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The importance of thorough compliance due diligence in overseas transactions: the Turkish example

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In a legislative landscape where international anti-corruption conventions shape the domestic laws of countries and where extraterritorial enforcement of certain anti-corruption laws such as the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act increase with accelerating speed, compliance with anti-corruption laws becomes a top priority for multinational companies. Conducting a thorough pre-acquisition due diligence and post-acquisition integration is crucial for the acquiring company since successor companies may possibly be held liable for the past corrupt behaviour of the target company in corporate transactions. Given the recent amendments realised in the Turkish anti-corruption legislation, which increase the burden on companies, acquiring companies are advised to conduct a thorough anti-corruption due diligence on target companies acting under the Turkish jurisdiction, with special emphasis on the new areas of liability introduced by the recent amendments.

The importance of anti-corruption due diligence

As a general legal principle, an acquiring company will be inheriting the

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liabilities of a target company resulting from the applicable legislation and the target's previously executed contracts. Therefore, it is crucial for an acquirer to identify the liabilities of its target prior to the transaction. Through conducting pre-acquisition due diligence, the acquirer may be able to uncover the target's improper behaviour, engage in post-acquisition integration efforts, and inform the relevant authorities if necessary, in order to prevent the perpetuation of corrupt behavior. Accordingly, a successful pre-acquisition due diligence helps the acquiring company to be able to accurately assess the value of the target company, reduces the risk of continuation of the corrupt behaviour and prevents the reputational and financial damage to the company that could result from the target's corrupt actions. In addition, such due diligence helps the company to identify both the legal and business risks the target company faces.

What to take into consideration when the acquirer is a US or a UK company

'A Resource Guide to the U.S. Foreign Corrupt Practices Act' emphasises the importance of a thorough anti-corruption due diligence and lists the steps to follow. According to the Guide, a thorough anticorruption due diligence should include: (i) a review of the target company's customer contracts, third party and distributor agreements; (ii) a risk based analysis of the target company's customer portfolio, (iii) an audit of pre-determined transactions conducted by the target company; and (iv) interviews with the top management of the company regarding the anti-corruption risks the company faced for the last 10 years (p. 28-30).

Both the Department of Justice and Securities and Exchange Commission decline to prosecute successor companies when the successor company has found out about the target company's corrupt behavior through the pre-acquisition due diligence and prevented the occurrence of further corrupt behavior through post-acquisition integration, where the acquiring company has enforced its compliance program, after making the necessary adjustments, on the acquired company *(Ibid, p. 28.)*.

Regarding successor liability, it is important to note that if no FCPA jurisdiction could be asserted prior to the acquisition, the successor can be liable only for the continuing corrupt conduct of the acquired company. This means, where the acquired company was not a US issuer, a US domestic concern or any person within US territory, the successor will not be liable for the acquired company's past corrupt behaviour. However, even in such a case, thorough pre-acquisition due diligence would help the acquiring company to value the target accurately, and identifying any existing corrupt behaviour would assist with enforcing the acquiring company's compliance program on the acquired company during post-acquisition integration.

Similar to the FCPA, the UK Bribery Act also applies to UK persons or UK companies or companies that carry out part of their business in the UK. However, the UK Bribery Act widens this scope by asserting jurisdiction on companies who employ UK citizens or provides services to a UK organisation. Accordingly, when an acquirer wishes to acquire a target company which employs UK persons or provides services to a UK company, the acquirer, beyond its standard list, should also be sure to conduct pre-acquisition due diligence to determine whether the target company infringes the UK Bribery Act.

What to take into consideration

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in the Turkish anti-corruption landscape – recent regulatory developments

Recent amendments realised in the Turkish anti-corruption legislation have increased the liability of companies with regard to anti-bribery and sanctions regimes.

In June 2009, within the scope of Turkey's efforts to comply with the OECD Convention on Bribery, Article 43/A was inserted into the Law No. 5326 on Misdemeanours with the specific purpose of increasing corporate liability for bribery and corruption offences. The law holds a legal person liable for misdemeanours committed in the scope of duty by its organs, representatives or persons who are assigned with duties to carry out its activities (Article 8). After the insertion, the risk to a legal person of being fined if the organs, representatives or persons who are assigned with duties to carry out its activities commit the crimes of bid-rigging and bribery for its benefit.

In July 2012, Article 252 of the Turkish Commercial Code was amended to incorporate two significant changes, namely: (i) broadening the scope of provisions incriminating the bribery of foreign public officials; and (ii) the criminalisation of private commercial bribery. Both of these amendments have helped render the Turkish anti-bribery provisions in line with the standards set out by the international anti-corruption covenants.

In 2003, within the scope of Turkey's obligations under the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the repealed Turkish Criminal Code No. 765 was amended to include the bribery of foreign officials as an offence. With the latest amendment in Article 252 of the Turkish Criminal Code No. 5237, which is the main article regulating the crime of bribery under Turkish law, the scope of the relevant offence has been broadened. The provision now provides that bribery of foreign public officials is committed when a benefit is provided, offered or promised not only directly, but via intermediaries too, in order to obtain or preserve a task or an illegal benefit for international commercial transactions to persons defined as foreign public officials. The scope of the persons who are deemed to be foreign public officials was also broadened.

The amendments made to Article 252 of the Turkish Criminal Code also introduced private commercial bribery into the Turkish legislation. Accordingly, if a benefit is provided, offered or promised, or if the respective individuals request or accept such benefit, or if such is mediated, and if benefit is provided to another individual due to the following relationship, the general provisions regulating domestic bribery are applicable to individuals acting on behalf of the following entities: (i) professional organisations that are public institutions; (ii) companies that have been incorporated by the participation of public institutions or entities, or professional organisations that are public institutions; (iii) foundations that carry out their activities within a body of public institutions or entities, or professional organisations that are public institutions; (iv) associations working for the public interest; (v) co-operatives; and (vi) publicly traded joint stock companies.

The latest addition to Turkish anti-money laundering legislation is Law No. 6415 on the Prevention of the Financing of Terrorism ('Law') dated February 2013, and its implementing regulation, the Regulation on Procedures and Principles on the Enforcement of the Law on the Prevention of the Financing of Terrorism ('Regulation'), which Turkey has enacted in order to implement its obligations under the International

Convention for the Suppression of the Financing of Terrorism. The Law and the Regulation mainly provides the framework for enforcing under the Turkish law the UN Security Council's resolutions with regard to the freezing of the assets of certain persons. Due to such legislation, it could be asserted that companies now have the obligation to report to the Financial Crimes Investigation Board any transactions they have conducted with persons whose assets have been frozen in accordance with the relevant legislation, within the scope of suspicious transaction reporting as per the anti-money laundering legislation.

Conclusion

The above-mentioned elements should be taken into consideration when a company wishes to pursue an overseas corporate transaction in order to comply with the relevant anti-corruption law. Focusing solely on a specific anti-corruption law is not sufficient in the current legislative landscape, where regulations are rapidly changing due to either international anti-corruption conventions or extraterritorial enforcement of certain anti-corruption laws, such as the FCPA or the UK Bribery Act. Therefore, it is always crucial to finalise the due diligence check list with the assistance of local experts.. ■