were unable to prevent the bribe. To successfully raise and establish this defense, the company must satisfy the balance of probabilities.³⁸ One of the most critical factors involved in this defense is what should be understood from the expression "adequate." The Ministry of Justice explained the meaning of this expression in the UK Bribery Act guideline. According to this guideline, six principles can be used to determine whether an implemented anti-bribery procedure is adequate. However, these principles do not aim to set strict and mandatory rules that must be applied for every single company. They have been prepared considering that every company's condition and needs may be different (for example, a small company's needs will be different from the needs of an international

³⁶ The Bribery Act 2010 Guidance about procedures that relevant commercial organizations can put into place to prevent persons associated with them from bribing. <https://www.gov.uk/government/publications/bribery-act-2010-guidance> pages 15-16.

³⁷ The Bribery Act 2010 Guidance about procedures that relevant commercial organizations can put into place to prevent persons associated with them from bribing. <https://www.gov.uk/government/publications/bribery-act-2010-guidance> page 16.

³⁸ The Bribery Act 2010 Guidance about procedures that relevant commercial organizations can put into place to prevent persons associated with them from bribing. <https://www.gov.uk/government/publications/bribery-act-2010-guidance> page 15.

company) and provide flexibility and serve as a guideline for companies. Companies should prepare internal anti-corruption procedures that align with these principles, and these procedures should be proportionate to the corruption risk within the company.³⁹ For example, the procedures of companies operating in sectors with a higher risk of corruption should be appropriate to address these risks, detailed and extensive enough to mitigate or even completely prevent the risk. However, for companies operating in sectors with a lower risk of corruption, their procedures do not need to be as detailed or extensive. These principles are the following:

- i. Procedures should be proportionate to the risk of corruption that the company may be exposed to during its activities, and they should be clear, practical, accessible, and effective in comparison with the scale and the nature of the commercial activities of the company:

Procedures in this context refer to both the procedures prepared to prevent bribery and the rules regarding their implementation. It might be helpful first to assess and evaluate the company's risks to satisfy the first criterion. While assessing a company's corruption risk, it is crucial to consider the size of the company as well as the nature of its commercial activities. For example, an international company regularly attending public tenders faces a higher corruption risk compared to a jewelry goods company with a single branch.

The companies should demonstrate their stance against bribery and establish an anti-bribery culture within the company through the implementation of the procedures while preparing the procedures.

These procedures, at the very least, should include the company's attitude toward the prevention of bribery, risk assessment procedures, provisions on gifts and hospitality expenses, donations, procedures on delegations of authority, responsibilities of individuals to prevent conflicts of interest, information exchange, precautions to mitigate the risk of bribery, periodic audits, denouncement of bribery and an implementation strategy for these procedures.

- ii. The commitment of the top-level management and fostering a culture within the organization in which bribery is never acceptable:

An appropriately communicated formal statement may be very beneficial in establishing an anti-corruption culture within the company. These statements may differ depending on their recipient and should be communicated periodically and in a form easily accessible to everyone. These statements might include a commitment to honest, transparent, and fair conduct of business, a commitment to zero tolerance toward bribery and corruption, the consequences of violating the company procedures, the benefits of adopting an anti-corruption culture within the company, and that departments of the company are responsible for the prevention of corruption and the implementation of anti-corruption procedures.

- iii. Periodic risk assessments conducted by the company:

The main purpose of risk assessment procedures is to determine and prioritize the risks that the companies face. In this context, the supervision of a risk evaluation by top-level management, appropriate resourcing for risk assessments, and accurate and proper documentation of the risk assessment along with its results are crucial. The risk assessment procedures should evolve proportionately to the company's growth and development. When conducting a risk assessment, companies should consider risks associated with the country, sector, transaction, business opportunity and business partnerships.

³⁹ The Bribery Act 2010 Guidance about procedures that relevant commercial organizations can put into place to prevent persons associated with them from bribing. <https://www.gov.uk/government/publications/bribery-act-2010-guidance> page 20.

- iv. Due diligence by taking a proportionate and risk-based approach to gathering and evaluating information on persons who perform or will perform services for or on behalf of the organization to mitigate identified bribery risks:

As expressed in the previous principles, a company's risk-based approach should be proportionate to its size and the volume of its business. Companies may fulfil the due diligence requirement by appointing their own employees or employing an external consultant.

- v. Companies seek to guarantee that their bribery prevention procedures are rooted and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks they face:

Communication and training that better explains the anti-corruption procedures to the company's staff and associated persons raises awareness of combating corruption. By doing this, it is possible to mitigate the risk of corruption by providing the necessary knowledge and skills on combating corruption to the company's staff and associated persons. The context and language of the training are essential in this regard and must be appropriate to the relevant audience. Therefore, the context and language of the training provided to employees and representatives of a company might be different. It might be necessary to provide more detailed training to employees working in high-risk sectors or countries. It is necessary to make the company's general training on bribery and corruption mandatory and periodically repeat it.

- vi. Companies should periodically evaluate and, if necessary, amend and improve their anti-corruption procedures:

The nature of a company's business and its scale of activities may change over time. Therefore, companies should periodically monitor their anti-corruption procedures and adapt them to reflect these changes.

