التميمي و مشاركوه
AL TAMIMI & CO.

Issue 317 I March 2019

Latest Legal News and Developments from the MENA Region

Taming Financial Crime Beasts in the Middle East Region: Welcome to the Concrete Jungle

The Falcon's View: What the European Union's SPV for Trade with Iran Means for Businesses in the Middle East

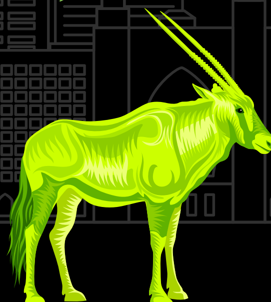
Can a Leopard Change its Spots? Lessons from the Transparency International Corruption Perceptions Index 2018

Tackling the Prickly Issues: Nazaha's Efforts to Unearth Corruption in Saudi Arabia

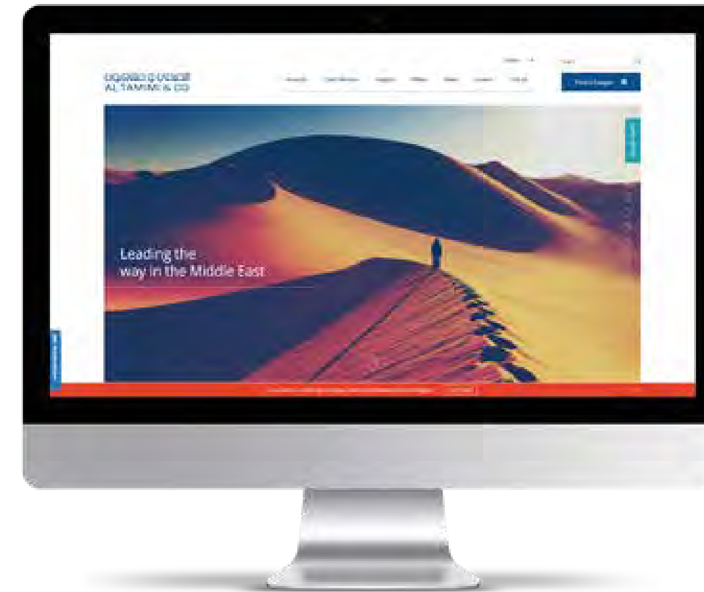
A Detailed Look into the Implications of the Tax Blacklisting of the UAE and Oman by the EU

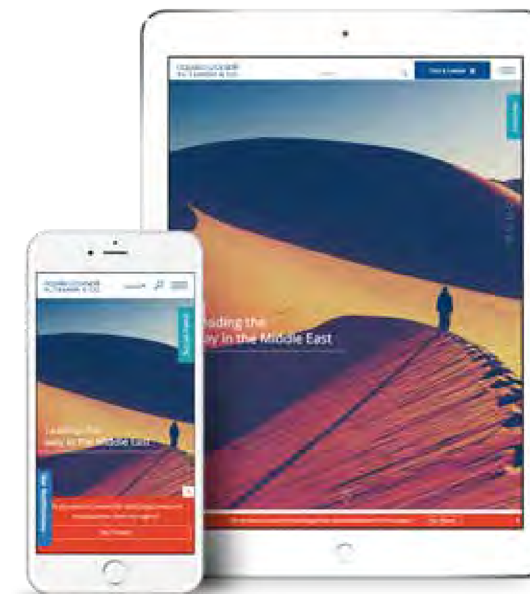
Testing the Limits: Is it finally possible to establish a limitation fund in the UAE?

An overview of telecoms licensing in Saudi Arabia



LAW UPDATE *Online*





The contents of Law Update are not intended to be a substitute for specific legal advice on any individual matters. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except for individual use and other non-commercial uses permitted by copyright law. The permission to recopy by an individual does not allow for incorporation of the material in part or in whole of any work or publication, whether in hard copy, electronic or any other form, unless specific mention is made to the source, "Law Update published by Al Tamimi & Company," and written permission is granted by the firm. For more information, please contact us.

@AlTamimiCompany

Al Tamimi & Company

Al Tamimi & Company

Production
Nigel Higgins
n.higgins@tamimi.com

Creative
Noura Haggag
n.haggag@tamimi.com

Shriya Sanjeev
s.sanjeev@tamimi.com

Editor
Siobhan Farrell
s.farrell@tamimi.com

Federal Gazettes
Zane Anani
z.anani@tamimi.com

Translation
Vincent Percival
v.percival@tamimi.com

Illustrations
Studio3

Artwork
Shutterstock

For information on Law Update
info@tamimi.com

www.tamimi.com

In this Issue

Welcome to the March 2019 of Law Update.

