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The Red Flag Group

The Red Flag Group
raises the bar with
support from the
Academies

see page 18



FEATURES

- 18 **The Red Flag Group raises the bar with support from the Academies**
by Adam Turteltaub
A look at how The Red Flag Group uses the SCCE Academies as a way to keep their compliance and ethics professionals sharp and up to date on current issues and trends within the industry.
- 23 **Why should you care about money laundering in a personal way?**
by Mónica Ramírez Chimal
The number of industries and businesses affected by criminal activity continues to increase, and the repercussions can be devastating down to a personal level.
- 29 **ISO 37001:2016, a sword that pierces to the heart of bribery**
by Vivian Zhou
Illicit interest transfer is one of the most damaging problems in today's world. However, as anti-bribery efforts have gained awareness, prevention and control are becoming a global trend.
- 36 **The impact of the EU GDPR on compliance**
by Robert Bond
Once the EU's General Data Protection Regulation goes into effect, businesses need to be ready for strict restrictions surrounding consumer data. Failure to comply could lead to increased scrutiny and fines.
- 40 **[CEU] Preventing corruption in multinational corporations: A very different game, Part 2**
by Duncan McCampbell
The second in a three-part series examining culture and how to prevent corruption in multinational corporations.

DEPARTMENTS

- 8 **News**
- 16 **People on the move**
- 64 **SCCE congratulates newly certified designees**
- 66 **SCCE welcomes new members**
- 69 **Takeaways**
- 70 **Events calendar**

COLUMNS

- 3 **Letter from the CEO**
by Roy Snell
- 5 **Letter from the Incoming CEO**
by Gerry Zack
- 21 **Empirically speaking**
by Billy Hughes and Dian Zhang
- 27 **Ethics vs. or AND compliance**
by Steven Priest
- 35 **Compliance, life, and everything else**
by Thomas R. Fox
- 39 **View from the front lines**
by Meric Craig Bloch
- 49 **Kaplan's Court**
by Jeffrey M. Kaplan
- 59 **The view from Nickel City**
by Jennifer L. Kennedy
- 63 **How to be a wildly effective compliance officer**
by Kristy Grant-Hart
- 68 **The last word**
by Joe Murphy



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“ Product development, professional services, client services, and sales should have a complete and holistic understanding of compliance. ”

See page 18

ARTICLES

46 [CEU] **An enforcer's view of compliance**

by Leigh Faugust

Finding a problem, assessing the risk and cause of that problem, and addressing and preventing recurrence of that problem are key factors in establishing an effective compliance program.

50 **Minimizing risk associated with the Internet of Things**

by Mark Lanterman

The Internet of Things refers to the interconnected network of smart devices. It brings convenience at the price of risk, so education and training are vital.

52 **What is your company's ethical brand?**

by Joe Kale

Companies are increasingly being judged on their ethical brands. By weaving compliance and ethics into the fabric of leadership, an ethical brand reputation can be a potent asset in creating a competitive edge.

55 [CEU] **Criminal liability of an executive under Turkish law**

by Filiz Toprak Esin and Ömer Bayman

A company executive in Turkey can face many different types of criminal liability. This article provides a general overview of the risks executives can encounter if they ignore compliance best practices.

60 **The evolving role of CIOs and how the board can spark transformation**

by Betsy Atkins

The CIO fills a crucial need, but it may not be the best suited for meeting the demands of the digital business age. So which role is? And how can the board oversee a company's digital transformation?

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by Filiz Toprak Esin and Ömer Bayman

Criminal liability of an executive under Turkish law

- » During his/her professional life, a company executive operating in Turkey can face various types of criminal liability.
- » Companies, being fictional legal entities, cannot be subject to criminal liability like natural persons. However, companies can be subject to significant penalties and fines and can suffer from loss of reputation.
- » According to Turkish law, a board of directors (BoD) is the legal representative of a company, and therefore BoD members are the primary suspects in a potential crime committed during the activities of a company.
- » An executive may commit crimes due to lack of knowledge about various legislation that contains criminal provisions. Furthermore, there are also crimes where executives may be held responsible for breaching the duty of diligence and care.
- » Some of the minor offences of a purely commercial nature regulated in the Commercial Code are punishable by imprisonment, which can be surprising for some executives.

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During his/her professional life, a company executive operating in Turkey can face various types of criminal liability. This article aims to provide a general overview of the possible risks in

relation to criminal law that an executive can come across.