3.3 Germany

The German Penal Code regulates commercial bribery.⁴⁰ With the amendment adopted in 2015, the definition and scope of commercial bribery in the private sector have been expanded.⁴¹ Giving and offering bribes, promising to give bribes, requesting bribes, and accepting the promise of bribes constitute bribery. As a rule, commercial bribery is regulated as a crime prosecuted on a complaint. Other persons, such as victims, craftsmen and those who run industrial or commercial companies, unions and chambers listed in the Unfair Competition Law, have the right to lodge a complaint. In addition, official authorities may act *ex officio* without waiting for a complaint for public interest.⁴²

Bribery in the private sector is regulated as follows in the German Penal Code:

Whosoever as an employee or agent of a company (including the management of a company):

- (a) demands, allows himself to be promised or accepts a benefit for himself or third person in a business transaction as consideration for according an unfair preference to third person in the competitive (domestic or foreign) purchase of goods or commercial services; or

⁴⁰ Articles 299 to 301 at Section 26 entitled Unfair Competition Offenses of the German Penal Code.

⁴¹ Stetter and, S. and Reichelt, C., 2020. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. [online]

Thelawreviews.co.uk. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/germany> [Last accessed 22 September 2021].

⁴² N. Özalp, Bribery in Turkish Penal Code page 112.

(b) without the prior approval of the company demands, allows himself to be promised or accepts a benefit for himself or third person as consideration for an act or omission of an act that violates the duties towards the company shall be held criminally liable.⁴³

The term "benefit" is broadly interpreted. It covers all indirect and direct benefits that the beneficiary would not have obtained without this agreement. However, in the case of acquiring customers through the assistance of a third party, since the third party is not the beneficiary's representative, it is not considered within the scope of benefit. For example, a taxi driver guiding their customers to a restaurant in exchange for a commission does not fall within the aforementioned definition because the taxi driver is not the restaurant owner's representative. Another critical point here is that the benefit only covers the future benefits. In other words, providing benefits for an act performed in the past does not fall within the scope of commercial bribery.⁴⁴

All kinds of indirect and direct benefits that the beneficiary would not have obtained without this agreement fall within the scope of commercial bribery. Benefits can include a meal, concert tickets, theater invitations, discounts, commissions, gifts, or contracts that improve the beneficiary's situation economically or personally. On the other hand, benefits that are considered normal or acceptable in a social context and do not influence the decision-making process, such as tips, birthday gifts and invitations to dinner at a reasonably priced restaurant, do not fall within the scope of commercial bribery. However, each case should be evaluated separately, taking into account the characteristics of the case. Although there is no regulation in German law on what is reasonable and acceptable, benefits worth EUR 40-60 are considered reasonable in practice.⁴⁵ ⁴⁶ In addition, when the beneficiary is a manager, benefits of up to EUR 100 are often considered reasonable. However, the factual circumstances of a case might justify benefits valued more than these amounts. Nevertheless, the higher the value of the benefits, the greater the importance that courts will give to the specific circumstances of each case when evaluating the situation. In Germany, because even low-value benefits can fall within the scope of commercial bribery depending on the circumstances, it is often advised that companies should adopt a zero-tolerance policy on accepting and giving gifts.⁴⁷

According to reports periodically published by the German Federal Police, there were 535 investigations initiated in 2018 regarding the commission of commercial bribery. However, in 2019 this number increased to 729. An increase of approximately 36% was observed within one year. In addition, according to data collected on aggravated commercial bribery, there were 48 investigations initiated in 2018, and this figure increased significantly in 2019 to 426.⁴⁸

Natural person offenders of commercial bribery may be penalized with the following:

- Imprisonment for up to three years

⁴³ Lohner, A. and Behr, N., 2017. *Anti-Corruption Germany*. [online] Global Compliance News. Available at: <https://www.globalcompliance-news.com/anti-corruption/handbook/anti-corruption-in-germany/> [Last accessed 17 September 2021].

⁴⁴ N. Özalp, Bribery in Turkish Penal Code pages 111-112.

⁴⁵ Lohner, A. and Behr, N., 2017. *Anti-Corruption Germany*. [online] Global Compliance News. Available at: <https://www.globalcompliance-news.com/anti-corruption/handbook/anti-corruption-in-germany/> [Last accessed 17 September 2021].

⁴⁶ Helck, T., Xylander, K.-J. & Schauenburg, T., Bribery & corruption laws and regulations: Germany: Gli. GLI - *Global Legal Insights - International legal business solutions*. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany> [Last accessed 17 September 2021].

⁴⁷ Stetter and, S. and Reichelt, C., 2020. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. [online] Thelawreviews.co.uk. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/germany> [Last accessed 22 September 2021].

⁴⁸ 2019, *Korruption*. Seite X. [online] Bundeskriminalamt, page 6 Available at: https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/Lagebilder/Korruption/korruption_node.html [Last accessed 22 September 2021].

