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A comparative analysis of self-reporting and cooperation mechanisms under FCPA and Turkish Criminal Code

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This year, Vimpelcom, a telecommunications company based in the Netherlands, has agreed to pay $397 million to US authorities to settle the charges that it made corrupt payments to Uzbek officials. However, this was not the only blow to the company, as the case was also prosecuted in the Netherlands and Vimpelcom was also fined in the amount of $397 million.[2] This is what we call the spill-over effect. It is the inherent risk in all corrupt conduct. In a similar, but hypothetical example, a Turkish company having a subsidiary in the US, would be very likely fined in both the US and Turkey, for its corrupt conduct elsewhere in the world. In today's robust anti-corruption enforcement environment, the question remains for our hypothetical company when corrupt conduct occurs, how, if at all possible, to mitigate the consequences?

This article seeks to answer that question by analyzing and comparing the approaches of US and Turkish authorities to two of the most used mitigation mechanisms in anti-corruption enforcement sphere, namely self-reporting and cooperation.

I. The US System

The Department of Justice ("DOJ"), the main body tasked with the criminal enforcement of the FCPA, considers the US Attorney's Manual 9-28000 Principles of Federal Prosecution of Business Organizations ("Principles"). Principles, accepting that corporations should not be treated more leniently or harshly than individuals, stipulates that for the interests of justice, indicting a corporation would not always be the most effective and non-prosecution agreements ("NPAs") as well as deferred prosecution agreements ("DPAs") could be a better solution. In that, the Principles provide the attorneys with a few factors to consider, when deciding whether to indict or enter into a DPA/NPA with a corporation. Among these factors are "a corporation's willingness to cooperate in the investigation of its agents", and "a corporation's timely and voluntary disclosure of wrongdoing". Principles further clarify what should be understood from cooperation. Accordingly, the DOJ would not look for a waiver of attorney-client privilege and nor such waiver on its own would qualify for cooperation credit. Rather, the DOJ would look for the timely disclosure of relevant facts. By way of example, such disclosure could include information pertaining to "How and when did the alleged

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[2] https://www.theguardian.com/world/2016/feb/19/vimpelcom-pays-835m-to-us-and-dutch-over-uzbekistan-telecoms-bribes

misconduct occur? Who promoted or approved it? Who was responsible for committing it?" As for voluntary disclosures, i.e. self-reporting, the Principles provide that internal investigations should be conducted as a part of the compliance program of the company and the findings should be timely disclosed to the DOJ. In practice, such disclosure would occur following an internal investigation and the company would be expected to disclose the facts of the case, rather than the privileged material. Following DOJ's evaluation that these factors, along with others stipulated in the Principles is deemed in the interests of justice by the DOJ, the DOJ may enter into a DPA/NPA with the corporation instead of indicting the case.

Cooperation and self-reporting also affect the amount of the fine imposed on a company. As per the US Sentencing Guidelines ("Guidelines") Section 8, both self-reporting and cooperation are considered as mitigating factors when determining the culpability score of the company. According to the Guidelines, if an organization self-reported (i) prior to an imminent threat of disclosure or a government investigation and (ii) within a reasonable time after becoming aware of the offence; and fully cooperated with the investigation, clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, then the company's culpability score might be lowered. This in turn, will decrease the fine imposed on the company.

As indicated in our previous article, on April 5th 2016, DOJ launched a pilot program, which basically reiterates and clarifies the principles mentioned above. Corporations which (i) self-disclose, (ii) cooperate and (iii) timely remediate would be eligible to benefit from the pilot program. There are two options for companies that are deemed eligible. The first option is for companies who fully undertake the aforementioned three conditions of the pilot program. Such companies may (i) be awarded up to a 50% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale and (ii) not be appointed a compliance monitor, given the existence of an already effective compliance program. The second option is applicable to those companies which fail to disclose but fully cooperate with the DOJ and fully remediate. Such companies may be awarded utmost a 25% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale. According to the pilot program, if a corporation fully complies with the criteria of the pilot program, the DOJ may also consider a declination decision.

II. The Turkish System

The Turkish anti-corruption enforcement system is completely different from the US. First of all, there is no corporate criminal liability under the Turkish criminal law system. If a company's organs or representatives have committed certain crimes (such as bribery or bid-rigging), an administrative fine between TL 15,804 (approximately USD 5,500) to TL 3,161,421 (approximately USD 1,000,000) would be imposed on them. Accordingly, a corporation's anti-corruption liability would be administrative under the Turkish legal system. That said, it is possible for a corporation's conduct (discharged through real persons working at the corporation) could be subject to a criminal investigation, while prosecutors are focusing

on the actions of the individual perpetrator of the crime. Further, under criminal law, security measures such as disgorgement of profits or revoking of licenses provided by a public authority could be imposed on companies.

As for prosecutorial discretion on whether to indict a certain case, the principle enshrined in the Criminal Procedure Law No. 5271 is firm. If the evidence gathered following the investigation phase create sufficient doubt that a crime has been committed, the prosecutor will prepare an indictment. Cooperation and/or self-disclosure during an official investigation could not prevent the prosecutor from indicting the case. As Turkish law does not recognize plea bargaining system, cases are bound to be resolved through litigation.

Although Turkish law does provide leniency procedures for bribery, these are confined to real persons, since corporations could not be held criminally liable. As per the Turkish Criminal Code No. 5237, if a person who has accepted a bribe informs the competent authorities about the particular act of bribery before the relevant authority becomes aware of it, that person will not be punished for bribery. The same holds true for a person (1) who has agreed with someone to accept bribery, (2) who has bribed the public official or agreed with the public official on the bribe and (3) who has been complicit in a crime, but who informs the competent authority before the relevant authority learns of it. Significantly, this rule is not applicable to a person who gives a bribe to foreign public officials.

As discussed above, mitigation on grounds of self-reporting or cooperation is not possible under Turkish law. However, whether national or multi-national, all companies are still urged to have anti-corruption compliance programs. This is because compliance programs are always a tool for risk mitigation, through their preventive and at worst, through their detecting functions. An effective compliance program could prevent any irregularities from occurring in the first place, and even if it fails to do so, the company would already have the facts (through the internal investigation it conducted) when the authorities come knocking on the company door.

III. Conclusion

As this article explains, Turkish and the US anti-corruption law enforcement and mitigations systems completely differ. While there is little prosecutorial discretion regarding whether to indict a case under Turkish law, US prosecutors enjoy plenty of discretion for the same. However, this discretion is to be used in accordance with the Guidance and the Principles. Companies which cooperate and self-disclose would be rewarded under the US system. Under the Turkish system such methods would at best be considered as best practices. However, one thing does not change for companies active in both jurisdictions—even if a company does not self-disclose or cooperate, having the facts ready before a crisis is always to the advantage of the company. And that can be achieved through an effective compliance program.

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