

## **Risk, Compliance and Liability: International Reflections on the Turkish Anti-Money Laundering System**

Authors: Gönenç Gürkaynak, Esq., Ç. Olgu Kama and Burcu Ergün, ELIG, Attorneys-at-Law

Over the years, the anti-money laundering landscape has become a risky arena, especially for companies active in the financial sector. The risk demonstrates itself as increasingly demanding regulatory requirements, the possibility of multiple enforcement actions for companies active in multiple jurisdictions and sky-rocket fines, as well as criminal enforcement against those liable. This is without mentioning the reputational harm even the allegation of money-laundering offences may cause the companies. As an example, HSBC had to pay \$ 1.9 billion to settle the charges that HSBC violated US anti-money laundering legislations. Given the devastating consequences of money laundering for both private sector actors and public sector, employing a preventative approach against money laundering risks seems like the smart thing to do. In the same vein, Financial Action Task Force (“FATF”) recommends member states to enact legislation that requires financial institutions to have programs against money-laundering. This preventative mechanism requirement, practiced in the form of compliance programs, bears especial significance in Turkey, given the region’s geographical location as a neighbor to Middle East and Asia, its role as a business hub opening up to those regions, its belated anti-money laundering legislative developments.

### **Turkish AML Climate – The Crimes and Offences**

According to FATF Mutual Evaluation of Turkey Follow-Up Report No. 15 of October 2014, Turkey has an effective anti-money-laundering (“AML”) and counter terrorist financing (“CTF”) system. Turkey’s involvement in the FATF has been turbulent, although Turkey became a member to the institution as early as 1991. In October 2012, FATF had released a statement indicating its concerns about Turkey’s failure to fully criminalize terrorist financing as at the time, Turkey did not have a thorough counter terrorist financing system. In case Turkey did not adopt necessary legislation and establish the legal framework prescribed by the FATF Recommendations before 22 February 2013, Turkey’s FATF membership would be suspended. To that end, Turkey adopted the molded its legislation to get its AML system declared complete.

In order to meet the requirements of its FATF membership and to establish a credible AML legal system, Turkey has taken many steps since 1991. In order to define its money laundering crime in accordance with the international AML framework, Turkey reduced the threshold of predicate offences to a minimum penalty of 6 months of imprisonment, from a previous threshold of a minimum of 1 year. The term of imprisonment for the offence of money laundering has also been raised from a range of 2 to 5 years to a range of 3 to 7 years. Following the amendments, Article 282 of the Turkish Criminal Code now provides that laundering of proceeds of a crime occurs when (i) a person who takes out of the country the

funds obtained due to a crime that is fulfilling the abovementioned threshold, (ii) subjects the funds to certain transactions to create the impression that they have been obtained legitimately or (iii) subjects the funds to transactions to conceal their illegitimate source. This crime can occur not just for the person who committed the predicate crime, but for anyone who is launders the proceeds of a crime. The perpetration of this crime by a public officer or during the performance of one's professional duty (e.g. when a banker is performing its professional duties), is deemed as an aggravating circumstance. Leniency procedure is available for the crime provided that the relevant persons comply with the procedure set out by the law. Due to the perpetration of this crime, security measures against legal persons might be taken. These security measures are: (i) cancellation of permits provided by public authorities, and (ii) seizure of assets.

Turkish law does not recognize corporate criminal liability. However, Article 43/A Law on Misdemeanors No. 5326 further liabilities on legal persons, in case the crime of laundering the proceeds of crime has been perpetrated by the representative of a legal person to the benefit of that legal person. Accordingly, the stated legal persons will be punished by an administrative fine between TL 14,969 and TL 2,994,337.

### **Turkish AML Climate – The Regulatory Requirements**

On the regulatory front, Turkish law imposes preventative mechanisms such as customer due diligence and a risk based compliance program to be adopted by the incumbents as stipulated by the legislation. Accordingly, incumbents include banks, insurance companies, other financial service companies, companies whose operations include activities related to valuable stones and minerals, luck and betting games etc. According to the Regulation on Measures Against Laundering of Proceeds of Crime and Financing of Terrorism ("Regulation"), the incumbents are expected to engage in customer due diligence for all of their transactions. Moreover, when the incumbents determine a suspicious transaction is being conducted through their services, the incumbents should notify the Financial Crimes Investigations Board ("Board") with regard to such suspicion. Aside from these, the incumbents are also expected to inform the Board on a regulatory basis with regard to transactions that exceed the threshold amount determined by the Board. In case the incumbents do not realize their obligations, the Law prescribes certain administrative fines, in addition to criminal measures.