- Fine
- Imprisonment for up to five years in more severe cases

According to the German Penal Code, legal persons do not have criminal liability. However, the criminal liability of legal persons is regulated under administrative law. In this respect, in accordance with the German Administrative Offences Act,⁴⁹ if a company representative or representative body (for example, board members or general managers) commit a criminal or administrative offense and breach their duties to the company or profits, administrative fines may be imposed directly on companies.⁵⁰ Companies might be held liable if they fail to take appropriate action to prevent bribery.⁵¹ In other words, the failure of a company's representative to take adequate measures to prevent corruption may lead to their liability for failing to fulfill their auditing duties. Additionally, this liability may be attributed to the company. If this liability is attributed to the company, it may be penalized with an administrative fine of up to EUR 10 million for each offense under the German Administrative Offences Act.⁵² In addition, revenues gained from bribery may be confiscated. For example, after the Volkswagen diesel emissions scandal, Volkswagen had to pay EUR 1 billion — EUR 5 million as an administrative fine and its revenues worth EUR 995 million were confiscated.⁵³

In addition, under the German Penal Code⁵⁴ and the German Administrative Offences Act,⁵⁵ the court may decide to confiscate the company's property acquired due to criminal or administrative offenses committed by the company's employees or representative. However, under the German Administrative Offences Act,⁵⁶ if a company has already received a fine, the court may not confiscate the assets obtained due to bribery. In addition to the sanctions described above, a ban from entering into tenders, suspension or revocation of operating permits or licenses can be imposed against the legal entity.⁵⁷ Although discussions regarding the criminal liability of legal entities started in 2014, no action was taken in this regard.⁵⁸ The penalties are expected to be turnover-oriented. Moreover, it is stipulated that the new regulation will introduce procedures for conducting internal investigations and sharing these findings with the public after the investigation has been completed.⁵⁹

⁴⁹ German Administrative Offense Act Article 30.

⁵⁰ Lohner, A. and Behr, N., 2017. Anti-Corruption Germany. [online] Global Compliance News. Available at: <https://www.globalcompliance-news.com/anti-corruption/handbook/anti-corruption-in-germany/> [Last accessed 17 September 2021].

⁵¹ N. Özalp, Bribery in Turkish Penal Code page 113.

⁵² Helck, T., Xylander, K.-J. & Schauenburg, T., Bribery & corruption laws and regulations: Germany: Gli. GLI - *Global Legal Insights - International legal business solutions*. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany> [Last accessed 17 September 2021].

⁵³ Stetter and, S. and Reichelt, C., 2020. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. [online] Thelawreviews.co.uk. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/germany> [Last accessed 22 September 2021].

⁵⁴ German Penal Code Article 73-73a.

⁵⁵ German Administrative Offense Act Article 29a.

⁵⁶ German Administrative Offense Act Article 30 paragraph 5.

⁵⁷ N. Özalp, Bribery in Turkish Penal Code page 113.

⁵⁸ Lohner, A. & Behr, N., 2017. Global Overview of Anti-Bribery Laws. <https://www.globalcompliance-news.com/anti-corruption/handbook/anti-corruption-in-germany/> [Last accessed 17 September 2021].

⁵⁹ Stetter and, S. and Reichelt, C., 2020. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. [online] Thelawreviews.co.uk. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/germany> [Last accessed 22 September 2021].

German law does not explicitly regulate to what extent parent companies can be held liable for the crimes committed by their subsidiaries. For this reason, each case should be evaluated according to its relevant facts.⁶⁰

Although German regulations do not allow deferred prosecution agreements (DPA), the accused and the prosecution can always make an agreement.⁶¹

Similar to the other developed countries' regulations, German law adopted detailed accounting and financial reporting standards to protect and assure trust to shareholders. Accordingly, public authorities and private auditors perform financial auditing. Additionally, Article 200 of the German Financial Code obliges taxpayers to keep books that show the accuracy and reliability of commercial transactions. The relevant law ensures that taxpayers keep their financial books properly by empowering the tax authorities to conduct detailed investigations. Detecting errors and inaccurate information on financial books often raises suspicion regarding corruption.⁶²

3.4 France

The French Penal Code regulates public and commercial bribery. French law defines commercial bribery as the following:

Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations.

... giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual, or professional obligations.⁶³

A natural person perpetrator of bribery in the private sector may be penalized with the following:⁶⁴

- Imprisonment for up to five years,
- Fines of up to EUR 500,000 or twice the amount of the criminal proceeds,
- Forfeiture of civic, civil, and family rights for up to five years,
- Prohibition from exercising public functions for up to five years or permanently,

⁶⁰ Ballo, E., Global bribery offenses guide: Insights: DLA piper global law firm. *DLA Piper*. Available at: <https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/> [Last accessed 17 September 2021] pages 53-54.

⁶¹ Ballo, E., Global bribery offenses guide: Insights: DLA piper global law firm. *DLA Piper*. Available at: <https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/> [Last accessed 17 September 2021] pages 53-54.

⁶² Stetter and, S. and Reichelt, C., 2020. *The Law Reviews - The Anti-Bribery and Anti-Corruption Review*. [online] Thelawreviews.co.uk. Available at: <https://thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/germany> [Last accessed 22 September 2021].

⁶³ French Penal Code Article 445.

⁶⁴ Lasry, E. & Guyot-Rechard, C., 2017. Global Overview of Anti-Bribery Laws page 240.

- Prohibition from exercising the activity within which the offense was committed for up to five years or permanently,
- Prohibition from exercising a commercial or industrial profession, or from directing or controlling, directly or indirectly, an industrial or commercial company for up to 15 years or permanently,
- Confiscation of the object that was used in or intended for use in committing the offense, or the proceeds of the offense,
- Publication of the decision.

