

# How to Establish and Operate an Anti-Corruption Compliance Program in Emerging Markets: The Turkish Example

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## ABSTRACT

*A compliance program, a tool which will enable companies to detect, deter and prevent any non-compliance with the applicable laws must be culturally adapted to the environment it will be implemented in. While there is some guidance on what the core elements of a compliance program should be, it should still be flexible enough to adapt to the changes that each jurisdiction brings with it in order to ensure a successful outcome. The importance of this flexibility can be clearly observed when a multinational company exports its business to different jurisdictions, e.g. emerging markets, where differing aspects of legal rules, enforcement and business culture come to light. Therefore, in order for a compliance program to work in different jurisdictions, adaptation of the compliance program to the sensitivities of the jurisdiction at hand becomes the foremost issue.*

## I. INTRODUCTION

Recent years have witnessed the increasing popularity of anti-corruption compliance, making it an issue on a global scale for multinational companies. This issue was elevated to the international arena first and foremost by the US Foreign Corrupt Practices Act (FCPA) due to its extraterritorial application. Accordingly, even if the act does not take place within the US, the relevant persons could still be held liable under the FCPA. Following this pioneering jurisdictional rule enacted as of 1977, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was opened to signature on 1997 requiring the signatory states to criminalize bribery of foreign public officials. This was followed by the UK Bribery Act (UKBA) of 2011, which also foresaw extraterritorial jurisdiction for foreign bribery. According to the FCPA and the UKBA, not only companies established in these

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jurisdictions could be a source of liability, but also their subsidiaries and distributors acting in foreign jurisdictions. In other words, a company need not be headquartered in these jurisdictions to trigger liability. However, jurisdictional rules on their own could not have put compliance to the tops of the agendas of multinational corporations. It is the rigorous enforcement of these legislations, combined with the aforementioned jurisdictional rules that enhanced the attention paid to these legislations. Theoretically, a company with loose ties to the US and the UK could be prosecuted in those countries for foreign bribery. The results of such prosecution would be a C-level executive nightmare with hundred million dollar fines accompanying disastrous reputational ramifications for the company.

This is where the importance of compliance programs becomes relevant. A compliance program, ready to detect and deter any violations, could serve as a mitigating factor when deciding the amount of fines, could lead to the execution of deferred prosecution and non-prosecution agreements or could even be among the factors leading to a declination decision under the FPCA. Under the UKBA, the compliance program, as a mechanism to prevent corruption, could serve as a defence. Aside from these where the compliance program could be determined as a bargaining chip against prosecution, a compliance program has more sustainable effects. Compliance programs foster a culture of compliance which could provide the company with the opportunity to police itself.

Given the abovementioned significance of compliance programs, especially for the private sector, both the US and the UK have published guidance as to what the components of a compliance program should be. All these to-dos point to more or less the same elements, which makes it more compliance friendly for multinational companies. However, this is not to say that one size fits all when it comes to compliance programs; it does not, even where different subsidiaries of the same company are concerned. A compliance program should be adapted to jurisdiction, sector and culture in order for it to be able to detect and deter any possible violations.

This issue becomes especially important for multinational companies attempting to expand their operations into emerging markets. When the compliance program created in a different jurisdiction with completely different sensitivities is exported to an emerging market, it could fail to serve its purpose of detect and deter the forms of corruption specific to this jurisdiction, resulting from differing legal rules and enforcement trends and different corruption perceptions. Accordingly, in order for a company to maximize the utility of its compliance program, it should adapt it to the specifications of the relevant jurisdiction. Using Turkey as an analogy for emerging markets, this article will aim to illustrate the points of adaptation in order to successfully operate compliance programs.

## **II. AN OVERVIEW OF COMPLIANCE PROGRAMS**

Compliance programs foster compliance cultures and are part of a company's sustainable efforts in combatting corruption. The compliance program should aim to

ensure the company's compliance with all applicable legislation, taking into account the jurisdictional, sectoral and cultural context the company is active in. The FCPA Guide (the Guide) gives extensive explanation on expectations of how a 'corporate compliance program' should be shaped. In general terms, a compliance program is supposed to promote an organizational culture which encourages compliance. An effective compliance program should help prevent, detect, remediate and report misconduct. Moreover, the existence of an effective compliance program can also determine how the relevant authorities will move further following an allegation and potentially could function as a mitigating factor in proceedings in front of the Department of Justice (DoJ) and/or the Securities and Exchange Commission (SEC).<sup>1</sup> An effective compliance program can then influence the decision on whether the DoJ and the SEC decline to pursue charges and whether they decide to reward the company for having it in place by reducing the fines to be imposed. The DoJ and the SEC analyse compliance programs based on the design of a compliance program, whether it is implemented in good faith and whether it is effective in its main aims<sup>2</sup>.