Before I proceed with an overview of this month's issue, I would like to take this opportunity to congratulate Essam on his inclusion in Arabian Business' List of GCC 100 Inspiring Leaders for 2019. In this list Essam finds himself in the company of some of the biggest and most successful names in the GCC business community; an immense achievement and well deserved recognition.

This month's Focus is on Financial Crime. In their introductory statement Khalid Al Hamrani and Ibtissem Lassoued touch on how shifts in the geopolitical ecosystem have impacted a number of financial crime issues. Our experts' articles traverse the globe highlighting how current affairs in the US, UK, the EU, China and the Middle East are influencing political decisions aimed at addressing the threat of corruption and other forms of financial crime.

In this month's General section, Martin Hayward offers practical advice on how best to deliver a telecommunications project in the Middle East/Africa region where compliance risk is a real threat to a supplier's business (page 27).

Peter Smith of our DIFC Litigation team examines an interesting way in which agreements between Ras Al Khaimah and the DIFC's Dispute Resolution Authority, aimed at encouraging closer co-operation between the two jurisdictions, were put to the test in a mock enforcement exercise in which Al Tamimi & Company was invited to participate (page 15). He concluded that the exercise will be an important precedent for actual future enforcement applications.

When our Transport & Insurance Team analyses a decision by the Dubai World Tribunal ('**DWT**') regarding the establishment of limitation funds, they consider whether the Dubai Courts might, one day, be persuaded by the DWT's reasoning (page 33).

In Sharjah, our Real Estate Team explores the increased obligations under a recent resolution governing real estate development projects highlighting the broader regulatory powers of the Emirate's real estate regulatory authority (page 19).

In our Jurisdiction Update Nick O'Connell and his TMT Team take a targeted look at telecoms licensing in the largest telecoms market in the Middle East, Saudi Arabia, whilst advising clients to familiarise themselves with the licensing categories and ensure they obtain the appropriate licences (page 103).

Staying in the Kingdom our Corporate/Commercial Team summarises the key points of the 2018 Corporate Governance Regulations which are aimed at achieving transparency, fairness and integrity in all business transactions (page 109).

An important topic in this month's edition looks at the implications of the tax blacklisting of the UAE and Oman by the European Union and underlines the UAE's efforts to secure its removal from the blacklist (page 23).

I hope you enjoy this month's issue and find the content interesting and informative.

Should you have any questions about this month's topics, please feel free to reach out for further information.

Best wishes,

Husam Hourani

h.hourani@tamimi.com

CONTENTS

Judgments

Enforcement of Foreign Arbitral Awards in the UAE: Paving the Way for a New Enforcement Regime 9

Articles

Recent Development in Financial Services Regulation in the UAE 11

DIFC Courts Enforce Ras Al Khaimah Order for the First Time 15

Real Estate Development in the Emirate of Sharjah 19

A Detailed Look into the Implications of the Tax Blacklisting of the UAE and Oman by the EU 23

Delivering the Telco Deal Right: Practical Considerations for Suppliers Managing Compliance Risk 27

Testing the Limits: Is it Finally Possible to Establish a Limitation Fund in the UAE? 33

Jurisdiction Update

An Overview of Telecoms Licensing in Saudi Arabia 103

Corporate Governance Regulations for Non-Listed Joint Stock Companies in Saudi Arabia 109

UAE Federal Gazette 114

News & Events 116

Firm Profile 118

Focus: Regional Financial Crime Practice

The Falcon's View: What the European Union's SPV for Trade with Iran Means for Businesses in the Middle East 39

Tackling the Prickly Issues: Nazaha's Efforts to Unearth Corruption in Saudi Arabia 45

Wars & Walls of the Dragon: China's Geopolitical Ties and Sanctions Risks in the Middle East 51

Still A Good Guard Dog? A review of the United Kingdom's financial crime structures post-Brexit 57

Going After the Lion's Share: The UAE's Changing Approach to Foreign Direct Investment in Technology and its Financial Crime Implications 61

Float Like a Butterfly, Sting Like a Bee: Kuwait's National Anti-Corruption Strategy to Take the Fight to Graft 67

Can a Leopard Change its Spots? Lessons from the Transparency International Corruption Perceptions Index 2018 71

Sniffing Out Dirty Money: Combining the Ancient and the New in Egypt's Anti-Money Laundering Policy 77