In addition to regulating the criminal liability of natural persons, French law also regulates the criminal liability of legal persons. French criminal law accepts the principle of personal liability; as a result, parent companies cannot be held liable for the crimes committed by their subsidiaries, without prejudice to the situation that the parent company aided and abetted the commission of the crime. However, recent case law is changing the tide. In a recent decision, the French Court of Cassation held a parent company liable for the crimes committed by its subsidiary because the court found that the subsidiary did not have the authority to make decisions independently from the parent company.⁶⁵

A legal person perpetrator of commercial bribery may be penalized with the following:⁶⁶

- Fines of up to EUR 2.5 million or one-tenth of the amount of the criminal proceeds,
- Prohibition from operating, directly or indirectly, one or several professional or social activities within which the offense was committed for up to five years,
- Placement under judicial supervision for up to five years,
- Closure of the establishment that was used to commit the offense for up to five years,
- Debarment from public procurement for up to five years,
- Prohibition from making an initial public offering for up to five years,
- Prohibition from issuing a check or using a payment card for up to five years,
- Confiscation of the object that was used in or intended for use in committing the offense, or the proceeds of the offense,
- Publication of the decision,
- Implementation of a compliance program.

In 2016, Law No 2016-1691 Relating to Transparency, Fighting Bribery and Modernizing the Economy ("**Loi Sapin II**") was adopted to strengthen the position against corruption and transpose the OECD recommendation into domestic law. One of the most significant changes introduced by this law is the establishment of the French Anti-Corruption Agency.⁶⁷ At the same time, with Loi Sapin II, essential steps

⁶⁵ Ganivet, F., Global bribery offenses guide: Insights: DLA piper global law firm. *DLA Piper*. Available at: <https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/> [Last accessed 17 September 2021], pages 50-52.

⁶⁶ Lasry, E. & Guyot-Rechard, C., 2017. Global Overview of Anti-Bribery Laws page 241.

⁶⁷ Malgrain, L., Durand, G. & Picca, J.-P., Bribery & CORRUPTION laws and Regulations: FRANCE: GLI. *GLI - Global Legal Insights - International legal business solutions*. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/france> [Last accessed 17 September 2021] pages 63-67.

were taken to monitor activities outside French territory by reducing the conditions for cross-border enforcement of anti-corruption laws.⁶⁸

Loi Sapin II introduced a new obligation obliging companies with 500 employees to adopt and effectively implement a compliance program. In this context, companies are required to prepare and implement institution policies for combating bribery and corruption, establish anonymous reporting of corrupt activities and establish protection against retaliation, conduct risk assessments to identify the company's weak spots, conduct due diligence activities with third parties, including their customers, intermediaries and suppliers within the framework of the risk assessment findings, establish effective financial auditing practices and arrange training — especially for senior managers and employees who are in the riskiest group — establish a disciplinary regime and establish internal audit mechanisms to comply with the Loi Sapin II amendments. As can be seen, Loi Sapin II introduced very detailed obligations.^{69 70}

The prosecutor's office and the French Anti-Corruption Agency monitor the compliance program's implementation, which is sought against a company as a different type of sanction. Companies that do not establish or implement a compliance program may be penalized with an additional fine. The amount of the fine is the same as the fine imposed against them for bribery. In addition, other penalties for bribery may be imposed on companies that do not fulfill their compliance program obligations.⁷¹

In addition, Loi Sapin II strengthened the protection provided for whistleblowers. The law specified who can be qualified as a whistleblower by first defining whistleblowers. Accordingly, a whistleblower is a person who, in good faith, discloses or reports a crime, an offense, a serious threat or harm to the public interest, or a severe and evident breach of an international commitment duly ratified or approved by France, a unilateral act of an international organization adopted based on such commitment or a law or regulation of which they had personal knowledge. The reporting procedure has been regulated in great detail. In this context, the whistleblower must first inform the person to whom they are directly or indirectly reporting. Then, the person who receives this should investigate to confirm the accuracy of this information. If the person who received the report does not take any actions within a reasonable time, the whistleblower can inform the relevant judicial or administrative authorities. If the relevant public institution does not take any action within a reasonable time, the whistleblower can reveal it to the public. Loi Sapin II strictly prohibits retaliation against whistleblowers. Accordingly, retaliation is prohibited even if the issues reported by the whistleblower are not substantiated or no action is taken on the reported issue.⁷²

Lastly, Loi Sapin II allows *convention judiciaire d'intérêt public*, which is similar to the DPA found in the American judiciary.⁷³ Within this framework, the mechanism imposes various sanctions to ensure financial and legal compliance by negotiating and providing settlements with legal entities. This mechanism ensures compliance with the laws and is an alternative to the criminal justice system.

Unlike the regulations in the United Kingdom, French law does not recognize a defense for the offense of bribery. Even so, the French Anti-Corruption Agency's guidelines explain that if a company that does not

⁶⁸ Haley, B., Stietz, K. & Crowder, S., 2021. What companies need to know ABOUT France's Loi Sapin II ANTI-CORRUPTION LAW. *Cov Africa*. Available at: <https://www.covafrica.com/2018/06/what-companies-need-to-know-about-frances-loi-sapin-ii-anti-corruption-law/> [Last accessed 17 September 2021].

⁶⁹ GAN Integrity. 2021. *Sapin II Compliance Guide*. [online] Available at: <https://www.ganintegrity.com/portal/compliance-quick-guides/sapin-ii-compliance-guide/> [Last accessed 17 September 2021].

