

Emirates Law

Business & Practice

“When it comes to health legislation a key aim of the UAE is to protect the country’s assets and prosperity, and to ensure sustainable development.”

IN SICKNESS AND IN HEALTH UAE HEALTH CARE LAW

His Excellency Humaid Al Qatami

Chairman of the Board and Director
General of the Dubai Health Authority

The Crime of Fraud

Jouslin Khairallah
Khairallah Advocates & Legal Consultants

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Takeda

FIGHTING BRIBERY AND CORRUPTION

Muneer Khan and Samir Safar-Aly of Simmons & Simmons consider the UAE's Federal anti-bribery and corruption laws, the organisations that enforce them and insights into developments in the US and UK.

According to the 2016 edition of Transparency International's Corruption Perceptions Index, the UAE is the least corrupt Arab nation and the 24th least corrupt nation in the world. Within the UAE, there are both Federal and Emirate specific laws which deal with bribery. The UAE's Federal State Audit Institution (SAI) has the power to investigate any allegations of fraud or mismanagement of federal funds or assets. The SAI actively monitors, detects and enforces Federal anti-corruption laws. Any individual who wishes to report these activities can do so anonymously through the SAI. Similarly, the Abu Dhabi Accountability Authority (ADAA) seeks to ensure that all public organisations in the Emirate of Abu Dhabi abide by transparency standards and use their funds ethically. The Dubai Financial Services Authority (DFSA) works to address corporate misconduct and financial crime in the private sector within the Dubai International Financial Centre (DIFC) through enforcement initiatives and publication of its enforcement notices. However, the key investigators in the UAE remain the Economic Crime Units of various Emirate-level police forces and relevant Public Prosecutors Offices across the UAE. It is expected the UAE Government will establish the Federal Authority for Combatting Corruption, which will ensure the terms of the United Nations Convention Against Corruption (UNCAC) are enforced.

Most of the UAE's laws on anti-bribery and corruption have been in place since the 1980s and are found in the Federal Penal Code, Federal Law No. 3/1987. However, last year, Federal Decree-Law No. 7/2016 introduced wide-ranging reforms which altered 130 existing articles and added an additional 23 provisions to Federal Law No. 3/1987, revamping many existing provisions on anti-bribery and corruption. The amended Article 234 of Federal Law No. 3/1987 states that a 'public servant' or a person entrusted with a public service, a foreign public servant or an employee of an international organisation (e.g. private sector), who directly or

indirectly requests or accepts a gift, benefit, or other grant not due (or even a promise of one), whether to benefit them or another entity, in order to commit or omit an act included in their duties even when they have intended not to commit or omit such an act (including such requests, acceptances or promises made after the fulfilment or omission of these acts), shall be sentenced to 'temporary imprisonment'. In addition, under Article 237 of Federal Law No. 3/1987 those who promise, offer or give such persons the same shall be sentenced to a maximum five years imprisonment. Article 236 bis of Federal Law No. 3/1987 states any person who administers an entity or establishment pertaining to the public sector, or is employed by either one in whatever capacity, shall be imprisoned for a maximum of five years for committing any of these offences. A key development in the amendments to the Federal Penal Code was the expansion of the 'public official' or 'public servant' definition in Article 5 of Federal Law No. 3/1987. Notably, chairmen, board members, directors and other employees of public authorities and institutions, and companies wholly or partially owned by UAE Federal or Emirate-level governments are now specifically included as is anyone who is not included in the list of what constitutes a 'public servant' but is still engaged in public service work assigned to them by a 'public servant' in charge (under powers vested to such a person under relevant laws and/or regulations), is deemed to be a 'public servant' in relation to that task. Therefore, private organisations, potentially including law firms acting under UAE Federal or Emirate-level governmental entity instruction, could potentially fall within the 'public servant' definition following the 2016 amendments.

The Federal Human Resources Law, (Federal Decree No. 11/2008) also prohibits UAE Federal employees from accepting any gifts unless they are symbolic and bear the name of the entity presenting them. Each ministry also has to assign a unit permitted to accept gifts in accordance with that ministry's regulations. Under under Article 70 UAE Government employees are prohibited from distributing gifts unless they bear the name of the ministry and are distributed through the aforementioned unit.

