

Reaching New Heights: Fighting Financial Crime in Oman

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The new Omani Penal Code entered into force on 11 January 2018 through Royal Decree No 7/2018. The previous Penal Code, which was issued in 1974 and required some updating was repealed, in order for Oman to keep up with the developments in Omani society as well as to be in line with international treaties to which the Sultanate of Oman has committed.

Due to the increasing attention directed at the Middle East by organisations such as the United Nations Office on Drugs and Crime, the Sultanate has taken long awaited action to implement more stringent regulations on various issues such as misappropriation of public property. In order to avoid unexpected legal risks, companies carrying out business operations in Oman need to be vigilant, requiring strict adherence to compliance policies and procedures not only from their staff but also from external business partners.

Are You a Public Official?

In line with many Middle Eastern jurisdictions, the new Omani Penal Code has adopted a broad definition of a public official. Therefore, companies should carefully examine their ownership structure before drafting compliance policies in order to ensure whether their employees can in fact fall within the definition of a public official and whether the assets of the company are defined as public property for the purposes of criminal liability.

Many employees may be caught by surprise considering themselves as employees of a private company, albeit subject to Government ownership. However, according to Article 11 of the Penal Code, if the Government holds more than 40 percent of the share capital of a company, the company is considered public property. As a result, according to Article 10 of the Penal Code, all employees of companies in which the Government holds more than 40 percent of the share capital, are considered public officials entailing special compliance obligations, relating to, e.g. receiving hospitality or observing conflicts of interest. Such special compliance requirements should be carefully reflected in the compliance policies of such companies.

Similar to neighbouring jurisdictions, the low threshold of ownership renders many companies operating in Oman public property. Even if the business operations of such companies extended to overseas jurisdictions, the provisions in Article 19 of the Penal Code may entail extraterritorial application if the offence is committed by an Omani public official.

Safeguarding Public Property

The new Omani Penal Code constitutes a qualitative leap in legislation in the Sultanate with a focus on preventing financial crime. The amendments have been motivated by the significant impact of financial crime on commercial activities, business transactions and national security, along with damaging the development of the economy. In terms of a well-functioning society which is also considered attractive in the eyes of foreign investors, it is important to maintain trust in public officials duly exercising their functions and operating in a transparent manner, which has clearly been set as a goal by the legislator when amending the Penal Code.

Public funds and the financial sector operations have been given considerable attention in the new Penal Code through the imposition of severe penalties against any employee or public official who abuses his function to achieve personal benefit.

Chapter IV of the law (Articles from 213 to 222) focuses on offences conducted by public officials causing damage to public property. The purpose of the provisions is to provide a framework of rules

aimed at enhancing transparency within the public sector. The newly introduced provisions criminalise embezzlement (Article 213), misappropriation of public funds (Article 214), illegitimate collection of taxes, fees or fines (Article 215), causing wilful damage to public property (Article 216), neglecting the maintenance of public property (Article 217), trickery relating to public bids or auctions (Article 218), receiving illegitimate profit or benefit (Article 219), obtaining illegitimate benefits based on government contracts (Article 220), fraud in performance of government contracts (Article 221) and trespass to government property (Article 222).

Sanctions vary depending on the offence in question. For example, embezzlement of public or private property, misappropriation and causing damage to public funds entail a sanction of imprisonment up to five years. Fraud relating to public bids or auctions entails a maximum punishment of 10 years' imprisonment. Also, the illegitimate collection of taxes, fees or fines and fraud in performance of government contracts may, under certain aggravating conditions, result in imprisonment for 10 years.

The Penal Code pays significant attention to preventing fraudulent practices in procurement of government contracts relating to e.g. construction projects. Obtaining illegitimate benefits based on government contracts (Article 220) and fraud in the performance of government contracts (Article 221) have expressly been criminalised outside the scope of general anti-corruption provisions.

According to Article 220 of the Penal Code, obtaining illegitimate benefits based on government contracts occurs when a public official obtains for himself or another, directly or through an intermediary, a commission, profit or benefit from the preparation, management or performance of a contract of construction, supply, works or undertakings with one of the state authorities. According to Article 221 of the Penal Code, any person who commits fraud in performance of all or part of the obligations stipulated in a contract relating to construction, supply, public works or any other contract to which a government entity is a party, shall be sentenced to imprisonment for a term of not less than three years and not more than five years. It should be noted that the fraudster is not always the public official himself, but a third party such as a sub-contractor, agent, broker or consultant.