⁷⁰ Jonas Day. 2017. *A New Era in French Anticorruption Enforcement: What Companies Should Know About the Newly Enacted Sapin II Law*. [online] Available at: <https://www.jonesday.com/en/insights/2017/01/a-new-era-in-french-anticorruption-enforcement-what-companies-should-know-about-the-newly-enacted-sapin-ii-law> [Last accessed 17 September 2021].

⁷¹ Lasry, E. & Guyot-Rechard, C., 2017. Global Overview of Anti-Bribery Laws pages 239-250.

⁷² Jonas Day 2019, Anti- Corruption Regulation Survey of 42 Countries pages 90-91.

⁷³ Haley, B., Stietz, K. & Crowder, S., 2021. What companies need to know ABOUT France's Loi Sapin II ANTI-CORRUPTION LAW. *Cov Africa*. Available at: <https://www.covafrica.com/2018/06/what-companies-need-to-know-about-frances-loi-sapin-ii-anti-corruption-law/> [Last accessed 17 September 2021].

have a legal obligation to implement a compliance program adopts and implements it, it may play a role in mitigating any penalties.⁷⁴ However, the fact that a company adopted and implemented a compliance program that is more detailed than what the law envisions does not prevent prosecution. Along the same line, legally speaking, after a prosecutor has initiated an investigation, the fact that the accused cooperates with the prosecution does not affect the determination of the punishment. However, prosecutors may consider cooperation as a mitigating factor.⁷⁵

In recent years, the French Anti-Corruption Agency has published the following five guides: (i) general guidelines regarding the implementation of a compliance program, including developments on the eight pillars;⁷⁶ (ii) practical guidelines regarding the corporate anti-corruption compliance function;⁷⁷ (iii) practical guidelines regarding anti-corruption due diligence in M&A transactions;⁷⁸ (iv) guidelines on managing corruption risk in the public procurement cycle;⁷⁹ and (v) practical guidelines on gifts and a hospitality policy.⁸⁰

Before the French Anti-Corruption Agency's guidelines on gifts and hospitality expenses, French law did not regulate this topic. Before the guideline, the phrase found under the French Penal Code "any other advantages" was interpreted very broadly. In line with this interpretation, whether dinner invites with gifts, use of an apartment or cruises fall within the scope of "any other advantages" was discussed.⁸¹ Under certain conditions, it was possible to categorize small benefits and low-value gifts as bribery under French law.⁸² The guideline on gifts and hospitality published in 2020 shed some light on the discussions. The guideline explains that there are many different forms of gifts and hospitality expenses, for example, a restaurant meal, a sporting event, and cultural events. Moreover, it states that gifts and hospitality are a natural part of doing business and do not, on their own, constitute bribery because one often provides gifts and hospitality out of kindness or for business development purposes. However, the guideline underscored that under certain circumstances, gifts and hospitality expenses might constitute bribes. When one provides gifts and hospitality to influence another to perform or not perform a duty in violation of their legal, contractual, or professional obligations, then such gifts and hospitality fall within the scope of bribery. Considering that gifts and hospitality can be categorized as bribes under certain circumstances, companies should identify the risks relating to gifts and hospitality and manage those risks when needed. In this context, companies can adopt policies and internal rules regulating gifts and hospitality. Managers need to express that they will also comply with the internal bribery rules adopted within the scope of these policies. The policies may introduce different rules for employees working in different parts of the company that are compatible with their risk. For example, a policy may introduce stricter rules for the procurement department. If a company does not ban gifts and hospitality, it should conduct risk-mapping activities to identify bribery risks and set rules to manage these risks. In this context, a company can adopt different rules for gifts and hospitality. The policy on gifts and hospitality must be clear and concise. Furthermore, this policy should include

⁷⁴ Ganivet, F., Global bribery offenses guide: Insights: DLA piper global law firm. *DLA Piper*. Available at: <https://www.dlapiper.com/en/us/insights/publications/2019/09/bribery-offenses-guide/> [Last accessed 17 September 2021], pages 50-52.

⁷⁵ Bougartchev K., Moyne E., Muratyan S., & Huylebrouck E., 2018, Anti- Corruption, Law and Practice in France, Chambers Global Practice Guides, page 142.

⁷⁶ For further information, please see [French AC Agency Guidelines .pdf \(agence-francaise-anticorruption.gouv.fr\)](https://www.agence-francaise-anticorruption.gouv.fr).

⁷⁷ For further information, please see [0275_20_a_EN_CIB_V3_DEF \(agence-francaise-anticorruption.gouv.fr\)](https://www.agence-francaise-anticorruption.gouv.fr).

⁷⁸ For further information, please see [https://www.agence-francaise-anticorruption.gouv.fr/files/files/Practical Guide 2021 FUSACQ.pdf](https://www.agence-francaise-anticorruption.gouv.fr/files/files/Practical%20Guide%202021_FUSACQ.pdf).

⁷⁹ For further information, please see [Guide Risque Corruption-Hyperlien.pdf \(agence-francaise-anticorruption.gouv.fr\)](https://www.agence-francaise-anticorruption.gouv.fr).

⁸⁰ For further information, please see [Practical Guide gifts and hospitality policy in private and public sector corporations and non-profits.pdf \(agence-francaise-anticorruption.gouv.fr\)](https://www.agence-francaise-anticorruption.gouv.fr).

⁸¹ Jonas Day 2019, Anti- Corruption Regulation Survey of 42 Countries page 87.

