PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

An Emerging Market Context: The Turkish Example

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This article contains information regarding the following topics: STRATEGY + LEADERSHIP + RISK MANAGEMENT

The Foreign Corrupt Practices Act ("FCPA"), a U.S. federal law prohibiting bribery of foreign government officials, has risen to new prominence over the past decade. Since 2004, and particularly in the past 2 years, the FCPA has been enforced more aggressively, with greater financial penalties, and with increasing extraterritoriality. It is of particular relevance to U.S. companies doing business abroad, and foreigners working with U.S. companies – both of whom face heightened scrutiny for their dealings with foreign officials. In this respect, this article aims to provide an overview of the FCPA and its practical implications in view of the Turkish legal framework. The article also discusses these issues in respect to the Bribery Act 2010 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, making reference to the relevant legislative documents in light of the provisions found under the FCPA and the relevant legislative basis under Turkish law.

FCPA IN BRIEF

The FCPA was enacted in December 1977, in the wake of the Watergate scandal and subsequent discovery of U.S. corporations' illicit payments of millions of dollars to foreign officials in return for favors. It was amended in 1988 and again in 1998, after the U.S. Congress ratified the Organization for Economic Cooperation and Development's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("The Convention"). This amendment expanded the jurisdictional reach of the FCPA beyond U.S. borders, and also enlarged the enforcement mechanisms available to U.S. prosecutors.

The FCPA makes it illegal for a U.S. citizen, resident, or corporation to give or promise anything of value to an officer of a foreign government, international organization, political party, or a political candidate to influence an official decision in order to secure a business benefit. It also prohibits the payments or promises to third parties, in order that the payment will pass on to a foreign official.

The FCPA does not apply to payments that are legal in the country which they are made, according to written laws there. It also does not apply to bona-fide and reasonable expenditures, like those for travel, accommodation, food, or the promotion of a product. The FCPA also allows for 'facilitating' or 'grease' payments -- gratuities to foreign officials performing routine governmental actions, like obtaining businesses permits, processing visas, or providing utilities, inspections, or deliveries.

It also requires businesses that are publicly-held issuers in the US, which have securities registered with the Securities and Exchange Commission ("SEC"), to maintain reasonable and prudent accounting of their financial activities. The FCPA mandates these businesses keep accurate, detailed records of all their transactions and assets, regardless of whether they involve foreign officials.

Both the Department of Justice ("DOJ") and the SEC may enforce the FCPA. Those found to have violated the FCPA may be subject to fines, penalties, fees, and imprisonment. Increasingly, the penalties include the disgorgement of profits attributable to the improper activities.

THE NEW ERA OF ENFORCEMENT

The FCPA has attracted greater attention in the past decade due to increased enforcement, higher penalties, and more prosecutions of foreign persons and companies. It is of particularly concern to U.S. companies who acquire foreign businesses or establish subsidiaries abroad, because of its aggressive vicarious liability and successor liability provisions. Moreover, there exists only limited guidance on how to comply with the FCPA, and thus confusion as to how the provisions of the law will be applied.

During its first two decades, the FCPA was minimally enforced. From its enactment in 1977 through 2003, the SEC and DOJ pursued on average about two cases per year. For its first 25 years, these agencies pursued only about 60 total cases against corporations for violations of the FCPA.3 In the wake of the 1998 amendment and particularly after 2004, enforcement has risen considerably. In 2007, the SEC prosecuted 20 cases, and the DOJ prosecuted 18 cases. In 2009, the DOJ prosecuted 26 cases, and the SEC instituted 14.4 Most of the cases have resulted in settlements.

2010 set new records of enforcement – the agencies resolved over 50 actions and had 35 more defendants awaiting trial. Cases against individuals doubled between 2010 and 2009. The amount of penalties collected also mushroomed, to more than $1 billion in corporate fines and disgorgements in 2010.

The number of investigations and self-disclosures has similarly risen each year over the past decade. Especially after the Sarbanes-Oxley Act of 2002 required that all corporate accounting records be totally accurate, corporations often pay closer scrutiny to payments they make, and then, if they find any to be improper, come forward with them. The agencies have promised that those who voluntarily disclose will be rewarded, though they will not escape all punishment. They have also implemented whistleblower bounty provisions to encourage more disclosures, in part due to the Dodd-Frank Act's6 incentives and protection to corporate employees who may have insider information on illegal practices.

Moreover, the agencies also are deploying more proactive enforcement tactics, using undercover agents, electronic surveillance, and court-authorized searches and seizures to uncover FCPA violations.8 The SEC and DOJ have also built partnerships with foreign authorities to cooperate in their extraterritorial prosecutions. Foreign governments have arrested those charged with FCPA violations, they have volunteered information to U.S. authorities about potential violations, and have obtained evidence on behalf of the U.S. agencies.9 International organizations like the World Bank have also referred possible violations to the U.S. authorities for prosecution under the FCPA.