In addition to imprisonment, the Penal Code has made restitution a legal obligation and a part of the total penalty for embezzlement, misappropriation of public funds, illegitimate collection of taxes, fees or fines and trespass on Government property. In other words, the offender shall compensate the Government entity the loss it has caused as a result of the offence.

Combating Bribery

It is widely known that corruption often results in concentration of funds within organised crime away from legitimate actors in society. Company resources that could be used in implementing business strategies and creating turnover are derailed or used unproductively to pay bribes which may not even result in the desired outcome. Corruption also compromises the reputation of the company, potentially resulting in the loss of business opportunities and customers.

Moreover, corruption in the society undermines the attractiveness of a country from the perspective of foreign investment.

The new Penal Code includes anti-corruption provisions laid down in Articles 207-212. According to

these provisions, seeking and accepting bribes as a public official as well as offering a bribe to a public official are criminal offences.

The law remains silent about the definition of an illegitimate benefit. There is no set price tag for an accepted gift or hospitality, as any benefit may be considered a bribe if it has been provided with the intent to illegitimately influence the recipient. The corrupt intent of the parties may be presumed and, therefore, attention should be paid to the underlying circumstances in which gifts and hospitality are offered.

Consequences of Non-Compliance for Companies

Individuals aside, the Omani Penal Code also includes newly introduced corporate liability provisions which means that companies can be subjected to criminal penalties and ordered to pay fines. The amount of the fine depends on the offence in question.

According to Article 21 of the Penal Code, legal persons, such as companies, can be held criminally liable for the offences committed by their representatives, directors or agents acting on their behalf or in their name.

The risk of corporate criminal liability triggers the need to conduct due diligence on external representatives, sub-contractors and agents of companies. Preserving compliance requires that the effect of compliance policies is extended beyond employees to cover external representatives and sub-contractors as well. It is advisable that companies only engage such representatives, such as sub-contractors or sales agents, who meet certain pre-determined criteria and who are regularly trained with regard to compliance obligations. Also, when negotiating agreements with any external representatives or sub-contractors, the right to conduct compliance audits in the organisation of the contracting party with sufficient access to records should be retained.

Focus on Transnational Organised Crime

The new Penal Code includes a separate chapter dedicated to transnational organised crime which indicates the intention of the Omani legislator to pay close attention to preventing organised criminal groups from establishing themselves in the Sultanate. According to the definition of an organised criminal group laid down in Article 146 of the Penal Code, a group of at least three participants may constitute an organised criminal group. According to the Penal Code, participation, incitement or assistance with regard to the activities of an organised criminal group, with the aim of committing transnational organised crime, is considered a severe criminal offence.

Establishing an organised criminal group may result in imprisonment of five to ten years. Participating in the criminal activities of such a group, with knowledge of the group's objectives, may entail imprisonment of four to seven years. Any legal person, such as a company, participating in the activities of organised criminal groups shall be punished by a fine of 10,000 – 50,000 Omani Riyals. The legal person may also be ordered to be dissolved.

The key take home for international business with regard to transnational organised crime is to understand the risk of involvement in transnational organised crime through employees or external representatives. Even if the company is not considered to be aware of criminal operations taking place within its organisation and thus avoids corporate criminal liability, such illegitimate activity taking place within its organisation is often extremely harmful for the reputation of the business.

Significance for International Business

As the amended provisions are still in the early stages of being tried before courts, it remains to be seen how the Omani court practice will respond to the more stringent regulations. In terms of transnational business operations, it is vital to pay attention to implementing proper compliance policies with regard to prevention of corporate crime and avoidance of conflicts of interest. A high level of transparency and diligent documentation also serve as efficient compliance controls, in addition to compliance training and regular audits, which are essential in order to nurture a compliance culture in an organisation. Extending certain compliance obligations to contracting parties is also highly recommended.

The recently upgraded Penal Code provides an excellent opportunity for all businesses with operations in Oman to review and update their compliance policies, conduct training sessions, and review their third party agreements in order to prevent and detect any financial crime or non-compliance related issues.