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GETTING THE DEAL THROUGH

market intelligence

Anti-Corruption

Will increased international cooperation stem corruption?

John E Davis leads the global interview panel covering anti-corruption regulation and investigations in key economies

Regulatory developments • Major investigations • 2016 trends
Asia-Pacific • Europe • Latin America • North America

Gönenç Gürkaynak

ANTI-CORRUPTION IN TURKEY

Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law. A graduate of the Ankara University faculty of law (1997), he was called to the Istanbul Bar in 1998. He received his LLM from Harvard Law School and is qualified to practise in Istanbul, New York, Brussels and England and Wales (currently non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak was an attorney at the Istanbul, New York and Brussels offices of a global law firm for over eight years.

Mr Gürkaynak heads the regulatory and compliance department, with a significant practice in Turkey focusing on internal investigations and white-collar criminal matters, and the practice advises clients in connection with Turkish corporate compliance issues under the OECD Anti-Bribery Convention, the US FCPA, the UK Bribery Act and Turkish anti-corruption laws.

Ms Ç Olgu Kama graduated from the Istanbul Bilgi University faculty of law in 2002 and was called to the Istanbul Bar in 2003. She obtained her first LLM, in economics law, from the Galatasaray University faculty of law in 2006, and her second, in banking, corporate and finance law, from Fordham Law School, New York in 2008. Ms Kama has been working in ELIG's regulatory and compliance department for over seven years, following years of practice at reputable law firms, and she has been a partner since 2014. She has extensive experience in corporate compliance matters and white-collar irregularities issues, and contract, commercial, general corporate and real estate law. Ms Kama has also authored and co-authored many articles and essays in relation to corporate compliance and matters concerning white-collar irregularities.

What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction?

Gönenç Gürkaynak & Ç Olgu Kama: One of the most prominent cases under Turkish law regarding corruption in the pharma sector, the *Roche* case, was finally resolved in 2016, with imprisonment sentences for both former Roche executives and certain public officials. This case came to light 12 years ago, following an employee tip-off, and led to criminal adjudication against 18 defendants on bid-rigging and abuse-of-duty charges. The criminal court of first instance had dismissed the case because of the expiry of the statute of limitations. However, in 2015, the High Court of Appeals decided that since the crimes that are the subject matter of the case warrant sentences of more than 10 years' imprisonment, the case should have been adjudicated before high criminal courts, instead of the criminal courts of first instance, and therefore the case should be adjudicated again. Following the decision of the High Court of Appeals in 2016, 10 defendants were sentenced to imprisonment, including the former general manager of the company, who was sentenced to imprisonment for four years and two months.

Within the past year, anti-money laundering investigations gained momentum. In October 2015, an investigation was initiated into İpek Koza, a company active in many sectors, from oil production to hotel management, because of the allegations that it was laundering the gold obtained from the members of a certain terrorist organisation as donations. It is alleged that the money was laundered through shell companies, as if it were earned from gold production, and the relevant amounts were used to finance the alleged terrorist organisation. In October 2015, trustees were assigned to 22 İpek Koza companies. In January 2016, the number of trustees was increased by the criminal court of peace. In September 2016, İpek Koza was transferred to the Savings Deposit Insurance Fund. The case is still pending.

Another publicised anti-money laundering cases was the one against Bank Asya, which allegedly used the names of certain businessmen to transfer money as donations to foundations and associations abroad established by a terrorist organisation. That said, further scrutiny has allegedly suggested that the businessmen were not aware of these donations. Eventually, the Savings Deposit Insurance Fund seized the majority of the shares in Bank Asya and took over the bank's management. On July 2016, the Banking Regulation and Supervision Agency revoked the bank's banking licence. The investigation into the Bank Asya allegations is still ongoing.

On the regulatory side, this year Turkey finally ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the Convention), almost 10 years after signing the Convention, in March 2007. According to the Convention, which is the first international instrument regulating both anti-money laundering and prevention of financing of terrorism, state parties are obliged to establish financial intelligence units (FIU) that exchange information that may be relevant to the processing or analysis of information. Turkey has already appointed the Financial Crime Investigation Board as its FIU, to deal with asset-freezing requests made by foreign countries and requests made by Turkey to other countries.