Along with more frequent enforcement, penalties have also risen. The highest penalty so far has been $448.5 million, along with $350 million in disgorgement, paid by Siemens AG in 2008. Other large penalties have been $402 million for KBR Haliburton in February 2009, $400 million for B.A.E. in March 2010, and $240 million for Snamprogetti Netherlands B.V./ENI S.p.A. in July 2010. Other penalties against foreign issuers include that against Statoil for $21 million in 2006, against Schnitzer Steel for $15 million in October 2006, and ABB for $16.4 million in 2005.

THE AMOUNT OF FCPA PENALTIES COLLECTED MUSHROOMED IN 2010

The SEC and DOJ have developed novel theories of liability by which to enforce the FCPA. The statute's requirement that a payment must be made to obtain a business benefit has been read more broadly. Recently, business was found to be defined more broadly than securing contracts. It also may include the reduction of customs duties and sales taxes.10 Similarly, 'things of value' has been read broadly. It is not only cash payments that may fall within the FCPA's scope, but also charitable and political contributions, travel and travel-related expenses, and gifts and entertainment.

Individuals and employees are subject to greater enforcement actions for FCPA violations. In 2006, the agencies pursued actions against 10 individuals, and in 2005, charges were filed in cases against 15 individuals.12 In 2009 and 2010, the number continued to climb. When companies or other employees face FCPA charges, they may settle with the government and then cooperate with it, supplying information to be used to prosecute individuals for their roles in improper payments. As more companies self-report FCPA violations, this may feed into the prosecution of individuals.

LIABILITY RISKS OF U.S. PARTIES DOING BUSINESS ABROAD

US businesses, citizens, or residents may be liable for FCPA violations when doing business abroad. For them, the FCPA requires no territorial nexus to the U.S. for liability. Even if the prohibited payment occurs entirely outside of U.S. territory and involves no use of an instrument of U.S. commerce, the FCPA still may apply to the payment.

US businesses face increased risk during mergers and acquisitions abroad. They will bear liability under the FCPA if their acquiree has made illegal payments in the past or during the acquisition process. Liability may also arise if the acquiree is owned or controlled by a foreign government official. It is unclear how much due diligence by a U.S. company is sufficient to shield it from liability for its acquiree's improper activities.

US parent companies also bear liability for their foreign subsidiaries' illegal payments or substandard accounting. If a subsidiary, agent or consultant makes an illegal payment, then the U.S. parent company may be indirectly liable under the FCPA.14 Also, if the subsidiary does not follow accurate and reasonable accounting provisions, the parent company may bear liability for this violation as well. There is a requirement that the parent have knowledge of the subsidiary's violation, but knowledge can be inferred from 'willful blindness' or 'unwarranted obliviousness' to red flags that should have alerted it to the likelihood that a violation had occurred.

Parent companies bear liability for subsidiaries which they wholly own, or even if they hold only a minority share in them. U.S. companies acting abroad must also be wary of the ambiguities of FCPA interpretation. Though 'facilitating payments' are permitted under the law, it is not clear how much money would still be acceptable under this exception. In practice, the maximum ceiling seems to be around $1,000, but there is nothing in the law to establish this as a reliable guide.

ENFORCEMENT AGAINST FOREIGNERS DOING BUSINESS WITH U.S. PARTIES ABROAD

The FCPA's extraterritorial reach was expanded in 1998, and increasingly it is being used to investigate and prosecute non-US individuals and companies.

Foreign-owned issuers of securities in the U.S. are subject to the anti-bribery and accounting provisions of the FCPA. As a top DOJ official stated recent, "the Department will not hesitate to enforce the FCPA against foreign-owned companies, just as

FOR U.S. BUSINESSES, CITIZENS OR RESIDENTS, THE FCPA REQUIRES NO TERRITORIAL NEXUS TO THE U.S. FOR LIABILITY.

it does against American companies." The DOJ and SEC have found several foreign issuers to be in violation of the FCPA, including Siemens, Alcatel, and DaimlerChrysler.

Non-issuers, including foreign subsidiaries and individuals, are also subject to increasing numbers of investigations and charges.20 Foreign subsidiaries of U.S. companies face increasing scrutiny under the FCPA. U.S. parent companies may disclose illegal payments to the authorities and cooperate with an investigation, avoiding prosecution themselves, but leading to the prosecution of their subsidiary abroad.

Foreign nationals are also increasingly subject to prosecution under the FCPA. Foreign individuals who are officers, directors, employees, or agents of a U.S. company, including lawyers and accountants, are subject to the FCPA's anti-bribery provisions. The agencies have charged several foreign individuals with violating the FCPA, particularly in the past several years.