⁸² Lasry, E. & Guyot-Rechard, C., 2017. Global Overview of Anti-Bribery Laws pages 239-250.

examples that everyone can easily understand. Additionally, companies may adopt regulations on the value of gifts and hospitality expenses.

3.5 Switzerland

In Switzerland, commercial bribery is regulated under the Swiss Criminal Code⁸³ and the Swiss Unfair Competition Law,⁸⁴ as bribery in the private sector constitutes unfair competition. Both the Swiss Criminal Code and the Swiss Unfair Competition Law differentiate between giving and accepting a bribe.

Giving bribes in the private sector is regulated as follows:

Any person who offers, promises, or gives an employee, partner, agent, or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion.⁸⁵

However, accepting a bribe is regulated as follows:

Any person who as an employee, partner, agent or any other auxiliary of a third party in the private sector demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion is liable to a custodial sentence not exceeding three years or to a monetary penalty.⁸⁶

In Switzerland, the penalties listed below may be imposed on a natural person who commits commercial bribery.

- Up to three years in prison
- Fine
- Ban from certain professions for up to five years
- Confiscation of revenues derived from bribery or resources used or will be used for bribery purposes

On the other hand, the penalties listed below may be imposed on a legal person perpetrator of bribery in the private sector:

- Fine of up to CHF 5 million
- Confiscation of revenues derived from bribery or resources used or will be used for bribery purposes

In minor cases, the offense is only prosecuted on complaint.⁸⁷ Additionally, private individuals who fulfill official duties are subject to the same provisions as public officials.⁸⁸

Unlike in the United Kingdom, Swiss laws do not regulate the crime of failing to prevent bribery. Even so, if companies do not take sufficient measures to prevent commercial bribery, they may be held criminally

⁸³ Swiss Penal Code Article 322 octies and 322 novies

⁸⁴ Swiss Unfair Competition Act Article 4a.

⁸⁵ Swiss Penal Code Article 322 octies.

⁸⁶ Swiss Penal Code Article 322 novies.

⁸⁷ Swiss Criminal Code Article 322 octies and 322 novies.

⁸⁸ Swiss Criminal Code Article 322 decies 2.

liable for commercial bribery committed by their employees. Additionally, a company may be held criminally liable and penalized even if the bribery is committed within the company and the perpetrator cannot be identified due to organizational deficiencies. Under certain circumstances, managers and organs of a company may be held liable for the offense of bribery that their employees, who are under their control and supervision, committed due to their failure to fulfill their supervisory and auditing duties and/or to prevent bribery.⁸⁹

In Switzerland, there is no requirement to prove that the offense of bribery caused damages or loss. In the past, to hold the perpetrator criminally liable, the Swiss Criminal Code required that commercial bribery harmed competition. However, in 2016, this requirement of negative effect on competition was removed. It is argued that the rationale behind the removal was the lack of enforcement actions initiated before the Swiss criminal courts for commercial bribery.⁹⁰

In addition, the Swiss Criminal Code criminalizes the failure to keep proper accounts.⁹¹ Irregularities in financial books usually go hand in hand with bribery.⁹²

There is no regulation in the Swiss Criminal Code and the Swiss Unfair Competition Law in terms of gifts and hospitality expenses. However, some industries have guidance on hospitality expenses in the relevant industry standards or documents relating to self-regulation. Customary gifts and hospitality expenses do not constitute bribery. Due to lack of information regarding what constitutes customary gifts and hospitality expenses, to determine whether a gift or hospitality expense constitutes bribery, one should assess each case on a case-by-case basis, considering all of the facts and circumstances.⁹³

3.6 Italy

Before the 2002 amendments, Italian laws only regulated public bribery. After the 2002 amendments, bribery started to cover the managers of companies operating in the private sector, and the Italians amended and expanded the scope of their bribery laws in 2017 to comply with the European Union standards on the fight against bribery. Thus, commercial bribery laws took their current form.⁹⁴ The Italian Civil Code regulates commercial bribery.⁹⁵ Article 2635 of the Italian Civil Code defines commercial bribery as follows:

The directors, general managers, executives entrusted with the preparation of the company's accounting documents, statutory auditors, liquidators, or anyone subjected to their control or supervision who, as a consequence of the giving or promising of money or other equivalent benefits, for their own or others' benefit, perform or omit to perform actions in violation of the obligations related to their office or of their duty of loyalty, causing harm to their company.⁹⁶

⁸⁹ Borsodi B., Burchard P., Gully-Hart P., Ayoub G., Anti- Corruption, Law and Practice in Switzerland, Chambers Global Practice Guides, page 324.

⁹⁰ Pestalozzi Attorneys at Law. 2016. *Swiss Criminal Laws on Bribery: Reforms as of July 2016*. [online] Available at: <https://pestalozzilaw.com/en/news/legal-insights/swiss-criminal-laws-bribery-reforms-july-2016/> [Last accessed date 17 September 2021].

⁹¹ Swiss Criminal Code Article 166.

⁹² Borsodi B., Burchard P., Gully-Hart P., Ayoub G., Anti- Corruption, Law and Practice in Switzerland, Chambers Global Practice Guides, page 324.

⁹³ Berni, M., & Monnier, P., 2017. Global Overview of Anti-Bribery Laws pages 412-414.

⁹⁴ Pisano, R., 2021. *Bribery & Corruption Laws and Regulations | Italy | GLI*. [online] GLI - Global Legal Insights - International legal business solutions. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/italy> [Last accessed 17 September 2021].

