

Important Amendments to the UAE Penal Code Relating to Bribery and Misappropriation of Public Funds

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In keeping with the tradition of development and with the intention of maintaining a developed society and protecting that society on an individual and institutional level, the UAE has issued Emiri Decree No. 7 of 2016, amending the UAE Penal Code (Law No. 3 of 1987).

In this article we aim to set out the important amendments UAE federal penal code and the potential drastic impact they may have on the wide range of clients we have previously serviced. We wish to cast light on some of these new provisions, the significance of the changes to the wording and how they affect the legal classification of certain actions as well as the criminal legal responsibility which can potentially arise there from.

We first look at the amendments provisions, before considering the new provisions and noting those that have been repealed.

Amended Provisions

Article 5

'A public official as per the provisions of this Law shall mean any person occupying a federal or local job, whether legislative, executive, administrative or judicial, and whether he is appointed or elected; this includes:

- *Persons entrusted with the public authority and employees working in ministries and governmental departments.*
- *Members of the Armed Forces.*
- *Security authorities' employees.*
- *Members of judicial authorities and Chairmen and members of legislative, consultative and municipal councils.*
- *Whoever is delegated by any of the public authorities to perform a specific assignment within the limits of the work entrusted to him.*
- *Chairmen and members of boards of directors, managers and all other employees working in associations, public corporations and companies partially or wholly owned by the federal government or the local governments.*
- *Chairmen and members of boards of directors, managers and all other employees working in associations and public welfare institutions.*

Whoever is not included in the categories stated in the preceding paragraphs and performs work connected to public service in accordance with instructions issued to him from a public official having the authority to give such an instruction according to prescribed laws or regulations, concerning the work assigned to him, shall be considered ipso jure to be entrusted with public service functions.

The amendments to this provision expands the definition of those who are deemed to be a “public officials” to include, in addition to those who work in the security apparatus and the judiciary, all those employees of companies that are either wholly or partly owned by the federal or local governments. This has been done with the aim of providing greater protection to public funds and those funds linked to public officials. The amendments which were carried out had been done with the aim for protecting the status and integrity that people expect when dealing with the public office as a representative of the state. To do so the draftsman has sought through the changes to increase the seriousness and penalties in relation to offences committed against what the law deems to be public funds such as misappropriation, embezzlement, fraud or unjust enrichment, which may also be committed by a deemed public official who takes advantage of his employment.

Legal persons, with the exception of the government’s associations and their official departments and public organizations and corporations, shall be criminally responsible for crimes committed by their representatives, directors or agents acting in favour of or on behalf of them.

No sentence shall be imposed on them other than a fine, forfeiture and criminal measures provided for the crime by law; however, if the law provides for the crime a principal penalty other than a fine, the penalty shall be limited to the fine, which shall not exceed five hundred thousand Dirhams. This, however, shall not prevent personally punishing the offender with the penalties prescribed for the crime by law.

In this amendment the legislator has increased the punitive sanctions for legal/corporate entities. The fine has now been raised from AED 50,000 to AED 500,000 in the event that the company is convicted for offenses committed by its representatives, management or agents and which was done for the company’s benefit or on its behalf. This is a dramatic increase and will force companies to take more forceful action to prevent their employees committing crimes.

Article 227

Punishment by temporary imprisonment shall be inflicted upon any public official or person entrusted with public service functions who willfully harms the properties or interests of the authority where he works, or the properties or interests of a third party entrusted to such an authority.

A penalty of imprisonment and a fine not exceeding ten thousand Dirhams or either of these two penalties shall be imposed on any public official or person entrusted with public service functions who harmed, as a result of his fault, properties or interests of the authority where he works, or the properties or interests of a third party entrusted to such an authority.

In the amendment to Article 227, the legislator has created a new offence of causing loss to public funds by dereliction or negligence bordering on intent (or what is known in common law as basic intent). It has been drafted in this way with a view to provide extra protection to public funds which have been entrusted to a public official as a result of his employment and ensures that the official diligently upholds his fiduciary duty with regards to the funds of the state and the community, and prevents negligent or erroneous dealings.