> *"It is alleged that the money was laundered through shell companies, as if it were earned from gold production, and used to finance the alleged terrorist organisation."*

In another regulatory matter, the Turkish Prime Ministry published a circular regarding the fight against corruption. Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight against Corruption (the Circular) follows the Strategy on Increasing of Transparency and the Fight against Corruption, which encompassed the years 2010 to 2014. The new action plan mentioned in the Circular covers the years 2016 to 2019. The Executive Committee for Increasing Transparency and Strengthening the Fight against Corruption is to be responsible for the enforcement and coordination of the Circular, while the Commission for Increasing Transparency and Strengthening the Fight against Corruption has been appointed to approve the Action Plans within the scope of the Circular.

The Circular is organised under three chapters: precautions aimed at prevention, precautions aimed at enforcement of sanctions and precautions aimed at enhancing social awareness.

According to the Action Plan, the preventative precautions include the completion of studies on political ethics; review of the legislation and the effectiveness of enforcement of the legislation regarding positions that cannot be undertaken by

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those who leave public service; determination of a code of ethics for public service professions by the Council of Ethics for Public Service; increasing the effectiveness of the ombudsman institution; enforcement of a single-window system with regard to customs (which aims to increase the use of technology in customs); and review of the Public Procurement Law in the light of European Union legislation.

Precautions on enforcement actions include review of the permission system regarding investigations against public officials; and preparation of regulations regarding the protection of whistle-blowers within the public sector, private sector and non-governmental organisations.

Precautions aimed at social awareness include increasing the influence of the ethical behaviour principles in the Ministry of National Education curricular and supporting social actions regarding fighting against corruption and working for a clean society.

The Action Plan mainly aims at regulating the rules of ethical behaviour for public officials and attempting to remove the obstacles to their adjudication; it also targets widely criticised areas of the law such as public procurement legislation, which is amended arbitrarily, the lack of a whistle-blower protection system under Turkish law and the efficiency of the ombudsman institution.

What lessons can compliance professionals learn about government enforcement priorities from recent enforcement actions?

GG & ÇK: As there is no corporate criminal liability under Turkish law, enforcement authorities generally focus on individual prosecutions. That said, this is not to suggest that companies are off the hook. Law No. 5326 on Misdemeanours foresees administrative (rather than criminal) fines (TL 15,804 to TL 3,161,421) against corporations whose organs or representatives commit the crimes listed under the relevant article (including bribery or money laundering) within the scope of the activities of the corporation. Further, security measures can also be imposed against corporations that benefit from the commission of certain crimes, such as bribery. These security measures are: (1) invalidation of the licence granted by a public authority; (2) seizure of goods used in the commission of (or that result from) a crime by the representatives of a legal entity; and (3) seizure of pecuniary benefits arising from or provided for the commission of a crime. Recent trends also demonstrate that anti-money laundering enforcement has gained momentum. Accordingly, companies active in Turkey should strengthen their anti-money laundering compliance programmes.

What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

GG & ÇK: As an emerging market situated right at the juncture of Europe and the Middle East, Turkey is sensitive territory for compliance professionals; this despite Turkey's integration into the international anti-corruption system (through treaties and membership of regional organisations) and despite its legal framework being adequate to the task of fighting corruption. However, even though the anti-corruption framework does not differ in Turkey, the culture does and so does the way that employees view corruption. Accordingly, companies are advised to exercise careful due diligence when engaging in business with third parties. Such parties may think that what they do while discharging their contractual duties would not create liability for the main company; they may think that corruption is the normal way of doing business or may not even be fully aware of what practices might be considered as corruption in legal terms (such as donations to a third party appointed by the public official). These third parties should be required to sign corruption undertakings, their activities should be closely monitored when they are discharging their duties and they should be given anti-corruption training. Training of employees is advisable because what employees consider to be cultural practices (gift-giving and covering entertainment expenses) may in fact constitute corruption. As such, while conducting merger or acquisition anti-corruption due diligence at a local company, acquiring companies should carefully review any gift-giving, travel and meal expenses made in relation to third parties, and should dig deeper where necessary.

Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

GG & ÇK: In 2015, Turkey hosted the G20 and along with it the B20 Anti-Corruption Taskforce. Thus, during the year, Turkish public officials, civil society institutions and the private sector discussed with their counterparts the most topical issues in the anti-corruption arena. These topics included wider enforcement for the OECD Anti-Bribery Convention, enhancing anti-corruption training for SMEs and promoting integrity in the public procurement system. Accordingly, the coming years may witness changes in these areas.

