Corporate liability: applicable criminal penalties

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Introduction

Corporate liability remains a highly problematic and criticised issue in Turkey. In Turkish criminal law practice, criminal liability is deemed as personal, and criminal penalties can be imposed only on natural persons for crimes committed under a corporate body. Although the fact that corporate bodies can also commit crimes has long been established by the precedents of the Constitutional Court,(1) criminal penalties are not specifically regulated under the criminal jurisdiction.

In this legal framework, complementary measures have a critical role in ensuring compliance by legal persons, and the criminal legislation sets out certain mechanisms, such as security measures and monetary fines, which are intended to regulate corporate liability. However, the existing practice is insufficient to impose corporate liability effectively. This issue was highlighted by the Organisation for Economic Cooperation and Development (OECD) in its Phase 3 Report,(2) which highly criticised Turkey for the low enforcement and absence of sufficiently effective, proportionate and dissuasive penalties for companies.

This update focuses on the implementation and nature of the criminal penalties that may be applicable to corporate bodies as a result of conviction of white collar crimes, but omits the preventive measures applicable to the same corporate bodies during investigation. Therefore, certain measures are not addressed (eg, appointment of a trustee to the company).

Focusing on criminal penalties, the primary legislations regarding corporate criminal liability are:

- Article 38 of the Constitution;
- Article 60 of the Criminal Code (5237); and
- Article 43/A of the Code of Misdemeanours (5326).

Constitution

First, Article 38 of the Constitution states that criminal responsibility is 'personal'. This means that a corporate body cannot be liable for the crimes committed under its jurisdiction, rather the natural persons who committed these crimes.

Security measures under Criminal Code

Article 60 of the Criminal Code states that special security measures will be imposed on legal persons. The article states that:

> *"in case of conviction with respect to an intentional crime that was committed for the benefit of a company/civil legal entity operating under a license granted by a public institution, through participation of an organ or a representative of the company/civil legal entity, the*

legal entity's operating licence shall be revoked."

The article proceeds to state the following:

> "*Provisions relating to confiscation shall apply also to civil legal entities with respect to the crimes committed for the benefit of such entities. Where the application of the provisions in the above subparagraphs would lead to more serious consequences than the offense itself, the judge may not impose such measures. The provisions of this article shall only apply where specifically stated in the law*."

These provisions have never been imposed on a company in a bribery case. The two key criticisms of the inefficiency of Article 60 are as follows:

- Courts can interpret the conviction of a natural person as a prerequisite in order to impose a legal penalty on the legal entity; and
- Revocation of a legal entity's operating licence may be considered inappropriate and disproportionate to the act committed.

Administrative monetary fine under Code of Misdemeanours

A more recent regulation on this issue is Article 43/A of the Code of Misdemeanours, which entered into force on June 26 2009. While some companies will pay $500,000 in settlement amounts, Article 43/A was enacted in order to achieve alignment with worldwide trends (as much as possible) and compliance with the obligations under the OECD conventions. Article 43/A stipulates that a monetary penalty of between TRY10,000 and TRY2 million may be imposed on those who are convicted of white collar crimes, including fraud, money laundering, embezzlement and smuggling.

The article introduces monetary penalty on corporations, but – according to criticism – still needs improvement. One reason for this is because the article states that:

> "*a legal entity shall also be imposed a penalty of [...] in the event that an organ or a representative or a person who is not an organ but has a duty within the scope of that legal person's operational framework commit [the following] crimes for the benefit of the company/civil legal entity*."

Similar to Article 60 of the Criminal Code, courts can seek prosecution or conviction of a natural person in order to proceed against a legal entity. The result of Article 43/A is that criminal courts are unable to hear a case that speaks solely to establish administrative liability of a legal person. Since its publication, no application of the article has been made.

Comment

On considering the published jurisprudence with regard to white collar crimes, it is evident that – although the judge has the authority to proceed with the above explained mechanisms against legal entities – there is still no case law involving the application of Article 43/A of the Code of Misdemeanours or the security measures under the Criminal Code. This supports the OECD's criticism expressed in the Phase 3 Report.

Moreover, the interpretation of natural persons being prosecuted and convicted first in order to prosecute legal persons raises concerns. It should be obvious for the courts and prosecutors that prosecution or conviction of a natural person is not a prerequisite to hold a legal entity liable for a white collar crime.

Another reason for criticism of the corporate criminal liability system for white collar crimes is that the type of punishment set forth under the law does not suit the type of crime. In other words, as white collar crimes are financial in nature, imposing financial penalties instead of imprisonment could be more appropriate and proportionate. Judges may be reluctant to impose severe imprisonment(3) for an economic crime which allows the company to remain unpunished.

Although major legislative changes have occurred, anti-corruption rules are little enforced in

Turkey. The most important issue is not solely to enact laws, but to implement the existing framework in order to show corporate bodies that they can also suffer the consequences of corruption. Hopefully, in 2017 determined enforcement regarding white collar crimes can prevent Turkey's continuous fall in the Corruption Perception Index.

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Endnotes

(1) Constitutional Court, February 14 1989, E1988/15, K 1989/9 (published in the *Official Gazette* February 4 1991, 20776).

(2) Phase 3 Report on Implementing the OECD Anti-bribery Convention in Turkey, October 2014.

(3) The minimum punishment for foreign bribery is four years' imprisonment and it is not possible to convert the prison sentence into a fine, defer the prison sentence, suspend the pronouncement of the judgment or defer the filing of a public action. Further, the law does not provide for plea-bargaining or deferred prosecution. Finally, in foreign bribery cases, defendants cannot avail themselves of the effective regret provision.