The picture is clear when an executive intentionally commits a crime to the detriment of the company that he/she is working for in order to obtain personal financial benefit. In such cases, the situation is more straightforward.

The perpetrator is the executive who committed the criminal act, he/she is individually liable, and the company can be involved in the criminal proceedings as the complainant.

The first example that comes to mind is abuse of trust, which is one of the most common white-collar

crimes in Turkey. If an executive obtains a personal benefit by abusing their authority to manage or represent the company, this constitutes abuse of trust, and it is punishable by imprisonment up to seven years. If an executive deliberately deceives other executives or employees while trying to obtain personal benefit, his/her acts can constitute aggravated fraud, which is punishable by imprisonment up to ten years.

It is also common that an executive or employee intentionally commits a crime for the benefit of the company or negligently while performing their duties. In this case, it is not always easy to determine the perpetrator of the offence. Moreover, criminal liability of the company also comes into question.

Criminal liability of companies

Criminal intent is an essential component of a crime, and for companies, it can only be formed through their executives or employees. Therefore companies, being fictional legal entities, cannot be subject to criminal liability like natural persons. However, companies can be subject to significant penalties and fines and can suffer from loss of reputation.



Toprak Esin



Bayman

Legal entities may face serious but rarely applied security measures and administrative fines if particular crimes are committed intentionally for the interest of the legal entity. Furthermore, according to Article 60 of the Turkish Criminal Code (TCC) number 5237, if a legal entity who makes business under a license or permission granted by a public body and the executives and/or authorized representatives of this legal entity commit a crime by abusing this license or permission for the interest of the legal entity, the license or permission shall be revoked, and the benefit obtained from the crime shall be confiscated.¹

In addition to the above, Law of Misdemeanours number 5326 provides that the private legal entity shall be subject to administrative fine up to ₺3,282,503.42 in case that the organ, representative, or anyone acting within the scope of the legal entity's business commits crimes such as bribery, fraud, money laundering, bid rigging, or smuggling in favour of the legal entity (Article 43/A).²

Who is the perpetrator?

According to Turkish Law, a board of directors (BoD) is the legal representative of a company, and therefore, BoD members are the primary suspects in a potential crime committed during the activities of a company. However, due to the principle of individual criminal responsibility, prosecutors and courts take into consideration the division of responsibility among BoD members within the company structure in order to determine the perpetrator of the crime.

For the crimes that are committed intentionally, executives and authorized representatives who were aware of the crime and played a part in committing it will be held responsible. Bribery, bid rigging, tax evasion,

and smuggling can be given as examples of crimes committed intentionally.

On the other hand, BoD members or executives can avoid criminal liability by proving that they did not have any criminal intent, that the employees working under them committed the offence individually by not obeying their instructions, or instructions in relation to the crime were given by another BoD member or executive.

It should be noted that the TCC is not the only piece of legislation regulating the criminal liability of executives. Many other laws, including commercial law, capital markets law, environmental law, construction zoning law, banking law, and enforcement and bankruptcy law also contain provisions about criminal liability.

The majority of the crimes exemplified above are committed premeditatedly; however, it is also possible for an executive to commit crimes due to lack of knowledge about various legislation that contains criminal provisions. Furthermore, there are also crimes where executives may be held responsible for breaching the duty of diligence and care. Some of these possibilities will be explained below.

Crimes regulated under Turkish Commercial Code

Potential criminal liabilities that can be attributed to BoD members that are related to corporate law are regulated under Article 562 of the Turkish Commercial Code (Commercial Code) number 6102. Under Article 562, crimes and punishments related to corporate law are listed by making references to various articles of the Commercial Code that regulate obligations of BoD members.³

The majority of the actions listed under this article are punishable by fines, including both administrative and judiciary fines. For example, neglecting the duty to keep

commercial books or keeping commercial books improperly, taking inventory improperly, neglecting the duty to prepare reports regarding a parent or an affiliated company, and not establishing a website (for the companies that are obliged to establish websites) are punishable by administrative and judiciary fines.

On the other hand, some actions, such as making misleading declarations regarding the capital of the company or collecting money from the public without authorisation, are punishable by imprisonment of up to two years, and intentionally recording false information to company books or forging corporate documents (e.g., articles of organisation, prospectus, and statements) is punishable by imprisonment of up to three years.

