



Turkish involvement in Foreign Corrupt Practices Act investigations

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White Collar Crime, Turkey

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Introduction

Turkey stands out as a target market for foreign companies that want to expand their global reach, due to its geographical location, growing population and economy. Foreign companies investing in Turkey often establish subsidiaries through corporate structures in which officers have dual responsibilities and control over the parent company and the subsidiary. In other cases, companies may choose to run their business organisations with the help of third-party agents rather than incorporating subsidiaries and absorbing local laws into their operations. Third parties commonly act as distributors, agencies, customs consultants or representatives.

For US companies, establishing subsidiaries and a distribution system via third-party agents runs the risk of violating the Foreign Corrupt Practices Act; this also applies in Turkey. Six recent Foreign Corrupt Practices Act cases involved Turkish parties and five of these involved a subsidiary, a third-party agent or both.

Foreign Corrupt Practices Act cases

Third-party agents

In a recent case involving the firearms manufacturer Smith & Wesson, Foreign Corrupt Practices Act officers investigated a third-party agent in Turkey that had been instructed by the international sales team of the parent company to attempt to secure contracts through improper payments to government officials. The parent company did not win the contracts, but the improper payments breached the Foreign Corrupt Practices Act and resulted in a \$2 million fine. The Turkish parties involved in the case were not subject to any penalties under Turkish law.

The Smith & Wesson case involved the bribery of public officials, but the lack of proper means to prevent bribery was also considered to be a Foreign Corrupt Practices Act violation. Having a basic corporate policy prohibiting the payment of bribes without a reasonable system of controls to implement it was found to breach the Foreign Corrupt Practices Act. The fact that Foreign Corrupt Practices Act officers did not focus solely on gifts and bribes provided to government officials, but also on the lack of internal controls to prevent such acts, highlights the importance of establishing a sustainable compliance programme in target or third-party companies. Further, the findings in this case regarding the characterisation of improper payments as a legitimate business expense highlight the importance of setting high standards of book keeping as part of internal compliance rules and control systems. **(1)**

Acquisition of target company

Some foreign companies prefer to enter the Turkish market through the acquisition of a local company or a foreign company that has already established its operations in Turkey. This option usually benefits foreign buyers to the extent that an already settled distribution chain becomes a subsidiary of the buyer. The company therefore avoids having to

start operations from scratch. However, the due diligence process prior to acquisition is fundamental, as it highlights potential risks to which the target company will be exposed, including from the Foreign Corrupt Practices Act. Due diligence should focus on a company's daily operations and the third-party agents with which it engages.

In a recent case concerning a foreign company's acquisition of another foreign company with a distributor in Turkey, pre-acquisition internal investigations that the buyer and the target company undertook focused on its practices in Turkey, Brazil, China, Georgia and Iran. Although public information regarding the outcome of these investigations is limited, the fact that the agreement with the Turkish distributor was terminated following the investigation strongly implies that the investigation revealed problems with the distributor's operations. The case underlines the fact that a buyer company is merging not only with the target company, but also with its third-party agents and that this arrangement is not guaranteed to work.

Self-initiated investigations

Turkish subsidiaries and third-party agents have been linked to additional US Department of Justice and US Securities and Exchange Commission (SEC) investigations which were terminated due – in part – to the self-initiation of investigations by the companies in question. Self-initiated internal investigations have had positive and negative effects on Foreign Corrupt Practices Act cases involving Turkish parties.

In one example, a subsidiary of Delta & Pine Land Co made improper payments to officials at the Turkish Ministry of Agricultural and Rural Affairs in order to receive the government reports and certificates required to obtain, retain and operate its business in Turkey. The improper payments were discovered by Delta during an internal investigation. However, there was no disclosure or cooperation regarding this information. Instead, Delta shifted the improper payments from its subsidiary to third-party agents through an inflated invoice scheme. The SEC investigated the corrupt practice and the case ended in a settlement.

In contrast, during investigations and proceedings, Turkish and Foreign Corrupt Practices Act investigation officers take into account:

- voluntary disclosure and cooperation;
- self-initiated thorough investigation; and
- the steps taken by a company to enhance its anti-corruption compliance programme.

An example of this scenario involved a large multinational company engaged in several different sectors (including consumer goods, electronics, energy and healthcare) which initiated an internal investigation following information it received about the involvement of its Turkish subsidiary in attempted bribery, bid rigging and other inappropriate payments in the context of government entities. The company voluntarily disclosed the details of the investigation that it had conducted to US and Turkish officials and its cooperation resulted in no liability for the company in either jurisdiction.

Comment

In light of recent Foreign Corrupt Practices Act investigations involving Turkish subsidiaries and third-party agents, when a company makes the strategic decision to sell its products in or through Turkey, it must ensure that the proper internal controls are in place and that they are operated correctly. Company-wide Foreign Corrupt Practices Act compliance and audit programmes must also be established to detect and prevent misconduct in the globally dispersed business units, including those in Turkey. A strict due diligence process prior to acquisition is a must. Further, although Turkish law does not provide adequate immunity or awards for whistleblowers, companies should encourage whistleblowing and be open to listening to the actors in their business flow in order to mitigate the risk of exposure to Foreign Corrupt Practices Act proceedings. Finally, self-initiation of investigations and cooperation with authorities should always be promoted, as these actions are taken into account in US and Turkish proceedings.

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Endnotes

(1) Details of the case can be found here.



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