⁹⁵ Italian Civil Code Article 2635.

⁹⁶ Giovannelli, A., Cursano, R. and Mancuso, E., 2017. *Anti-Corruption in Italy*. [online] Global Compliance News. Available at: <https://www.globalcompliance-news.com/anti-corruption/anti-corruption-in-italy/> [Last accessed 17 September 2021].

Although the guides published by the Italian Anti-Corruption Agency (ANAC) are not legally binding, they provide guidance on best practices in order to comply with Italian and European Union regulations.⁹⁷

According to the regulations in Italian law, offenders of commercial bribery can be both managers and employees of the company. In addition, similar to the German commercial bribery regulation, Italian law requires the offender to act against their duty. Before the 2019 amendments, the offense of commercial bribery was not punishable *ex officio*, but only when a victim makes a criminal complaint. The only exception of prosecution on a complaint basis was when commercial bribery distorts competition.⁹⁸ However, following the implementation of Anti-Corruption Law No 3/2019, the offense of bribery can be prosecuted *ex officio* and the prerequisite of the victim's complaint was eliminated.⁹⁹ Moreover, the commercial bribery regulations require that the offense cause harm to the company to be punishable.

In accordance with the Italian Civil Code, the following penalties may be imposed on natural person offenders of commercial bribery:

- Imprisonment from one to three years for the directors, general managers, executives, statutory auditors, and liquidators of the company who are assigned to draft company accounting documents.
- Imprisonment for a maximum of one year and six months for those who are under the control or supervision of the above individuals, i.e., directors, general managers, executives, statutory auditors, and liquidators of the company.
- Those who directly or indirectly (through an intermediary) provide money or other equivalent benefits or offer to provide to the people mentioned above, are subject to the same penalties stipulated for the people described above.
- In addition to the penalties for bribery mentioned above, the natural person may be prohibited from holding an executive position in the company for a certain period of time.¹⁰⁰

However, pursuant to the Italian Civil Code, the following penalties may be imposed on the perpetrator of bribery in the private sector:

- The legal entity concerned may be fined.
- Monetary sanctions are increased by one-third in the event that the legal entity has obtained material benefits due to bribery.¹⁰¹
- In addition to fines, courts may prohibit the company from conducting business temporarily, suspend or revoke their licenses and permits related to business, and prohibit it from negotiating

⁹⁷ De Nicola, A., Dell'Antonia, M. and Caselle, R., 2021. Italy: Bribery & Corruption. [online] Legal 500. Available at: <https://www.legal500.com/guides/chapter/italy-bribery-corruption/> [Last accessed 17 September 2021].

⁹⁸ Mariani P., 2015, The Effects of Corruption on Contracts in Italy: The Long Road, Springer International Publishing Switzerland, Available at: [The Effects of Corruption on Contracts in Italy: The Long Road Towards a Legal and Fair, Competitive Market | lawexplores.com](https://www.springer.com/978-3-319-18030-3) [Last accessed date 17 September 2021].

⁹⁹ Pistoichini, A., Gaudio A., Lazzeri F., & Bagnasco M., 2020, Anti-Corruption 2021, Chambers and Partners, Available at: [Comparisons | Global Practice Guides | Chambers and Partners](https://www.chambers.com/practices/anti-corruption) [Last accessed 17 September 2021].

¹⁰⁰ De Nicola, A., Dell'Antonia, M. and Caselle, R., 2021. Italy: Bribery & Corruption. [online] Legal 500. Available at: <https://www.legal500.com/guides/chapter/italy-bribery-corruption/> [Last accessed 17 September 2021].

¹⁰¹ Giovannelli, A., Cursano, R. and Mancuso, E., 2017. *Anti-Corruption in Italy*. [online] Global Compliance News. Available at: <https://www.globalcompliance-news.com/anti-corruption/anti-corruption-in-italy/> [Last accessed 17 September 2021].

and entering into contracts with public administration entities, except for contracts relating to public services.¹⁰²

Although Italian law does not allow DPAs, the prosecutor and the accused can reach a plea bargain.¹⁰³ Within this scope, a pre-trial agreement must be approved by the competent judge and a prison sentence of more than five years cannot be awarded. Moreover, if certain conditions are met and a civil settlement is reached with the victim regarding the compensation of damages incurred due to the offense of bribery, these can be considered as mitigating circumstances leading to a decrease of the criminal penalty.¹⁰⁴

Italian laws also include provisions on whistleblowers in relation to keeping their identities confidential and protecting them from retaliation or discrimination; however, there is no incentive provided for blowing the whistle other than this protection.¹⁰⁵

Within the framework of international conventions to which Italy is a party, Article 2621 of the Italian Civil Code penalizes certain transactions that are deemed as preparations for the offense of bribery. In this context, directors, general managers, executives, statutory auditors, and liquidators charged with drafting the company's accounting documents that paint an incorrect picture of the company's financial situation by changing the company's financial statements, reports or other disclosures to shareholders or the public to gain an unfair advantage for themselves or someone else are penalized.¹⁰⁶ The following penalties may be imposed within the scope of this crime:

- Imprisonment from one to five years for executives, general managers, directors, statutory auditors, liquidators, that are assigned to draft accounting documents of the company.
- The legal entity concerned may be fined.
- Pursuant to Article 2622 of the Italian Civil Code, in the event that this crime is committed at a public company, the penalty to be imposed on natural persons is regulated as imprisonment for three to eight years, and the penalty to be imposed on legal persons is a fine.