The UKBA Guidance also provides a model for an effective compliance program. Companies willing to obtain fine reductions for breaches would be wise to follow these guides, although there is no clear cut formula for compliance programs. As illustrated by these guides, components of compliance programs, as required by different administrative authorities from around the world, have a tendency to converge across jurisdictions. Although stated in different language, it is hard to differentiate between the elements of a compliance program under the FCPA and the UKBA. The latest addition to these guides, the Brazilian guidance, also provides the same elements in its recommendations for compliance programs. The outcome of this convergence trend is that the components of a compliance program are very similar across jurisdictions, which is without a doubt an advantage for multinational companies.

### III. GUIDANCE ON COMPLIANCE PROGRAMS

Below are the components of an effective compliance program, in accordance with the guidance published within the scope of the FPCA and the UKBA:

#### **a) Commitment from Senior Management and a Clearly Articulated Policy Against Corruption/Top-level commitment**

The top management of the company is deemed to be the leaders when it comes to ethics and compliance. Hence, first and foremost it should be the top executives of the company who demonstrate that the compliance program is indeed enforced and is not a paper program. Like the chain of command within an organization, top management's leadership of and compliance with the compliance program is an attitude expected to spread.

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<sup>1</sup> The Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, (Washington D.C., 2012) 56.

<sup>2</sup> *Ibid.* 10.

## **b) Code of Conduct and Compliance Policies and Procedures/ Proportionate procedures**

This component can be seen as the foundation upon which the compliance program is built. Codes must be clear, concise and accessible. Moreover, the code must remain current and effective, periodically reviewed and updated. The code should be shaped with profound understanding of the business risks of the company in question.

## **c) Oversight, Autonomy and Resources**

One or more specific senior executives within the organisation, with adequate authority and resources should be assigned responsibility for the oversight and implementation of the compliance program. Where need be, these executives should be autonomous from the management.

## **d) Risk Assessment**

The effectiveness of a strong compliance program depends on the risk assessment. The compliance program should be tailored to the risks each corporation faces, taking into consideration its field of business, its size, its jurisdiction and its potential business partners. As these parameters change, so do the risks the company faces. Hence risk assessment should be realized on a continued basis.

## **e) Training and Continuing Advice/Communication**

As the main aim of the compliance program is to deter employees from engaging in breaches, the communication of the compliance program to the employees and making sure that they understand the sensitivities of the program, i.e. adequate training, is indispensable. During training, the information should be presented in a manner appropriate to the audience, e.g. local language barriers should be taken into account. The company should also develop a system whereby the employees may access urgent advice on compliance matters whenever they need.

## **f) Incentives and Disciplinary Measures**

Enforcement of the compliance program is essential to its effectiveness. To that end, a compliance program must entail appropriate disciplinary measures, and it should apply equally to the most senior executives and the most junior associates. In addition to these negative incentives, positive incentives such as bonuses in case of compliant behaviour may also be used.

## **g) Third Party Due Diligence and Payments**

Since companies could be held liable for the breaches of their counterparts, depending on the level of their control over their activities, companies should also be diligent about their business partners. This can be realized through third party due diligence, which includes steps such as running a background check on the counterpart, examining the payment terms or the level of expertise on the subject the third party is hired for. This

due diligence should be conducted continuously, and companies should refuse to work with counterparts that produce too many red flags.

### **h) Confidential Reporting and Internal Investigation**

One of the most important functions of a compliance program is to detect wrongdoing. The detecting function would not operate properly without mechanisms ensuring confidential reporting in the form of, possibly, hotlines and internal investigations to determine how the compliance program may be breached.

### **i) Continuous Improvement: Periodic Testing and Review**

Compliance programs should evolve with the business environment and markets. Since over time the risks to which a company is exposed change, so too should the compliance program. This will ensure the company stays compliant. One way of reviewing and monitoring programs is by asking for employee feedback and conducting surveys and questionnaires. Another example is by resorting to formal reports of top-level management.

### **j) Mergers and Acquisitions**

The acquirer company should perform due diligence on acquisition targets to avoid potential liabilities that could follow the acquisition.

## **IV. BRAZIL: COMPLIANCE PROGRAMS FROM AN EMERGING MARKET PERSPECTIVE**

Recently enacted, the Decree No. 8.420<sup>3</sup>, within the scope of the Clean Company Act<sup>4</sup>, has made compliance programs a mitigating factor in Brazilian legislation. This decree, introducing compliance programs, also gives guidance on the components of an effective compliance program. Accordingly, the components can be listed as follows: (i) tone at the top, (ii) compliance policies applicable to everyone in the company, (iii) policies applicable to third parties, (iv) periodic training, (v) periodic risk assessment, (vi) accuracy of books and records, (vii) internal controls to assure the reliability of financial statements, (viii) specific public procurement policies and policies for the interaction with government officials, (ix) the compliance officer should be independent and authoritative, (x) whistleblowing hotline and prevention of retaliation, (xi) enforcement of disciplinary measures in case of wrongdoing, (xii) immediate suspension of identified irregularities and remediation procedures, (xiii) third parties due diligence, (xiv) mergers and acquisition due diligence, (xv) continuous monitoring of the program, and (xvi) transparency over political contributions.<sup>5</sup> Here again, the main components are very similar, if not identical, to the components listed

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<sup>3</sup> Decree No. 8.420 2015 (Brazil).