Showing the Sharp End to Public Corruption: Dubai's New Financial Audit Authority 83

Learning to Adapt: The UAE's New Anti-Money Laundering Law and Matching FATF Standards 89

Serpents in the Sand: Kickbacks in the Healthcare Industry 95

Reaching New Heights: Fighting Financial Crime in Oman 99

Enforcement of Foreign Arbitral Awards in the UAE: Paving the Way for a New Enforcement Regime

Law Update Judgments aim to highlight recent significant judgments issued by the local courts in the Middle East. Our lawyers translate, summarise and comment on these judgments to provide our readers with an insightful overview of decisions which are contributing to developments in the law. If you have any queries relating to the Law Update Judgments please contact info@tamimi.com

Mosaab Th. Aly
Senior Associate
Dubai, UAE
m.aly@tamimi.com

Zane Anani
Senior PSL
Dubai, UAE
z.anani@tamimi.com

Introduction

In an article entitled, "*Enforcement of Foreign Arbitral Awards in the UAE: Paving the Way for a New Enforcement Regime*", published in the December 2018/January 2019 issue of Law Update, we suggested that Cabinet Decision 57 of 2018 regarding the Executive Regulation of the UAE Civil Procedure Law ('**Cabinet Decision**') would have a significant impact on the procedure regarding the enforcement of foreign arbitral awards. The Cabinet Decision has now entered into force as of 16 February 2019, following its publication in the Official Gazette dated 16 December 2018.

This article will discuss the new enforcement regime in light of this Cabinet Decision, as well as briefly discuss recent case in which Al Tamimi & Company acted for one of the parties that made an application to an Execution Judge regarding the enforcement of a foreign arbitral award. This was one of the first orders issued following the Cabinet Decision.

Background

The UAE issued Federal Arbitration Law no. 6 of 2018 on the 15 May 2018 ('**UAE Arbitration Law**'), which introduced substantial improvements to the procedure for enforcing arbitral awards.

As mentioned in previous articles commenting on the UAE Arbitration Law, one of the improvements includes the power to enforce arbitral awards through an expedited regime. This is done by filing a petition with the Chief Justice of the Court of Appeal who issues his order on the ratification petition within 60 days of the filing date according to Article 55 of the UAE Arbitration Law. The ratification/enforcement order, once issued by the Chief Justice or to whomever he/she delegates, is enforceable with immediate effect and will enable the award creditor to get the award stamped in accordance with the execution formula and take all execution procedures against the award debtor. This is because the ratification order is deemed an 'Order on Petition' which is immediately enforceable by operation of law.

While the UAE Arbitration Law repealed the arbitration chapter found in Chapter III of the UAE Civil Procedure Law (Federal Law 11 of 1992 as amended) (Articles 203-218), it did not repeal Chapter IV on the Execution of Foreign Judgments, Awards and Instruments (Articles 235-238) of the UAE Civil Procedure Law.

Federal Decree no. 10 of 2017 issued on 28 September 2017 (which amended the UAE Civil Procedure Law in several respects), provided that Articles 5 to 19, 42 to 54, 70 to 83, 125 to 136, 140 to 149 and 219 to 331 of the UAE Civil Procedure Law would remain in force until repealed by the issuance of a Cabinet Decision which would regulate those areas of the Civil Procedure Law.

The Cabinet Decision now provides a new set of rules that regulate the enforcement of foreign arbitral awards. It repeals and replaces the rules set out under Articles 235 to 238 of the UAE Civil Procedure Law. As we discussed in our previous article, the Cabinet Decision has significantly improved the enforcement regime of foreign arbitral awards by ensuring the process is expedited and less costly:

1. an application for the enforcement of a foreign arbitral award will involve filing a petition directly with the Execution Judge who will issue his/her order within a maximum of three days; and

2. the order of the Execution Judge will be enforceable with immediate effect because it is to be considered as an 'Order on Petition' which is immediately enforceable by operation of law according to Article 78 of the Cabinet Decision.

It is worth noting that whilst the Cabinet Decision provides for the procedural rules for the enforcement of foreign arbitral awards as set out above, the substantive conditions of enforcement of foreign arbitral awards will still continue to be governed by the New York Convention, particularly Article IV of the New York Convention, which will have supremacy over the Cabinet Decision (as confirmed in Article 88 of the Cabinet Decision).

