

AN OVERVIEW OF WHITE COLLAR IRREGULARITIES UNDER THE TURKISH LEGAL SYSTEM

White collar irregularities, described as “*a crime committed by a person of respectability and high social status in the course of his occupation*¹” are recognized in Turkey, and are especially likely to occur during the daily business decisions and practices of foreign corporations’ Turkish branches or their affiliates. This result frequently arises due to a failure on the part of the foreign corporation to understand or otherwise exhibit due diligence pertaining to local legislation.

In the Turkish legal arena, there are firms which train the key employees of the corporations, counseling them so as to prevent their commission of any action that could result in a charge of bribery, fraud, misuse of trust, conspiring to rig the bid on tenders, etc. Beyond the criminal and tort liabilities that an employee charged with such actions would face, the corporation itself may be held liable for the misconduct of its employee (under a principle similar to “*respondeat superior*²” in the Anglo-Saxon legal system).

These trainings differ in connection with the various practice areas of business, origin and market shares of the corporations. For instance, for corporations incorporated within the United States, there is a contradiction on the implementation of the U.S. Foreign Corrupt Practices Act (“**FCPA**”) rules in Turkish practice. More specifically, under the FCPA rules, bribing foreign officers anywhere in the world for purposes of influencing the official decision in order to provide a business benefit is considered unethical and constitutes a crime.

FCPA comprises (i) all U.S. nationals, residents or companies, regardless of where the illegal act was conducted and (ii) almost everyone who commits a crime in the U.S. in order to facilitate bribing officers outside of the U.S. The anti-bribery provisions of the FCPA prohibit the direct or indirect proposal, promise, authorization or payment of money or anything valuable to (i) an employee or officer of a foreign government, international organization or a

¹ Sutherland, Edwin. (1949). *White Collar Crime*. New York: Dreyden Pres.

² is a legal doctrine stating that the employer will be held responsible for the actions of its employees that are performed during the course of their employment.

political party, or a candidate to a political position, or (ii) to anyone by knowing that the payment or promise will pass on to one of the persons mentioned herein above, (iii) in an unethical manner (expecting benefit from), (iv) for purposes of influencing an official governmental action or decision (v) for obtaining or retaining the business or securing a business benefit.

On the other hand, the anti-bribing provisions of the FCPA provide a limited exception with respect to small payments and gifts given for the purpose of accelerating or securing the routine governmental acts. The FCPA does allow the reasonable payments or *bona fide* expenses made for travel, accommodation and food directly related to (i) the promotion, demonstration or explanation of products or services, or (ii) execution or implementation of an agreement with the government.

As for the Turkish Legal System, according to the Turkish Criminal Code No. 5237 which came into force on November 12, 2004, “bribery” (under article 252 *et seq.*) is defined as “*obtaining a benefit by a public servant by agreeing with another person, to perform, or not to perform, a task in violation of the requirements of the public servant’s duty*”.

Under the same article of the Turkish Criminal Code, direct or indirect proposals or promises or otherwise affording special benefits for purposes of conducting or not conducting an act or obtaining or maintaining an unjust benefit because of international commercial transactions regardless of their structure and field of duty to officers of international organizations established by states, governments or other international public organizations or to those who perform international duties in the same country, chosen or assigned in a foreign country, pursuing legislative or administrative or judicial duties by public institutions or establishments, also constitute a bribery.

Therefore, unlike the anti-bribery provisions of the FCPA, the relevant provisions of the Turkish Criminal Code clearly dictates the provisions of bribery and do not provide any exceptions regarding the facilitating payments; meaning that the FCPA allowance for certain facilitating payments, mentioned prior, could fall within the scope of bribery under Turkish

law. Hence, reliance on a legal opinion obtained from the foreign counsel of such corporations regarding facilitating payments that are legitimate under the FCPA, unless also taking into consideration the provisions addressing and defining bribery under Turkish law, could possibly lead to unfortunate results.

In order to give a preliminary understanding of the crimes defined under the Turkish Criminal Code which constitute a white collar irregularity, the most frequently examined include the following crimes:

“Fraud”, is defined under article 157 of the Turkish Criminal Code as “*deceiving someone by fraudulent acts and obtaining benefit for itself or for another person’s benefit to the detriment of the deceived person or another person*”. Moreover, according to article 158, in the event that the crime of fraud is committed during commercial operations of merchants or of company managers or other persons acting on behalf of the company, the crime is considered a “qualified fraud”, which will be subject to even stricter penalties.

“Misuse of trust”, set out under article 155 of Turkish Criminal Code, which could be considered under the white collar irregularities, is defined as abusing an asset or denying the transfer of possession thereof, belonging to someone else which is left at his/her possession for protection or use in a certain manner, to his/her own or someone else’s benefit, outside the purpose of transfer of possession. As with fraud, the said crime shall also be subject to stricter penalties in the event that its commission results from a professional, commercial or service relationship.

“Bid rigging” is another reflection of the white collar irregularities conducted, which is defined under article 235 of Turkish Criminal Code as rigging tender and construction bids regarding product or service purchases, or sales or leases made on behalf of public institutions or establishments. Instances of the crime are set out further under the relevant article and counted explicitly as *numerus clausus*.

As to the evidence of white collar irregularities, a legal expert is considered necessary in determining whether actions constituting crime(s) were taken during the course of the employees' occupation. The sources where such proof may be taken from would be the laptops, documents and the financial statements of the corporation and/or the employees. However, obtaining such proof would bring into play another legal issue: data privacy.

Section five of the Turkish Constitution of 1982, entitled "Privacy and Protection of Private Life" and in particular article 22, preserves the secrecy of communication. The Turkish Civil Code article 23 *et seq.* includes provisions regulating the protection of personal rights in general. Also, according to article 24, an individual whose personal rights are violated unjustly is entitled to file a civil action.

Therefore, in practice, corporations place provisions within their employment contracts that are to be signed between the employee and the officer of the corporation, indicating what items constitute the "property of the corporation" and these generally include computers, memory discs, and any kind of document whether printed or not, in order to prevent any altercation of the employee claims regarding what may constitute a personal data.

Upon following all such processes, in the event that a white collar irregularity is detected, the continuation of the employee's occupancy at the corporation would be at the discretion of the authorized managers. In such phase, the termination of the employment contract(s) of the employee(s) shall be reviewed and analyzed under the employment laws and regulations.

Another important issue for corporate governance is the termination phase of the employment contract, when the title of the employee is the most essential element. In the event that said employee holds a position on the board of directors, his removal from the board of directors should be considered as an important and necessary precaution since a critical element of the director's position is that they are to be independent as a matter of course so as to fulfill their duties towards the shareholders. In such a case, since the director cannot be forced to submit his resignation, he would be keeping his positions until the term which he is elected for.

One way of getting over the stated obstacle would be that the board of directors, the executory organ of the corporation, be ceased by way of the resignation of other members of the board of directors, and then the quorum required in taking the necessary resolutions of the corporation would be failed.

Consequently, the assistance of a law firm that is competent in the fields of employment law, data privacy law, corporate law and criminal law sufficient to harmonize all those aspects with the corporate governance becomes more and more a significant need in assisting the corporation concerning compliance matters.