Article 234 of the Penal Code

A penalty of temporary imprisonment shall be imposed upon any public official or person entrusted with public service functions, or a foreign public official, or an employee of an international organization, who solicits or accepts or promises, directly or indirectly, for himself or for another person or entity or establishment, any undeserved gift or privilege or grant, in return for the performance of or the refrainment from the performance of an act while carrying out his job duties, even if he has in mind not to effect the act or to refrain from performing it, or if the demand or acceptance or promise comes subsequent to the performance of the act or the refrainment from the performance thereof.

The amendment is intended to close a lacuna which had previously existed in the offence of bribery. Under the provisions of the old law the definition of public officials only included those persons deemed to be UAE public officials, and therefore foreign public officials could not be prosecuted even if their criminality had adverse impact on the UAE. This addition has been made with the view of buttressing the importance of public service for the community and its interests and anticipates the potential roles that those who provide such services in taking advantage of their position by advancing their own personal interests at the expense of the interests of the state or society. It also brings the UAE laws in line with International Standards and the UN treaty on the combat of corruption to which the UAE is a signatory.

Article 236 (bis)

There is a slight amendment to the wording in Article 236 (bis), which clarifies the definition from the previous offence, where now the offence of bribery of a private employee is more clearly defined and in express than had previously been the case. It now expressly includes, as being subject to the anti-bribery laws, all private sector entities or those related to it, and all employees as well as their management.

Article 238

A convict shall be ordered to pay a fine equivalent to what has been demanded or offered or accepted, in all cases shown in the preceding Articles of this chapter, provided that the fine shall not be less than five thousand Dirhams. A judgment shall also be passed for the confiscation of a gift accepted by or offered to the public official or the person entrusted with public service functions.

Article 238 increases the penalty for the offence of bribery, raising the minimum fine from AED 1,000 to AED 5,000 in order to increase the deterrent effect of the law.

New Provisions in the Law

Article 6 (bis) (1)

A foreigner public official in accordance with this Law shall be: any person who occupies a legislative, executive, administrative or judicial position in another country, whether permanent or temporary, and whether he is elected or appointed, with or without a salary, and any person entrusted with public service functions.

An employee of an international organization in accordance with this Law shall be: any person who occupies a position in an international organization or is authorized by such organization to act on its behalf.

As explained above the draftsman had intended to close a lacuna in the old provisions of the Penal code. Therefore to in order to expand the scope of bribery to include foreign public officials, a definition of that had to be enacted. Article 6 bis 1 gives that express definition. As a consequence of the new Article the draftsman was able to extend the scope of Articles 236 and 237 to include Foreign public officials by adopting the new definition in the wording of those offences.

Note that Article 6 bis 1 explicitly includes employees of international organisations or those who undertake services on their behalf as well. This addition underscores the growing importance to the community of these organisations. The Penal Code now extends the bribery provisions to all those foreign officials and employees of international NGOs who work in the UAE. The same definition has also been added to Articles 236 and 237.

Article 6 (bis) (2)

Public property in accordance with this Law shall be:

The properties owned, in part or in whole, by a federal or local authority, or the federal or local public associations and corporations, or the companies that are partially or wholly owned by the federal government or the local government or the associations or the public benefit institutions.

The properties that are subject to the management or supervision of one of the entities provided for in Paragraph (1) of this Article or if such an entity has the right to utilize it and benefit there from.

The aim here is to protect public funds in all of its different guises and in whatever proportion, hence the use of the words “partially or wholly owned by the federal government or the local government or the associations or the public benefit institutions”. This is a new concept designed to protect the public interest and the individual’s interests. This will have far reaching consequences when applied to certain offences relating to companies and entities in which the government invests, or is subject to the supervision of one of the branches/departments of government listed in Article 6(1) (bis). By way of an example, funds of banks can now be deemed to be public funds under the Penal Code, and this ensures that offences which had previously been deemed misdemeanours now become felonies. This enactment exists even when banks are private entities and the government is not a shareholder. This is due to the fact that by reason of all banks being subject to the supervision of the Central Bank they are all now, in law, deemed to be public funds. The change, on the face of it, is to the benefit of the victims of crime in that it provides extra protection to the funds of the banks irrelevant of State ownership. However, it is necessary to wait and see how the courts will apply and interpret the new provisions.