Recent Decision Enforcing a Foreign Arbitral Award Pursuant to the New Cabinet Decision

In one of the first cases initiated to enforce a foreign arbitral award, Al Tamimi & Company acted for a party in applying to enforce a London seated-arbitral award in the UAE against an entity based in Sharjah.

In this case, a petition was filed with the Execution Judge of the Sharjah Federal Court, to enforce the foreign arbitral award pursuant to the procedural rules set out under Articles 85 and 86 of the Cabinet Decision and the conditions set out under Article IV of the New York Convention.

Once the petition was filed with the Execution Judge, an execution file was created and a decision was issued by the Execution Judge notifying the award debtor to pay the claimed amount set out in the arbitral award within 15 days of service upon the award debtor. At the time of writing this article, the outcome of the process remains to be seen. In the event the debtor fails to abide by the Execution Judge's decision, it is expected that the Execution Judge will commence execution against the debtor pursuant to the procedures set out under the Civil Procedure Law and the Cabinet Decision, i.e. freezing assets and funds as well as taking the necessary action to auction off such assets in order to recover the amount as set out in the award.

Conclusion

The Cabinet Decision has significantly improved the UAE regime regarding the enforcement of foreign arbitral awards by expediting the process to obtain an order, and it is already having an impact in practice. This represents another positive development for arbitration in the UAE.

Al Tamimi & Company's litigation and arbitration teams regularly advise on the enforcement of arbitration awards and judgments. For further information please contact Mosaab Th. Aly (m.aly@tamimi.com).

Recent Development in Financial Services Regulation in the UAE

Margaret Elder
Senior Associate
Dubai, UAE
m.elder@tamimi.com

Sarah El Serafy
Senior Associate
Dubai, UAE
s.elserafy@tamimi.com

Introduction

It has been another busy year for legislators in the United Arab Emirates ('**UAE**'), as there has been a number of changes to the regulatory framework in the financial services sector.

This article looks back on some key financial services' legal and regulatory developments in 2018 and early 2019.

United Arab Emirates

New Banking Law: Federal Law No 14 of 2018

After nearly 40 years, the law which underpins the UAE Central Bank ('**CB**') and the banking industry in the UAE has been replaced. The 1980 Union Law has been repealed and replaced by Federal Law No 14 of 2018 regarding the Central Bank and Organization of Financial Institutions and Activities ('Banking Law'). The CB regulations currently in place shall remain in full force and effect until new regulations are issued by the CB.

The new Banking Law does not apply to the financial free zones (the Dubai International Financial Centre ('**DIFC**') and the Abu Dhabi Global Market ('**ADGM**')). The Banking Law strengthens the CB's ability to exercise effective regulatory control over the financial sector in line with international best practices and standards.

Finance Leasing Law: Federal Law No 8 of 2018

The finance lease law which was approved by the UAE's National Council in 2018 is now in force having been published in the Official Gazette.

The law will be supplemented by a set of implementing regulations applicable to the licensing of finance lease activities in the UAE. The law mandates that the CB regulate lease financing and accordingly the CB shall issue its regulations to licence finance lease activities within the UAE.

The New AML Law: Federal Law No. 20 of 2018 on Anti-Money Laundering, Combating the Financing of Terrorism and Financing of Illegal Organisations

The new Anti-Money Laundering ('**AML**') law was issued on 30 October 2018 and has introduced more enhancements to the processes already in place for combating money-laundering crimes. These include additional enhanced investigation procedures (including the ability to permit a transaction in order to trace the funds and take action), increased fines and penalties, as well as establishing the process for freezing funds associated with financial crime. As highlighted in the Financial Free Zones section of this Article below, the UAE has been working to enhance its existing AML regime, so it aligns with the 2012 Financial Action Task Force ('**FATF**') Recommendations.

Central Bank Notice on Fees: Central Bank's circular No. 157/2018

In this circular the CB has set out the maximum caps on fees and charges which can be levied by banks. All fees set out in the circular are exclusive of UAE VAT charges. It appears from the provisions of the circular that banks can charge VAT on top of the maximum caps on the fees set out in the circular. This is unlike the previous position of the CB in an earlier circular in 2017 in which it instructed the UAE banks not to levy VAT on fees and charges and to absorb the tax amounts until receipt of further instructions from the CB.

Central Bank Dormant Accounts Regulation

For many years banks have been enquiring about the position of dormant accounts held by UAE banks. On 24 April 2018, the CB announced the Dormant Accounts Regulation pursuant to Circular No. 10 of 2018. This regulation explains the handling of dormant accounts and unclaimed balances; and sets out a framework for the control of dormant accounts; and procedures for enabling available balances of those accounts to be received by customers.

