



ETHICAL RISKS IN M&A TRANSACTIONS

(This bulletin is a condensed English version of the article "Birleşmeler, Devralmalar ve Etik Riskler", published in INmagazine, a publication of Ethics and Reputation Society.)

The primary consequence of an M&A transaction is that the buyer becomes a "partner" to the target company's assets and liabilities. For this reason, before the share transfer is realized, the buyer's ability to foresee the risks that the buyer is undertaking is very important. The buyer can identify these by conducting a due diligence prior to negotiating the transaction documents (generally, a share purchase agreement and, if the seller will remain as a shareholder in the target company, a shareholders agreement). In recent years, buyers' due diligence exercises have expanded beyond general legal and financial due diligence, and cover compliance issues that are governed by the Foreign Corrupt Practices Act (the "FCPA") (a federal law of the USA). In this article, we will address the importance of the FCPA in M&A transactions in non-US jurisdictions, such as Turkey.

FCPA's Scope

According to the FCPA, any direct or indirect monetary payment or other payments to any one of the following, which can be described as bribery or corruptive transactions, are considered criminal:

- (i) a country's (except the USA) public officials or to its public offices' employees;
- (ii) a country's (except the USA) political parties, political party authorities or candidates;
or
- (iii) international organizations or these organizations' directors.

Individuals and legal entities within the FCPA's jurisdiction are as follows:

- A. any listed company in the USA's stock exchanges, regardless of origin of incorporation or jurisdiction;
- B. (i) companies, including affiliates and subsidiaries, (ii) joint ventures and (iii) sole proprietorships incorporated within the USA;
- C. USA citizens or resident-alien, regardless of being commercially active within or outside the USA;
- D. (i) shareholders, (ii) board of directors member, (iii) representatives or (iv) other individuals acting on behalf of a company incorporated within the USA;
- E. persons who are directly or indirectly active in interstate commerce in the USA, and these persons' employees;

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- F. non-USA citizens who commit bribery or are engaged in any other corruptive transactions in any way within the USA;
- G. any company incorporated outside the USA that commits bribery or is engaged in any other corruptive transactions in any way in the USA.

According to the territoriality principle, every state's law is applicable within its borders. However, there are laws and regulations in the USA and various European countries (e.g. the UK's Bribery Act) that have extraterritorial effect, arising from political and economic reasons. As stated in the above list, the FCPA's jurisdiction is quite broad. Although it is a US law, its provisions allow penalizing bribery or other corruptive transactions with non-US third parties.

Sanctions and Examples

The USA Securities Exchange Commission (the "SEC") has penalized several multinational companies with extremely high amounts of penalties due to their FCPA violations. Please see the below Annex for a list of the five highest penalties imposed under the FCPA. One notable point about this list is that four of the five penalized companies are companies incorporated outside the USA. Most of these penalties were determined upon settlements between the SEC and relevant companies. These settlements clearly show how effective the FCPA's penal system is. They also demonstrate the importance of FCPA related risk-assessments when negotiating an M&A transaction.

Importance of the FCPA in M&A Transactions

Buyers in M&A transactions may enter into share transfers directly or via special purpose vehicles. In both cases, the target company becomes a direct or indirect subsidiary of the buyer after closing. If the ultimate parent company is in the FCPA's jurisdiction, then its subsidiaries are automatically considered also within the FCPA's jurisdiction. Due to the increasing growth of the FCPA's extra-territorial jurisdiction, the number of companies and managers that are subject to the FCPA's provisions has been rising. In order to minimize the associated risks, an FCPA related due diligence should be conducted, with a focus on the following matters:

- (i) When a company already subject to the FCPA acquires the shares of a company not subject to the FCPA, the target company will become subject to the FCPA after closing.
- (ii) When a company not subject to the FCPA acquires the shares of a company that is already subject to the FCPA, the acquiring company will become subject to the FCPA after closing.
- (iii) If the authorized representatives or shareholders of a company not subject to the FCPA have been blacklisted in the past because of an FCPA violation and these persons are active players in an M&A transaction in which the acquiring company is already subject to the FCPA, these blacklisted persons' involvement in the M&A transaction may create a significant risk for the acquiring company.

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In light of the above, it is very important that a buyer's due diligence determines whether or not (i) the target company or (ii) any board member or representative of the target company has been penalized or blacklisted or bears similar risks for the future because of an FCPA violation. The FCPA due diligence will also be instructive for the related parties to decide on their HR strategies or continuation of a commercial activity that may be bearing a risk under the FCPA.

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ANNEX

	Penalized Company	Origin of Penalized Company	Year of Conclusion	Amount of Penalty (USD)	Reason for Penalty
1.	Siemens	Germany	2008	800 million	Committing bribery on a regular basis
2.	Alstom S.A.	France	2014	772 million	Committing bribery for creating advantages in energy tenders
3.	KBR / Halliburton	USA	2009	579 million	Bribing Nigerian public authorities
4.	BAE Systems	UK	2010	400 million	Falsely keeping accounts and records of an agreement signed in Tanzania
5.	Total S.A.	France	2013	398 million	Bribing Iranian authorities for petrol agreements