Article 225 (bis)

Any public official or person entrusted with public service functions who receives or attempts to unrightfully receive, for himself or another person, an advantage or a gain from the duties of his position shall be punished by temporary imprisonment.

This enacts a free-standing offence for any public official who takes advantage of his employment for his own personal gain, irrespective of whether or not a loss is caused to the public funds. This amends what had previously been the case under Article 227. In addition, it is now an offence to attempt to unjustly enrich oneself whereas previously such an offence had not existed.

Article 230 (bis)

The provisions of this law shall apply to whoever commits one of the crimes set forth in this Chapter and Chapter One of Section Two of Book Two of this Law outside the State, if the perpetrator or the victim is a national of the country or if it is committed by an employee of the private or public sector of the State or if it affects a public property.

This new provision attempts to give further protection to public funds in all its guises and also hinder those who would think about transgressing the financial interests of the State whether inside or outside the jurisdiction. It expands the offences relating to offences under Chapter Six of Part One of Book Two (Embezzlement and Misappropriation of Public Funds) and also those offences under Chapter One of Part Two of Book Two (Bribery) and departs from the general principle that an offence is punishable in the jurisdiction where it takes place or the offender/victim is a citizen of the State which seeks jurisdiction. The provision now gives the UAE authorities extraterritorial jurisdiction over all offences relating to public funds, public employees, or, in the case of bribery, even private employees.

Article 236 (bis)

An imprisonment for a period not exceeding five years shall be imposed on whoever manages an

entity or establishment of the private sector, or works therein in any capacity, who solicits or accepts or promises, directly or indirectly, for himself or for another person, any undeserved gift or privilege or grant, in exchange for any undeserved gift or privilege or grant, for himself or for another person, in return for the performance of or the refrainment from the performance of an act of his duties or defaulting on his job duties, even if he has in mind not to effect the act or not to refrain from it, or if the demand or acceptance or promise comes subsequent to the performance of the act or the refrainment from the performance thereof.

This provision expands the offence of bribery into the private sector to encompass all employees in conformity with the amendments to Article 234, and has resulted in the repeal of the old article 236 where the offence was limited to members of the board and management.

Article 237(2)(bis)

It is to be noted that despite the expansion of the provisions of the offences of bribery to include foreign public officials, the punishment for those who are convicted has remained unchanged.

Article 239 (1) (bis)

The provisions of this Law shall apply on whoever commits one of the crimes set forth in this Chapter outside the State, or if the perpetrator or the victim is a national of the country, or if the crime is committed by an employee of the public or private sector of the State or affects a public property.

As with Article 230 (bis) but with a wider application, this article gives the authorities extraterritorial jurisdiction over all offences of bribery even if committed outside of the UAE.

Article 239 (2) (bis)

The criminal action shall not abate upon the lapse of the term in one of the crimes provided for in this Chapter and the adjudged sentence shall not abate. The civil actions that arise from or are connected to such action shall not abate upon the lapse of the term.

This provision departs from the general principles which apply to the statute of limitations relating to all offences and expands its scope to encompass civil claims arising from these offences. The article removes all time bars in relation to all offences of bribery so that there is no longer a time limit by which an investigation or a civil claim needs to be brought against those involved. Nor can any punishment be unenforceable by reason of the passage of time. This creates a strong deterrent by ensuring that those who commit these types of offences will be held to account and punished no matter when the crime was committed.

Repealed Provisions

The provisions 235 and 236 have been repealed, as they were rendered redundant by other amendments to the law.

Conclusion

The changes to the Penal Code highlighted above have a direct bearing on the offences of bribery and the misappropriation of public funds. The scope of who the offences apply to has been significantly broadened, together with the removal of any limitation period for the bringing of criminal or civil actions in relation to them. The changes will have a positive impact on the interests of all those who do business in the UAE, as they help protect the integrity of the country's business and government sectors, thereby protecting the financial interests of all.

Al Tamimi & Company's Financial Crime team regularly advises on the new amendments of Penal Code and its impact on the individuals and companies in relation to bribery and public funds. For further information please contact Waleed Shalabi (W.Shalabi@tamimi.com)