<sup>4</sup> Clean Company Act (Law No. 12.846) 2013 (Brazil).

<sup>5</sup> FCPAméricas Blog: <<http://fcpamericas.com/english/anti-corruption-compliance/highlights-brazils-regulation-clean-companies-act/#>>. Last accessed on 25 March 2015.

for the US and UK jurisdictions.

## **V. TURKEY: AN EMERGING MARKET EXAMPLE**

As mentioned above, gradually the requirements for a compliance program expected by authorities from around the world are converging. However, this should not suggest that a one-size-fits-all program would be acceptable. Compliance programs should be adapted to different legislations, cultures and perceptions if they are to detect and deter violations. In addition, the compliance program serves as a safety net in jurisdictions with insufficient anti-corruption legislations and enforcement. However, the compliance program, if adopted exactly as it is used in its original jurisdiction, could potentially be ill-equipped to detect and deter violations. Therefore companies using Turkey as a hub to operate in other emerging markets should adopt their compliance programs to the sensitivities of the jurisdiction.

First of all, compliance programs should be communicated to the employees in order for it to work. This calls for the language barrier to be lifted. The DOJ and SEC may very well hold the compliance program to be insufficient where its policies are not available in local languages. However, it is not just the policies that need adaptation. When using critical processes such as a whistleblowing hotline, it is vital that employees are able to express themselves effortlessly, in their own local language. The same applies for internal investigations. During the course of an investigation, when conveying information that could potentially lead to among others, self-reporting, the information obtained by companies should be expressed in the best way possible.

As a system, a compliance program heavily relies on its ability to detect violations. Whistleblowing is one of the most important elements of this detection. However, in many countries whistleblowing could be regarded as 'snitching', leading to the isolation of the employee by the employee's peers. Even though the company does not retaliate, such isolation could act as a punishment for the employee and therefore the act of blowing the whistle is deterred. Given the fact that most investigations commence with tips provided by whistleblowers, a company would lose a significant tool, if it were not to adapt its processes to this cultural sensitivity. Accordingly in jurisdictions where whistleblowing is regarded as snitching, the whistleblowing system should be anonymous so that employees in making allegations which could potentially bring major benefits to their employer can take comfort in anonymity.

Also, in some jurisdictions, gift-giving is considered part of the nature of business transactions. While engaging in such habit, perpetrators may not realize that they are in fact engaging in illegal payments, as it can be perceived as negative and even rude not to provide gifts within the course of commercial relations. A gift-giving culture can manifest itself through excessive accommodation and entertainment expenses, through simple and ordinary presents or through more indirect means. For example, officials may not always ask for things that directly benefit them. They could request

a donation for a specific charity, the offering of scholarship to a relative or finding a job for the relative of the relevant officials. Although these could easily be interpreted as illegal payments, the persons engaging in them could leave with a sense of having performed a good deed. This understanding can only be fought through changing employees' perceptions of corruption through raising awareness.

Aside from the language of the compliance program, in order for the compliance program to be effective it should also be effectively communicated to employees. Therefore, one of the most important components of a compliance program is providing training to employees. Training should be provided to the employees with the aim of changing their perceptions of corruption and thereby creating a company culture of compliance. However, effective training needs to adjust to the local cultural environment. For example, in some cultures, it would be better to separate senior management from the employees in different training sessions. This is because in the presence of the seniors, employees fearful of being singled out may hesitate to ask the questions that might help them internalize the compliance policy of the company. By giving training in environments where the employees can freely express themselves, employees will be better able to receive clear guidance on how the company wants them to operate effectively.

As mentioned above, the commitment of senior management is one of the indispensable factors of a compliance program. Yet while the effect of the senior management on the company's compliance culture is undisputed, this issue too should be evaluated through a cultural lens. The 'tone at the top' concept emphasizes the leadership role of top management in a company. However, the leadership role in emerging markets often is not discharged by the senior executives themselves, who have been given the duty of shareholder satisfaction, but is taken over by middle management, who is most likely local, and thus has a better understanding of the local business culture. Consequently, it is these mid-level managers the employees look up to in order to determine whether the compliance program can be incorporated to the daily necessities of commercial life, or it is just a paper program.

## **VI. CONCLUSION**

Although the requirements for compliance programs have a tendency to converge across jurisdictions, this should not be mistaken for the fact that compliance programs should not be adapted across jurisdictions. When implementing and enforcing a compliance program, companies should take into consideration local customs and perceptions of corruption and differing legislations. The employees of a company expected to carry out clean business should be trained in an adequate manner, taking into consideration language barriers and cultural differences that may impede their awareness and understanding as to what constitutes corruption. A disregard for these factors could risk the compliance program not being communicated effectively and its mechanisms not being adjusted to catch the breaches specific to the jurisdiction. When

exporting compliance programs to emerging markets, adapting to the sensitivities of the relevant jurisdiction is indispensable for its success.