

## **Assessing Compliance Measures in Emerging Markets: The Turkish Example**

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Compliance and risk management issues in evolving markets are becoming pressing concerns in many emerging markets where legislation on various fields of law is not yet entrenched in comparison to developed countries. Together with a growing awareness of building and implementing robust compliance programs, the necessity of complying with local laws is a top priority for companies operating in and willing to invest in an emerging market country. This holds true for Turkey.

This paper aims to outline general corporate compliance issues and their reflections towards Turkish companies, followed by discussions on compliance issues as observed in the employment law sphere. The paper will finally set out key compliance initiatives observed in the Turkish market, and provide five take-away points from the overall discussions set forth.

### **- General Corporate Compliance Issues Involving International Treaties and Turkey**

Turkey is a signatory to and/or has ratified various European and international anti-corruption conventions, including the following:

- Council of Europe Criminal Law Convention on Corruption of 27 January 1999 (signed on 27 September 2001; ratified on 29 March 2004);
- Council of Europe Civil Law Convention on Corruption of 4 November 1999 (signed on 27 September 2001; ratified on 17 September 2003);
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 8 November 1990 (signed on 28 March 2007);
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 (including OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions) (signed on 17 December 1997; ratified on 26 July 2000);
- the United Nations Convention against Transnational Organized Crime, 15 November 2000 (signed on 13 December 2000; ratified on 25 March 2003); and
- the United Nations Convention against Corruption, 31 October 2003 (signed on 10 December 2003; ratified on 9 November 2006).

In addition to multilateral treaties, Turkey has also been a member of the Group of States against Corruption (GRECO) since 1 January 2004, the Financial Action Task Force since 1991 and the OECD Working Group on Bribery.

The Turkish Criminal Code No. 5237 has been amended to ensure harmony and compliance with the foregoing conventions, as these are applicable to companies operating in Turkey. The extraterritorial reach of the foregoing conventions require Turkish companies and foreign companies operating in Turkey to comply with local laws in order to avoid being charged and investigated with criminal charges for transacting irregularly.

From among the foregoing international treaties, Turkey's progress in implementing the OECD Convention since its Phase 2 examination in December 2007 has been significant. The OECD 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 convention.<sup>ii</sup> The open-ended, peer-driven monitoring mechanism that the OECD 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 Turkey's progress in investigating and prosecuting allegations, referred to in the 2005 Final Report of the Independent Inquiry Committee (IIC), into the United Nations Oil-for-Food Program.

#### **- Compliance Issues on Employment Law**

Compliance matters in the context of Turkish employment law could involve various issues, including notices and obtaining defenses of employees as well as particular data privacy law issues.

In regard to the former, the employer is expected by law to comply and follow through with the following before executing a dismissal based on the conduct of an employee: (i) analyze the situation which causes dissatisfaction following the employee's relevant conduct; (ii) request the relevant employee's defense regarding his/her actions; (iii) make an objective evaluation by taking into account the employee's defense and the circumstances of the case revealed by the enquiry; and (iv) serve a written warning to the employee, should it be deemed necessary, which also informs the employee that if such an act is to be repeated, the employer may resort to terminating the employment agreement. Only if the employee continues with such an act, even after the aforementioned written warning, the employer may then resort to termination. On that note, the mentioned act shall be deemed to have an effect so as to disrupt the harmony and smooth operation of the work place.

In addition to the employer's compliance to the process explained above, Turkish Labor Law obliges the employer to serve the employee with a termination notice which explicitly states the reason for the dismissal decision of the employer. In the management of the abovementioned process, the High Court of Appeals fundamentally requires the employer to be moderate and take reasonable measures in face of the employee's actions. Provided that the employee shows unsatisfactory performance with respect to the standards and expectations of the employer, the employer is entitled to terminate the employee's employment agreement. Nevertheless, the High Court of Appeals presents strict guidelines in order to avoid the misuse of power by the employer. In other words, the employer is bound by certain criteria and duties set out by the High Court of Appeals in its precedents.

