

Alternative procedures for asset recovery

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White Collar Crime, Turkey

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Introduction

The Fifth Judicial Reform Package introduced important amendments to the Criminal Procedure Code on February 21 2014, including new requirements for the confiscation and freezing of assets as a precautionary measure during criminal investigations. These included a requirement for the competent authority to prepare a report in order for a confiscation decision to be rendered. Based on the nature and specifics of the case, the competent authority could be:

- the Public Oversight Accounting and Auditing Standards Authority;
- the Banking Regulation and Supervision Agency;
- the Capital Markets Board;
- the Financial Crimes Investigation Board; or
- the Undersecretariat of Treasury.

The competent authority must identify the assets that have been generated by the crime and prepare the report within a three-month period. If there is a mandatory need, this period can be extended for two months. However, it is not clearly stated whether this extension can be renewed and if so, how many times.

The provision was welcomed for regulating an important preventive measure by minimising discretion through independent expert input and raising the threshold of scrutiny. However, its enforcement in the past year has raised concerns and in some cases led practitioners to contemplate potential alternatives for asset recovery.

During the past year, the new provision has been applied in various instances. It was expected to introduce an additional step to the asset recovery process that would require additional time, but produce a more effective outcome. However, in some cases the requirement to prepare a report became a hurdle for the investigation, rather than an effective instrument. The process halted or slowed down investigations to the point where suspects could come up with preventive measures to hide or transfer the disputed assets. These adverse effects called for an alternative results-driven solution; civil precautionary measures, with their strengths and weaknesses, were thus taken.

Case study

In a recent white collar crime case, in which an employee of the finance department of a multinational company was charged with embezzlement, it was neither straightforward nor efficient to put the report system into action. The suspect acknowledged the embezzlement of TRY10 million (approximately €3.5 million), disguised as tax payments, and confessed that he had transformed the disputed amount into different estates. However, the court had to wait for the Public Oversight Accounting and Auditing Standards Authority's report before it could freeze or confiscate the assets. Although the evidence was clear and the suspect had confessed to the crime, the court could not impose the

measure. While the authority's report was pending, the disputed assets – which it had been admitted were the subject of the crime – were transferred to new owners. Although the prosecutor requested an exception to the application of this provision due to the suspect's confession, the court had no choice but to reject the request, as the amendment was poorly drafted, with no exceptions to the rule.

An alternative solution was thus pursued and a civil law request for a preliminary injunction was filed. Together with the civil law request made to the commercial court of first instance, this prevents the transfer and liquidation of the assets in question.

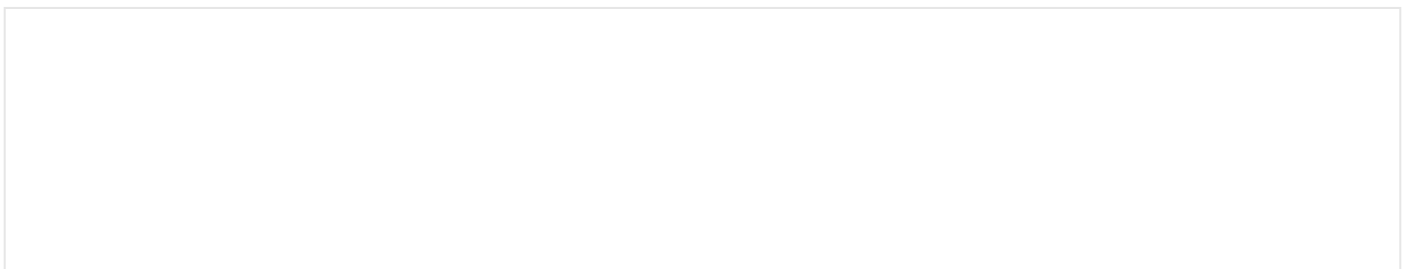
However, the civil procedure has potential downsides too. The law requires the plaintiff to deposit a guarantee to cover the respondent's damages if the request for a preliminary injunction is eventually found to be unlawful. Guarantees are proportionate to the effectiveness of the preliminary injunction decision and are generally set quite high. Further, once a preliminary injunction has been rendered, it must be followed by costly actions on the merits, which take longer compared to criminal proceedings. Even though this alternative solution is results oriented, it leads to additional costs and effort which are not required in well-functioning criminal proceedings.

Comment

The expert input from the competent authority on asset recovery-related issues aims to strike a balance between due process and the need to preserve evidence, and to create a safer and more stable environment for everyone, including business. However, some instances over the past year demonstrate that the proper drafting of procedural rules and their effective enforcement are vital, as the alternative may lead to deadlock and allow suspects to take advantage of the provision's limitations.

The law must provide for exceptional practices under exceptional circumstances and its enforcement must ensure that the report system remains an instrument for investigation and does not turn into a hurdle in that regard. Companies operating in Turkey must be well informed and advised on alternative means and solutions for effective asset recovery procedures.

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