Another development in Italian law is the regulations on autonomous administrative liability of legal persons. In this context, if the people who have the authority to represent or manage the company, or people under the control and supervision of those, commit bribery for the benefit of the company, then the company incurs a separate liability. This type of liability stems from the company's failure to prevent bribery.

Italian law provides a legal defense wholly or substantially relieving a company from such criminal liability.¹⁰⁷ If a company adopts and implements an organizational model aimed at preventing bribery and is unable to prevent bribery, it might be exempted from liability. Legal entities do not need to adopt this

¹⁰² Giovannelli, A., Cursano, R. and Mancuso, E., 2017. *Anti-Corruption in Italy*. [online] Global Compliance News. Available at: <https://www.globalcompliancencnews.com/anti-corruption/anti-corruption-in-italy/> [Last accessed 17 September 2021].

¹⁰³ Giovannelli, A., Cursano, R. and Mancuso, E., 2017. *Anti-Corruption in Italy*. [online] Global Compliance News. Available at: <https://www.globalcompliancencnews.com/anti-corruption/anti-corruption-in-italy/> [Last accessed 17 September 2021].

¹⁰⁴ Pisano, R., 2021. *Bribery & Corruption Laws and Regulations | Italy | GLI*. [online] GLI - Global Legal Insights - International legal business solutions. Available at: <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/italy> [Last accessed 17 September 2021].

¹⁰⁵ Pistochini, A., Gaudio, A., Lazzeri, F. and Bagnasco, M., 2020. *Anti-Corruption 2021 - Italy | Global Practice Guides | Chambers and Partners*. [online] Practiceguides.chambers.com. Available at: <https://practiceguides.chambers.com/practice-guides/anti-corruption-2021/italy> [Last accessed 17 September 2021].

¹⁰⁶ Pistochini, A., Gaudio, A., Lazzeri, F. and Bagnasco, M., 2020. *Anti-Corruption 2021 - Italy | Global Practice Guides | Chambers and Partners*. [online] Practiceguides.chambers.com. Available at: <https://practiceguides.chambers.com/practice-guides/anti-corruption-2021/italy> [Last accessed 17 September 2021].

¹⁰⁷ De Nicola, A., Dell'Antonia, M. and Caselle, R., 2021. *Italy: Bribery & Corruption*. [online] Legal 500. Available at: <https://www.legal500.com/guides/chapter/italy-bribery-corruption/> [Last accessed 17 September 2021].

organizational model. However, following the adoption of the model, if a company fails to implement it, it cannot benefit from the exemption.

- Companies might be exempted from liability if they can show that, before the commission of bribery, their board of directors adopted and implemented a compliance program suitable to prevent bribery.
- If a company does not fulfill the duties mentioned above and bribery is committed, provided that the company adopts and ensures the implementation of a compliance program appropriate to prevent bribery before the criminal lawsuit is brought against them, this can be considered a mitigating circumstance.

Gifts and hospitality expenses are not expressly regulated in Italian law. However, the Italian Civil Code may categorize these expenses as bribes depending on the circumstances of the case. According to the case law, gifts and hospitality expenses of low value do not constitute bribes. On the other hand, frequently given gifts of low value to obtain benefits may constitute bribery. Likewise, if negotiations between parties are close to an end and an important business decision is imminent, a gift with a low value may constitute bribery depending on the surrounding facts of each circumstance.¹⁰⁸ For example, frequently sent gifts during contract negotiations may be categorized as bribery.¹⁰⁹

4. Conclusion

The definition of bribery in the private sector and the duration and type of sentences in the case of commission of the bribery in the private sector envisaged under the other countries' legislation and international law texts differ. Additionally, some countries' legislation requires complaints to prosecute some types of bribery in the private sector or proof that some types of bribery caused damages or loss. In addition, different laws regulate bribery in the private sector in different countries. Although criminal laws are predominantly regulating the offense of bribery in the private sector, in some countries, different laws regulate it; for example, in Italy, the Italian Civil Code or in Switzerland, both the Swiss Criminal Code and the Swiss Unfair Competition Law, because under Swiss law bribery in the private sector constitutes unfair competition, regulate bribery in the private sector.

To summarize, at the end of this comparative analysis, although we cannot say that there is a uniform definition, a list of perpetrators, type, or duration of sentence for bribery in the private sector. One can observe that the elements of bribery in the private sector regulated under the legislation of the countries that we have examined differ from the Turkish regulation on bribery in the private sector.

¹⁰⁸ De Nicola, A., Dell'Antonia, M. and Caselle, R., 2021. *Italy: Bribery & Corruption*. [online] Legal 500. Available at: <https://www.legal500.com/guides/chapter/italy-bribery-corruption/> [Last accessed 17 September 2021].

¹⁰⁹ Giovannelli, A., Cursano, R. and Mancuso, E., 2017. *Anti-Corruption in Italy*. [online] Global Compliance News. Available at: <https://www.globalcompliancecenter.com/anti-corruption/anti-corruption-in-italy/> [Last accessed 17 September 2021].



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Ethics and Reputation Society

Mor Sümbül Sok. Varyap Meridian Business I Blok No:1 D: 66
34746 Batı Ataşehir, İstanbul
0 (216) 580 90 34

info@teid.org.tr - www.teid.org.tr