For non-US persons, there must be a territorial nexus between their improper activity and the U.S. for the FCPA to apply. If any person in the territory of the U.S. commits a crime to facilitate the violation of the FCPA, they are liable to the FCPA's anti-bribery provisions.

In recent cases, this territorial nexus has been expanded. Even if the foreign national is not physically present or acting in U.S. territory, if they take actions that would have intended effects in the US, or if they are acting directly on behalf of a U.S. party, then the nexus requirement may be satisfied.

When no territorial nexus can be established, agencies have turned to other anti-corruption statutes, which when used in combination with the FCPA, allows them to exert greater extraterritorial jurisdiction. If a foreign national is found to have conspired to violate an anticorruption law, like that against money laundering, they may be subject to U.S. jurisdiction – even though the practices were entirely extraterritorial. If the foreign national is promoting unlawful activity, he could be liable for conspiracy to violate the FCPA in addition to conspiracy to violate the other statutes – though he would not have been subject to U.S. jurisdiction based on FCPA violations alone.

This combination of prosecutorial tools has also led U.S. authorities to target foreign officials who receive illicit payments. Though these officials are not liable under the FCPA, the SEC and DOJ have charged bribe recipients with money laundering conspiracy, in connection with FCPA violations.

THE FCPA IN TURKEY

Several companies have been charged with FCPA violations in connection with business in Turkey. Daimler AG, a German company which is a foreign 'issuer' in the US, was charged with a criminal information by the DOJ in March 2010, for violations in 22 countries including Turkey. A Turkish subsidiary of Daimler, MB Turk, was found to have made approximately 6.05 million Euro payments to third parties to pass onto government customers outside of Turkey, to facilitate the sale of vehicles to them. Daimler's Corporate Audit department discovered records of these payments and insufficient record keeping in its subsidiary's office in Istanbul, and voluntarily reported them to the authorities.

In July 2007, the SEC charged Delta & Pine Land Company, a U.S. corporation, with FCPA violations for over $43,000 in bribery payments to the Turkish Agricultural and Rural Affairs Ministry to affect inspections of cotton seeds of its subsidiary Turk Deltapine, between 2001 and 2006. The U.S. parent company had investigated payments beginning in 2004, but failed to uncover the bribes after its Turkish subsidiary employees withheld facts about the payments. Afterwards, between 2004 and 2006, the subsidiary employees paid the Turkish officials in the form of cash, travel and hotel expenses, air conditioners, computers, office furniture and refrigerators, via a third party. The payments were recorded as "Porter Fees" to non-existent parties, or were not recorded at all. The violations were discovered in 2006 by Monsanto in the course of M&A due diligence, and then reported to the U.S. authorities.

York International Corporation, a subsidiary of Johnson Control, settled with DOJ prosecutors over numerous violations of the FCPA, arising out of bribes paid under the UN oil-for-food program and kickbacks to secure government contracts in Turkey, among other countries. They recorded these payments as "consultancy payments", but they received no bona fide services in exchange. It disclosed the violations to the authorities, and worked with the agencies to investigate the illegal conduct, including that by foreigners involved in the bribery. It agreed to a 10 million dollar corporate penalty and cooperation with DOJ's related investigations, in a 3 year deferred prosecution agreement, and also it will appoint an independent compliance monitor.

3M voluntarily disclosed in its November 12, 2009 SEC filing that it was investigating reports that its subsidiary in Turkey was involved in bid rigging, bribery, and other inappropriate conduct with the Turkish government.

In May 2005, Micrus Corporation, a manufacturer of medical devices used in the treatment of neurovascular diseases, voluntarily notified the DOJ of potential FCPA violations. The ensuing investigation revealed that Micrus had paid more than $105,000 disguised in Micrus' books and records as stock options, honoraria and commissions to doctors employed at publicly owned and operated hospitals in Turkey, France, Spain and Germany, in return for the hospitals' purchase of Micrus' products. Micrus agreed to resolve its criminal liability associated with potential violations of the FCPA by paying $450,000 in penalties, retaining an independent compliance expert for a period of three years and cooperating fully with the investigation.

Siemens AG pleaded guilty in December 2008 to violating the internal controls and book and records provisions of the FCPA and agreed to pay a $450 million fine to the DOJ and $350 million in disgorgement of profits to the SEC. Entering also into an agreement with the Munich Public Prosecutor's Office, Siemens agreed to pay approximately $569 million, which included a fine and disgorgement of profits, based on charges of corporate failure to supervise officers and employees. DOJ and SEC officials worked closely with the Munich Public Prosecutor's Office throughout the investigation of Siemens. The cross-border collaboration was made possible by the use of mutual legal assistance provisions of the 1997 OECD Convention.

