

New Precedent in White collar crimes

Khalid Al Hamrani - Partner, Head of Financial Crime - Financial Crime / Family Business
k.hamrani@tamimi.com - Dubai International Financial Centre

Omar Khattab
o.khattab@tamimi.com

The following judgment rendered by the court of first instance of Dubai gives us an insight to this modern legal approach and its reasoning and justifications.

BACKGROUND

The case concerned a businessman that owned a credit facility company which had an agreement with a well known Bank to act as its agent abroad to grant credit facilities. Such bank is a joint stock company incorporated in the Emirate of Dubai in which the government contributes with 30% of its capital.

That previously mentioned businessman conspired with others to defraud the bank by establishing a number of companies and forging false documents and invoices of bogus transactions to present them to the bank as though they were genuine operations requiring finance.

Moreover, the offenders conspired with two employees of the bank to assist their conspiracy by facilitating the execution of the fraudulent transactions. Those employees illegally exploited their positions as manager and deputy manager of the financial department at the bank to approve such transactions and leverage the credit limit.

Accordingly, the offenders presented the fraudulent transactions to the financial department of the bank attached with the forged documents to support their validity in an attempt to intentionally deceive the bank to produce funds; along with the aid of the conspiring employees of the bank to approve such false transactions and pass them before other departments of the bank without verification according to the principles of their jobs which expects them to investigate the validity of transactions requiring finance and thoroughly review its documents. In other words, they were required to ask for documents approving the receipt and acceptance of the goods by the purchaser and the relevant bill of lading. Alternately, the conspiring employees made recommendations and annotations that would give confidence to such false transactions and facilitated the approval of the documents although they were fully aware that the transactions were false.

Finally, the criminal conspiracy led to the unlawful seizure of USD 501 Million (equivalent to AED 1,841,000,000) from the defrauded bank resulting in substantial loss to such bank and its interests. Subsequently, the offenders were accused of committing the crimes of facilitating the fraudulent embezzlement, intentional infliction of damage of public funds and generating profits.

Accordingly, the offenders were found guilty and were convicted and sentenced by the competent court to imprisonment for a period of 10 years, also to jointly pay the unlawfully embezzled funds and to retribute the same amount. In addition, all the convicts shall not be able to serve in public positions and shall jointly pay the damaged bank temporary indemnity for its losses.

THE COURT'S APPROACH

The court settled its ruling on Article 5 of the Emirati Federal Penal Law that sets out the legal definition of public employees according to Emirati Penal Law and emphasizes in its last paragraph that even though some employees are not expressly mentioned in Article 5 as public employees, they shall be legally considered to be entrusted with a public service whenever they undertake work related to any public

service through proper assignment to such position which is given by competent authority designated by established laws and regulations to give such assignments in relation to that assigned position.

Moreover, the court acknowledged that funds owned, in whole or in part, to public utility institutions and associations are deemed public funds. However, this distinct legal status attributed to funds or employees affords stricter punishments to criminal offences committed against those funds or by those employees due to their relatively high national significance and to ensure that governmental bodies perform their desired roles effectively and efficiently. To that end, the court decided that the contribution of the government to the capital of the defrauded bank renders the bank a public utility body and the private employees of such are entrusted with public services.

Al Tamimi & Company on behalf of the claimant of civil damages argued that by virtue of the bank's shareholdings, its employees are considered to be entrusted with public service and thus addressees of Article 5 the Federal Penal Law. Hence, we requested the application of such article before the court, while the defense attorneys assured the absence of grounds for its application. At last, the court issued its abovementioned judgment asserting that the governmental contribution to capital share of private entities attributes a public quality upon its funds and employees.

Furthermore, the court applied another decisive and significant article of the Federal Penal Law which is Article 230 that illustrates that in certain crimes, the offender shall be punished by restitution and also by a fine equivalent to the fruits of the committed criminal offence. Consequently, the court ordered the convicts to jointly reconstitute the fraudulently seized funds to the defrauded bank as compensation for the damages inflicted by their unlawful actions, and also to pay the same amount as fines to the treasury of the state.

OUTCOME

Although the employees of private entities comply with the Emirati Labor Law that governs their work and business in relation to their day to day civil, commercial and employment rights and obligations, it ought to be noted that the contribution of the government in the capital share of any of those private entities confers a public quality on its funds and employees from a corporate criminal perspective. In other words, the employees of private entities are most likely to be criminally prosecuted as entrusted with public funds and services whenever they are employed by a private entity with governmental contribution.

The previous court approach illustrates the measures dictated by Emirati law to protect its financial system and the available safeguards for investment in order to ultimately create and sustain a sound environment for whoever is willing to invest with no leniency for any probable offences.

In that sense the Penal code addresses a wide range of unlawful procurements of assets whether related to the public or private sectors, although it is noted that the law affords a higher level of protection to public offences to deter offenders from committing offences against such public funds due to its significance and to give investors tempting incentives to invest their monies in a safe atmosphere.

Finally, the Emirati legal system addresses anticorruption and anti-money laundering crimes. Also, it criminalizes a wide range of white collar crimes, including among others, corporate fraud, bribery, embezzlement, breach of trust and forgery.