In the international arena, Turkey has been widely criticised for its lack of enforcement of foreign bribery offences and as a result of pressure from the OECD Working Group on Bribery, there is a chance that foreign bribery enforcement might feature on the agenda in future.


Ç Olgu Kama

On the regulatory side, the Action Plan envisages more stringent anti-corruption rules for public officials and a more accessible system for their adjudication. As corruption offences usually require two perpetrators (traditionally one from the public sector and one from the private sector), more investigations into the conduct of public officials are likely to reveal more violations by companies. Hence, companies can expect a rise in the number enforcement actions against such conduct. The Action Plan further hints that regulation with regard to whistle-blower protection in the private sector is expected. When this legislation is enacted, the companies should update their compliance programmes accordingly.

Have you seen evidence of increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

GG & ÇK: Turkey is a party to many bilateral and multilateral mutual legal assistance treaties. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which was ratified in 2016, also imposes legal assistance obligations on Turkey. That said, Turkey could increase its level of cooperation with such assistance requests, since it has been highly criticised for its lack of participation.

THE INSIDE TRACK

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

Understanding the culture as well as the market of the relevant jurisdiction is an imperative in the anti-corruption arena. A cultural understanding will guide advisers to those areas of practice where a more preventive approach is required, and to what should be underlined during training, or the issues that require further digging during internal investigations and due diligence. Understanding the market will also lead to the flagging up of certain sectors or certain operational stages as risky, and which should be the subject of particular attention during the due diligence process.

What issues in your jurisdiction make advising on anti-corruption compliance unique?

Since Turkey is an emerging market positioned as a hub between Europe and the Middle East, it is located in a particularly sensitive region in which to practise compliance. Even though there are sufficient rules to fight corruption, the attitude of some people in this region may be that rules exist only on paper and do not apply to them. Accordingly, a company's training of its employees and third parties is of paramount importance. The trick, most of the time, is to change the cultural perceptions of corruption towards a more legal understanding.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

In our experience, the most interesting or challenging issues arise during collaboration with international counterparts. Such challenges present themselves, for example, when having to explain, during investigations, that some employees seem to think rules exist only on paper and are not to be applied; when dealing with a foreign country's blocking statutes and the company cannot transfer information requested by public authorities; or when explaining to employees changes to rules that impose liability on their companies, even though the rules were not enacted in Turkey.

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Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

GG & ÇK: Article 20 of the Turkish Criminal Code No. 5237 (TCC) states that criminal liability is personal and criminal sanctions may not be imposed against legal persons. This principle has been challenged over the years, mostly through pressure from the OECD Working Group on Bribery, and the TCC was amended, however the amendments were repealed on the grounds that they were unconstitutional. Since then, liability has been imposed on corporations under Law No. 5326 on Misdemeanours, which levies administrative fines on corporations whose organs or representatives commit crimes such as bribery or money laundering to the benefit of the corporation. As such, there is no guidance similar to the Yates Memo, which sets out a plan for increased enforcement against individuals or corporations. Currently, real persons are considered to be the main perpetrators of crime under Turkish criminal law, while corporations are deterred through the imposition of administrative fines and security measures.

How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

GG & ÇK: In 2016, Turkey enacted its first law on data privacy, Law No. 6698 on the Protection of Personal Data (the DP Law). However, prior to the enactment of the DP Law, the TCC did criminalise the recording, provision in violation of the law, seizure and non-deletion of personal data. Hence, data privacy was a concern in investigations even before the enactment of the DP Law, and clients were advised to obtain their employees' consent for the use of such personal data during internal investigations. The Turkish Constitutional Court shed light on privacy issues during the internal-investigations document-review process. Pursuant to the decision dated 24 March 2016, the Court held that an employer could monitor its employees' corporate email accounts, even if the accounts contained information pertaining to an employee's private life, to the extent that such monitoring is proportionate to the employer's legitimate purpose. However, such a review should be target-driven and the employer should refrain from any unnecessary invasion of privacy.

With regard to providing the government with employees' personal information during an official investigation, article 28 of the DP Law provides that where personal data is needed with regard to an investigation of a crime, the DP Law provisions shall not be applicable.

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