Turkish Law In Comparison to the Legal Framework Established With the FCPA, The Bribery Act 2010 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In view of both the implications of the FCPA, as well as the Convention, the Bribery Act 2010 ("Act") was drafted in order to reform the criminal law of bribery, pro-

viding for a new consolidated scheme of bribery offences, i.e. offering, promising or giving of an advantage, as well as, requesting, agreeing to receive or accepting advantages, to cover bribery both in the United Kingdom (UK) and abroad.

The Act creates the discrete offence of bribery of a foreign public official and a new offence where a commercial organization fails to prevent bribery.

The extraterritorial effect of the Act particularly merits focus in that a non-UK registered company can be prosecuted in the UK for any act committed by it in the UK, or for any failure to prevent persons associated with it (including subsidiaries , joint venture partners, employees, agents and others) from committing an act of bribery anywhere in the world, if that non-UK company also has a business presence in the UK, unless adequate procedures had been put in place in an attempt to prevent bribery in accordance with the guidance published by the UK's Ministry of Justice.

The Act applies in both public and private sectors regarding bribery by the individuals or the companies. Individuals are subject to an imprisonment for up to ten years as well as an unlimited fine of a penalty payment likewise the companies. The Act has entered into force on July 1, 2011.

Turkey's progress in implementing the Convention since its Phase 2 examination in December 2007 has been significant. As a preliminary remark, the Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. The 34 OECD member countries and four non-member countries -- Argentina, Brazil, Bulgaria, and South Africa -- have adopted this Convention32. The open ended, peer-driven monitoring mechanism that the Convention establishes has allowed Turkey to make significant progress in its efforts to combat bribery in international business deals by fully implementing all but one of the recommendations made by the OECD Working Group on Bribery since 2007.

Turkey's implementation of the Convention continues to be monitored through the Working Group's rigorous peer-review monitoring system. The Working Group on Bribery will follow up in particular on Turkey's progress in investigating and prosecuting allegations, referred to in the 2005 Final Report of the Independent Inquiry Committee (IIC), regarding the United Nations Oil-for-Food Program.

Within the context of the Turkish legal framework, bribery and its sanctions find their legal basis under the Turkish Criminal Law No. 5237 ("Turkish Criminal Law"), which was enacted on September 26, 2004. According to Turkish Criminal Law, a bribe is defined as any benefit taken by a governmental officer from a person through agreement for any service or compensation in violation of the governmental officer's duty. Sanctions of it are provided as imprisonment for both the governmental officer taking bribe and the person giving bribe. In order to constitute as "bribe," a mutual agreement is satisfactory; there is no need for further action.

U.S. PARENT COMPANIES ALSO BEAR LIABILITY FOR THEIR FOREIGN SUBSIDIARIES' ILLEGAL PAYMENTS OR SUBSTANDARD ACCOUNTING.

In cases where foreign public officials are bribed, Turkish Criminal Law has also allowed for the provisions of the Convention to apply with an amendment that was introduced in 2005 to Article 252 of the Turkish Criminal Law in line with the requirement envisaged by the Convention. Accordingly, by introducing paragraph 5 to Article 252, the scope of bribery has been extended to include sanctioning of foreign public officials. What must be understood from "foreign public officials" is "officials or officers of a public authority or a public institution that carry out legislative or administrative or judicial work and who have been elected or appointed at a foreign country". Similarly, those who conduct business that is of an international nature at a foreign country are also deemed to be "foreign public officials". The fact that these persons have been provided with a material benefit due to international commercial transactions for doing or not doing a job or in order to obtain an unjust benefit or retain such benefit is also considered to constitute bribery. In this respect, bribery is considered to have been committed when a material benefit or a promise is provided or made to a "foreign public official" as a result of "international commercial transactions."

As a side note and in line with the provisions regulating bribery under the relevant applicable Turkish legislation, the authority to whom information with respect to circumstances of bribery are reported is the public prosecutor and the Ministry of Justice.

CONCLUSION

A global wave of regulation has been afoot since the U.S. first took the step to address bribery of foreign officials by enacting the FCPA in late 1970s. Thereafter, regulating the acts of international businesses to ensure compliance with ethical standards and to prevent illegal payments has mushroomed, in particular throughout Europe, with the most recent development observed in the UK, where a new legal instrument specifically regulating bribery was entered into force in early July 2011.

From the Turkish standpoint, closely following up on these global developments and trends has enabled Turkey to keep its local laws in concert with European and American practices, thereby allowing more room for extra-territorial application of national laws that could at first be considered to be territorial. However, the implications of the increasing number of investigations conducted by the DOJ and the SEC over the past few years, along with increasing fines, and the increased numbers of charges against foreign businesses and individuals, remain to be seen in the near future for Turkish businesses and international businesses closely connected to Turkey.

Author Biography

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