PRIVATE SECTOR AND CORPORATE LIABILITY

Federal Law No. 3/1987 also criminalises private sector bribery. Article 236 bis of Federal Law No. 3/1987 states that 'any person' who promises another person managing a private sector entity or establishment or who is employed by such person in any capacity, a gift, benefit or grant not due, either directly or indirectly, whether to benefit that person or another person, so that person can perform or omit an act included in their duties, could receive a maximum of five years' imprisonment. This also applies to an individual who intends to be rewarded



after committing the act even without a prior agreement. Under Article 65 of Federal Law No. 3/1987, private organisations can also be criminally liable for crimes committed by their representatives, directors or agents acting in their benefit or in their names, resulting in the confiscation of any bribery offence proceeds and fines of up to 500,000 AED vicariously (increased from 50,000 AED after the 2016 amendments). This does not prevent perpetrators of the crime being personally liable for any of these punishments under the provisions mentioned. In comparison, the UK Bribery Act 2010 created a wholly new strict liability offence for failure of a relevant commercial organisation to prevent a bribery offence (Bribery Act 2010, s7). However, the UK Bribery Act 2010, s7(2) provides a defence if the commercial organisation can demonstrate, that on the balance of probabilities, it had 'adequate procedures' in place designed to prevent associated persons from undertaking bribery. A company may potentially be prosecuted under s7 for a bribery offence even if its managers were unaware of it, including if the crime was committed by a third-party agent acting on their behalf. The 'adequate procedures' defence in the Bribery Act must be an integral business consideration and not just a static corporate policy.

Whilst the UK Bribery Act does not provide further detail of what is expected in terms of 'adequate procedures', a UK Ministry of Justice guidance note on the Bribery Act, published in 2011, outlined a risk-based approach following six principles: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (and training); and monitoring and review. The introduction of the 'adequate procedures' defence in the UK as a result of the Bribery Act has encouraged companies to assess their internal controls and procedures, and has led to increased awareness of ethical issues forming part of broader emerging international norms and conventions. However, adequate anti-bribery and corruption procedures should be an essential part of any corporate ethics policy in the UK, UAE and elsewhere, as without a strong corporate culture and a genuine desire to stamp out poor behaviour, no written policy will ever be sufficient. In the UK, there have only been a handful of successful cases against both individuals and corporations under the Bribery Act. However, the relatively new Deferred Prosecution Agreement (DPA) framework means that public prosecutors and courts have an alternative to the current choice of civil recovery orders and no

criminal action. The aim of DPAs is to enable public prosecutors to hold alleged offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity, or length of a criminal trial. DPAs are often used in the US by the Department of Justice (DOJ), guided by the 'Principles of Federal Prosecution of Business Organisations' and the 'Yates Memorandum'. However, they are a new kind of disposal of criminal risk in the UK, based on an agreement between the UK's bribery regulator - the Serious Fraud Office (SFO) - and the accused company. In the UK system, unlike the US one, DPAs are only effective once they have court approval. Judges must make a declaration that the disposal of criminal charges through the DPA is in the interests of justice; and its proposed terms are fair, reasonable and proportionate. A DPA Code of Practice was published by the SFO and Crown Prosecution Service on 14 February 2014 to guide prosecutors assessing whether a DPA is appropriate. On 30 November 2015, the UK's first DPA between the SFO and ICBC Standard Bank plc was approved. It suspended an indictment against Standard Bank alleging failure to prevent bribery contrary to the UK Bribery Act. Days later, Sweett Group pleaded guilty to failing to prevent an act of bribery intended to secure and retain a contract, contrary to the UK Bribery Act. Both Standard Bank and Sweett Group paid substantial penalties as a result of these breaches which confirmed that corporate criminal liability under the UK Bribery Act is no longer just theoretically possibility. A DPA between the UK SFO and Rolls-Royce PLC this year included a settlement of £497.25m (plus interest and SFO's costs of £13m), which shows DPAs help encourage responsible behaviour, and active engagement with authorities. However, it is still unsure if the UAE will explore using them to encourage cooperation in investigations and self-disclosures.