Unfair competition can be a crime

Unfair competition is also regulated under the Commercial Code, and various acts that constitute unfair competition are listed under Article 55 of this code. Among others, some of the examples listed under Article 55 are:

- ▶ discrediting others, their goods, products or activities;
- ▶ deceiving customers in relation to the actual price of the goods by providing additional services;
- ▶ giving misleading information regarding own status, goods, operations, prices, or business relations; and
- ▶ inciting the employees or agents of competitors to divulge trade secrets and benefitting from others' business products without authorisation.

The important point here is that in addition to civil liability, committing the acts listed under Article 55 of the Commercial Code can also cause criminal liability.

According to Article 62 of the Commercial Code, those who commit the acts of unfair competition as set forth under Article 55, some of which are listed above, *intentionally* will be sentenced to imprisonment or judicial fine up to 2 years. According to Article 52 of the TCC, a judicial monetary fine can be determined between ₺20 and ₺100 per day. The court will determine the amount of the judicial monetary fine per day by taking into consideration the economic and personal status of the accused.

Safety of customers

Health and safety issues are regulated under various separate laws and regulations. Especially in occasions where goods and services are provided to the customers in the place of business, such as hotels, gyms, restaurants, or night clubs, a fatality or an injury caused by negligence can be considered as criminal offence of negligent injury or manslaughter by negligence. This can only be possible if the injury or fatality occurs in connection to a breach of duty of diligence and care that can be deemed as culpable negligence.

To illustrate the situation, a manager of a hotel can be charged with manslaughter by negligence in the case of an accident involving death, if the accident was caused by the absence of necessary safety measures.

Workplace safety

Workplace accidents can cause injuries, illnesses, and fatalities to the workers. This is more common in dangerous workplaces, such as factories, construction sites, and warehouses. If a precaution stated in relevant workplace safety laws and regulations is neglected and if the accident occurred as a consequence of this negligence, BoD members or responsible executives can be charged with negligent injury or manslaughter by negligence.

Recording personal data illegally and disclosing confidential information

According to Article 135 of the TCC, those who record personal data illegally shall be sentenced to imprisonment up to 3 years. The upper limit of the punishment can increase to 4.5 years if the recorded data is in relation to political, philosophical, or religious opinions of a person or their racial origin, sex life, moral tendencies, medical condition, or connections to trade unions. Whether the personal data are recorded legally or illegally will be determined

according to the Data Protection Law number 6698, which entered into force on 7 April 2016. Considering that almost all companies collect personal data from their clients or at least from their employees, executives should pay attention to the provisions of the Data Protection Law in order to avoid any risk of criminal liability as well as serious fines regulated under the Data Protection Law.

In addition to this, according to Article 239 of the TCC, those who disclose or give to unauthorized persons the confidential information that can be classified as trade secret, banking secret, or customer secret that they obtained by virtue of their title, profession, or duty can be sentenced to imprisonment for up to 3 years and a judicial fine of up to 5,000 days.

Bankruptcy law

In Turkish law there are multiple provisions that direct the managers of companies in financial difficulty to take necessary precautions provided by the law or declare bankruptcy in certain conditions. One

of these provisions is Article 179 of the Bankruptcy and Enforcement Law (BEL) number 2004, which stipulates that an application of bankruptcy must be made to the court if assets do not cover the debts of a company. Along with civil liability, executives and authorized representatives of a corporation also have criminal liability if they refrain from making this application even though the conditions set forth in Article 179 are met. According to the Article 345/a of the BEL, in such case, upon complaint filed by

a creditor, executives and authorized representatives of the company shall be sentenced to imprisonment from 10 days up to 3 months.

Executives should be informed about a wide range of legislation that contains provisions regarding criminal liability.

Conclusion

Needless to say, being involved in a criminal case is an unpleasant experience, and in order to avoid it, executives should be informed about a wide range of legislation that contains provisions regarding criminal liability, including, but not limited to, the ones mentioned above.

It can be criticised that in some cases, the type and severity of punishment does not suit the type of the crime, considering that some of the minor offences of a purely commercial nature regulated in the Commercial Code are punishable by imprisonment. This is also the reason why some of these provisions can be surprising for executives.

Although some of these rules are rarely implemented, it should be kept in mind that these provisions are still in force, and it can be a mistake to ignore them. *

1. Available at <http://bit.ly/2C0zGRt>.
2. Available at <http://bit.ly/2BQdw1K>.
3. Available at <http://bit.ly/2BzE6iE>.