As regards data privacy issues, while Turkey does not currently have a dedicated data protection law in force, there is draft legislation awaiting ratification, the Draft Law on the Protection of Personal Data. Article 20 of the Turkish Constitution regulates the act of processing personally identifiable information – without any definitions – and states that personal data may only be processed in cases where it is stipulated by law or with the owner’s explicit consent. Similar to the provisions of Turkish Constitution, prior consent of the data owner is considered as a legitimizing factor in terms of the provisions of Turkish Civil Code. The valid consent of the data owner is required to ensure that data collection, publishing and communicating is in compliance with law. Similarly, the Draft Law provides that data owners should be informed of and should consent to the data collection (including review of records and correspondences) and storage. Except as required by law, any objection by the data owner to the data collection will invalidate such collection. The data may only be stored for specific and legitimate purposes and not reprocessed in a way incompatible with those purposes. The data must be preserved in a way so as to enable identification of the data owner and shall be kept for no longer than storage purposes require.

#### **- Compliance Initiatives in the Turkish Market**

The legislative landscape for compliance initiatives in the Turkish market, while previously limited to the provisions set out in the Prior Criminal Code before 2005, has rapidly witnessed an increase in legislation regulating bribery and corruption matters, as well as amendments to certain legislative provisions. In April 2005, the Prime Ministry adopted an Ethical Code to raise awareness about corruption among public officials. In 2010, an action plan on the fight against corruption as a national anti-corruption strategy was initiated for 2010-2014. Such strategic calls fall within the ambits of the Prime Minister’s Inspection Board, the entity authorized to provide organizational and technical support for the implementation of this strategy. Additionally, notices and additional provisions amended to the main domestic and foreign bribery laws are now setting more lucid standards by which the general, grassroots principles and provisions adopted by and stipulated in the Turkish Criminal Code are interpreted and enforced by both the judiciary and law enforcement offices.

The legislation is being gradually clarified through regulatory notices and legislative amendments, the most recent being the amendments made in early July 2012, to the core bribery provisions stipulated under the Turkish criminal law architecture. The legal provision regulating “bribery” in the Turkish Criminal Code No. 5237 was significantly amended in July 2012, bringing clarity on the types of actions that constitute bribery under Turkish law, as well as expanding bribery’s scope of application to private commercial bribery.

Turkey is persistent in combating corruption, which can be seen with the decision of the Council of Ministers, which was published in the Official Gazette of September 8, 2012, No. 28405, approving the “Agreement for the Establishment of the International Anti-Corruption Academy as in International Organization” which was signed on behalf of the Republic of Turkey on December 21, 2010 in Vienna. The agreement established an International Anti-Corruption Academy which is expected to promote effective and efficient prevention and combat corruption by providing anti-corruption education and professional training, undertaking and facilitating research into all aspects of corruption, providing other relevant forms of technical assistance in

the fight against corruption and fostering international cooperation and networking in the fight against corruption.

Furthermore, it is becoming widespread for companies to instruct independent domestic law firms to assist them with their corporate compliance matters in Turkey. This is because corporate compliance is an area that is yet not well known in Turkey and Turkish corporations are not as aware of its importance as most multinational companies. So the role of domestic law firms in assisting these corporations in familiarizing themselves with local regulations and prohibitions is important.

Accounting firms are also playing more substantial roles in compliance matters. They are increasingly being called upon by large corporations to keep their accounting records compliant to domestic, as well as foreign, regulations.

Companies that are conducting their first deal in Turkey should be particularly attentive about FCPA and UK Bribery Act risks, as well compliance with local laws and regulations that are associated with the deal. Conducting appropriate due diligence should constitute an inherent building block of the company's compliance measures and corporate policies. Furthermore, companies should be careful of criminal law regulations that are specific to Turkey (in that certain acts that may be legal in other countries may be prohibited in Turkey), and should seek assistance from an independent domestic law firm when entering into the market for the first time. Regular books and accounting checks would help the company in keeping their records compliant to laws and avoid risks in this respect.

## **- 5 Takeaways**

1. Turkish legislation is being gradually clarified through regulatory amendments.
2. Companies should be careful of Turkish criminal law regulations.
3. Conducting appropriate due diligence is an important compliance measure.
4. Accounting firms are playing more substantial roles in compliance matters.
5. Corporate compliance is an area not well known in Turkey.

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<sup>ii</sup> [http://www.oecd.org/document/21/0,3746,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html).