PENALTIES

All the penalties under the Federal Penal Code above require the bribe receiver to pay back the value of the bribe and a fine equaling the same value, or no less than 5,000 AED (previously it was 1,000 AED) under Article 238 of Federal Law No. 3/1987. All criminal cases under these bribery offences cannot be terminated due to a time limitation lapse, as, no statute of limitations applies, under Article 239 of Federal Law No. 3/1987. Intermediaries between the

bribe-giver and taker are also sentenced to up to five years imprisonment under Article 237 bis of Federal Law No. 3/1987. However, there is some leniency for whistleblowers as the briber or intermediary can be exempt from punishment if they report the crime to the authorities before it is discovered under Article 239 of Federal Law No. 3/1987. However, it is unclear if a self-reporting company will benefit from the protections given to whistle-blowers. In comparison, the UK SFO has removed guidance from its website that previously confirmed self-reporting companies would not be prosecuted. Its current policy appears to demand a self-report but following that they will still consider charges against the company and individual directors. Encouraging self-reporting may be a useful way to overcome some of the international hurdles associated with Mutual Legal Assistance (MLA) Agreements with other countries. In April 2016, the US DOJ, Fraud Section's under its guidance to the US Foreign Corrupt Practice Act 1977 (US FCPA), launched a one-year enforcement 'Pilot Programme' to promote greater accountability by 'motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate and, where appropriate, remediate flaws in their controls and compliance programs'. Companies which meet these requirements are eligible for reduced fines and penalties of up to 50%. In March 2017, it was announced this programme would be extended. In other US compliance areas, such as sanctions compliance, the US Treasury Department's Office of Foreign Assets Control (OFAC) Economic Sanctions Enforcement Guidelines (General Factor G) considers self-disclosure a key mitigating factor that may reduce penalties by up to 50%. It is also yet to be seen if the UAE will explore promotion of corporate self-disclosure.

FINANCIAL FREE ZONES

Whilst financial free zones like the DIFC and the Abu Dhabi Global Market (ADGM) have their own separate civil and commercial legal regime and financial services regulatory framework and Federal Penal Code still applies within them. However, the DFSA and the Financial Services Regulatory Authority (FSRA), the DIFC's and ADGM's respective independent financial services regulators provide guidance to those under their supervision through their own AML Modules.

FOREIGN AND EXTRATERRITORIAL MATTERS

A key change in the 2016 amendments was the inclusion for the first time of bribery of foreign public officials as a bribery offence. Foreign public servants are specifically mentioned in the offences under Articles 234 and 237 of Federal Law No. 3/1987. In the UK, it was only through the UK Anti-Terrorism, Crime and Security Act 2001, s108(1) that the common law offence of bribery extended to those holding public office outside the UK. In line with its commitments under the OECD (Organisation for Economic Cooperation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), the offence was clarified and codified in the UK Bribery Act, s6. It is not yet known if the UAE will adopt the OECD Convention, although the 2016 amendments to the Federal Penal Code are a significant development towards its goals. Another key change to the UAE regime was the introduction of extraterritoriality for bribery offences. Under 239 of Federal Law No. 3/1987 the bribery offences apply to any person who commits these 'outside the country', if the criminal or the victim is a citizen of the UAE, or

if the crime is committed by a public or private sector employee of the UAE, or involves public property. The UK Bribery Act also has extra-territorial jurisdiction, which were initially introduced in the UK Anti-Terrorism, Crime and Security Act 2001, s108-10 (and any later UK Bribery Act). Bribery offences in the UAE are now connected to the embezzlement and damage to public property offence in Chapter 6 of the UAE Federal Penal Code, whose provisions apply if the criminal or victim is a UAE citizen or if such a crime is committed by an employee in the public or private sector of the UAE, or involves public property (see Article 230 bis of Federal Law No. 3/1987). This provision specifically covers actions committed 'outside the country'. However, international co-operation will likely remain a major challenge to the extraterritoriality provisions generally. As well as practical issues like resources and time, bribery and corruption allegations often occur in jurisdictions considered high risk or 'red flag'. By entering into MLA Agreements with other countries, in addition to any extradition treaties already in place which allow for prosecutions, both the UK and UAE will be able to increase their evidence gathering internationally. Companies with multinational interests must also consider the extraterritorial scope of certain pieces of foreign legislation, e.g. the US FCPA applies to any entity with securities listed within the US and the UK Bribery Act penalises bribery offences committed by British citizens or corporations (whether or not they are in the UK). The UAE has also ratified the UNCAC under Federal Decree No. 8/2006, which requires its signatories to implement anti-bribery measures, aid in asset recovery and extradite those accused of bribery. The UAE must also provide other UNAC signatories with technical assistance in bringing corrupt individuals to justice. Therefore, the UNCAC, the US FCPA and UK Bribery Act must be taken into consideration when assessing anti-corruption compliance risks in the UAE. ■



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