In matters relating to CTF, the Law No. 6415 on the Financing of Terrorism ("Law on Financing of Terrorism") was promulgated on February 2013, in order to prevent Turkey from getting its FATF membership suspended. As per the Law on Financing of Terrorism, Turkey now accepts UN Security Council resolutions no. 1267 (1999), 1988 (2011) and 1989 (2011); and the relevant institutions are obliged to abide by the asset freeze decisions published in the Official Gazette. This was deemed a major step in Turkey's effort to combat the financing of terrorism. With this law, terrorist financing offence has been redefined, an administrative mechanism has been established in order to execute the UN Security Council resolutions.

As of September 2008, the promulgation date of the Regulation on Compliance Programs Regarding Obligations on Laundering the Proceeds of Crime and Prevention of Financing of Terrorism (Regulation on Compliance Programs), banks, capital markets intermediary institutions, insurance and pension companies and Post and Telegram Organization General Directorate, are obliged to create risk-based AML and CTF compliance programs. As per the Regulation of Compliance Programs, the institutions obliged to create compliance programs should (i) develop institution policy and procedures, (ii) carry out risk management activities, (iii) carry out monitoring and controlling activities, (iv) assign a compliance officer and establishing a compliance unit, (v) carry out training activities and (vi) carrying out internal control activities. The risk management and activities regarding monitoring and control should be carried out by the compliance officer. However such activities are under the responsibility of the board of directors (“BoD”), and the BoD should exercise monitoring and control over these activities. In fact, the ultimate body responsible for the sufficient and effective use of the compliance program is the BoD of the company. The Regulation on Compliance Program stresses that the compliance program of each company should be constituted by considering the size of the institution, the volume and type of their transactions.

### **Global Examples**

The significance of companies complying with AML and CTF regulations, as well as retaining an effective compliance program echo in the international arena, through the record fines imposed against companies like HSBC and BNP Paribas. According to the allegations against HSBC, between 2006 and 2010, at least \$881 million in drug trafficking proceeds were deposited into HSBC Mexico accounts. The Department of Justice stipulated that HSBC failed to exercise oversight over its AML system, failed to implement an adequate AML compliance program which monitored its subsidiary’s activities in Mexico and the company’s compliance department was severely understaffed, as a result of which, the company engaged in transactions with drug traffickers and sanctioned countries. In addition HSBC did not inform its US subsidiary of the deficiencies which prevented the US subsidiary to disclose the situation to the US authorities.<sup>1</sup> Recently in 2015, HSBC also settled with Swiss authorities for money laundering allegations against its Swiss subsidiary. As part of the settlement, HSBC agreed to pay 40 million Swiss francs, so that the Swiss authorities will not be able to publish the findings of their investigation.<sup>2</sup>

Likewise, in 2014, BNP Paribas pleaded guilty for violation of several US CTF legislations, paying almost \$ 9 billion for its transactions with Sudan, Iran and other sanctioned countries. As a part of the bank’s settlement agreement, BNP Paribas will not be able to engage in certain transactions in US dollars for a year. Among the reasons behind the gigantic fine imposed on BNP Paribas are the facts that the bank kept its employees in the US intentionally

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<sup>1</sup> <http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>

<sup>2</sup> <http://www.theguardian.com/business/2015/jun/04/hsbc-fined-278m-over-money-laundering-claims>

in the dark so as to keep them from reporting the allegations to the authorities and intentionally attempted to cover up its tracks with regard to the wrongdoing.<sup>3</sup>

## **Conclusion**

The examples above demonstrate that institutions subject to AML regulations, and especially financial institutions, have to be diligent both in the compliance of their transactions and internal processes to the legislation. Companies have to set risk-based compliance programs proportionate to the size and volume of their operations. The consequences of AML in compliance are severe including severe fines, criminal penalties, civil actions, reputational damage and debarment from projects finances by international finance institutions. The risk of in compliance of course, depends on the territory the company is active in. In territories such as Turkey, which acts as a business hub, opening up to a multitude of jurisdiction with different legislative and political sensibilities, the companies are urged to be vigilant in terms of their compliance with applicable legislations.

Article contact: Gönenç Gürkaynak, Esq.

Email: [gonenc.gurkaynak@elig.com](mailto:gonenc.gurkaynak@elig.com)

*(First published in Mondaq on January 4, 2016)*

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<sup>3</sup> <http://www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and>