Central Bank Finance Companies Regulation

These regulations, issued in April 2018, replace the previous finance company regulations issued in 1996 and finance companies regulations for companies conducting business in accordance with Islamic sharia'a principles issued in 2004. These new regulations encompass Islamic and conventional finance companies and introduce significant regulatory changes to the regulatory requirements applicable to finance companies (including capital requirements) and set out the type of activities permitted to be carried out by a finance company in the UAE.

The Netting Law: Federal Law No 10 of 2018

The Netting Law was issued on 20 September 2018 regulating netting for the first time in the UAE and it follows the guidelines of the International Swaps and Derivatives Association ('**ISDA**') Model Netting Act 2006. The new Banking Law has also recognised netting, which is a significant legal development for the users of derivative contracts in the UAE. The provisions of the Netting Law may overrule the concept of gharar, which is prohibited under the UAE Civil Code.

The Public Debt Law: Federal Law No (9) of 2018 Regarding Public Debt

The law permits the Federal Government to issue sovereign debt for the first time in the UAE. The Public Debt Law allows for establishing markets for government debt instruments through which those instruments can be traded in UAE markets, and hence become a source of funding for government projects. The law is a significant step in the development of the UAE's debt capital market. It will also support the CB to manage the banking liquidity.

The Regulation of Derivatives Contracts: Chairman of the Securities and Commodities Authority Board of Directors' Decision No. (22/R.M) of 2018.

The UAE Securities and Commodities Authority ('**SCA**') has issued regulations concerning certain types of derivative contracts for the first time. However, the scope and types of contracts that will be regulated remains unclear, as the SCA has not currently provided any separate guidance to clarify. It prima facie appears that the intention is to regulate: (i) contracts listed and traded on the local exchanges in the UAE; and

(ii) contracts where the underlying investments are securities listed on UAE markets. Parties to derivatives contracts had until 30 January 2019 to adjust their positions to accord with the regulation in order to avoid any adverse impact on existing contracts. These derivative regulations are newly issued and the position would need to be monitored and considered once the SCA has issued further guidance.

FinTech Regulatory Sandbox Guidelines: Decision of the Chairman of the SCA Board of Directors No. (28 / Chairman) of 2018 Approving the Fintech Regulatory Framework

The SCA has issued regulations in connection with its FinTech regulatory sandbox. A sandbox is defined in the regulations as a process-based framework that allows entities to test innovative products, services, solutions and business model under relaxed regulatory environment, but within a defined space and duration. Since the concept of regulatory sandbox has become widely spread across the financial services sector, the SCA has taken the initiative to promote innovation by developing its regulatory framework.

Chairman of the SCA Board of Directors' Decision No. (19/R.M) of 2018 Concerning the Regulation of the Central Depository Activity

These regulations aim to regulate the central depository activity in the UAE and the licensing requirements for depositary centres in the Emirates.

Chairman of the SCA Board of Directors Decision No. (20/R.M) of 2018 Concerning the Offering or Issuance of Islamic Securities

This decision relates to the issuance or offering of any Shari'a compliant securities in the UAE (including by foreign entities) or outside the UAE by UAE based issuers. The decision imposes various obligations in relation to such offers.

Chairman of the SCA Board of Directors' Decision No. (18/R.M) of 2018 Concerning the Licensing of Credit Rating Agencies

Pursuant to these regulations, the SCA is now regulating credit rating agencies in the UAE. A credit rating agency may only be carried out in the UAE subject to obtaining a licence from the SCA.

"There has been a number of amendments and additions made to the regulatory regimes over the last year."

UAE Financial Free Zones

In the DIFC and the ADGM there has been a number of amendments and additions made to the regulatory regimes over the last year. By way of summary we have highlighted below only some of the more significant updates.

'Passporting' of Domestic Funds within the UAE

In November 2018, the SCA, the Dubai Financial Services Authority ('**DFSA**') and the Financial Services Regulatory Authority ('**FSRA**') agreed on a common legislative framework which allows domestic funds, to be promoted anywhere in the UAE, in line with agreed provisions and licensing regulations. Each regulator will establish a notification and registration facility which will allow for the promotion of domestic funds (i.e. funds set up in the UAE, the DIFC or the ADGM) to potential investors situated anywhere within the UAE.

The Fund Protocol Rules of the DFSA Rulebook set out the DFSA's requirements regarding how Fund Managers or Authorised Firms can register domestic funds for passporting. In the ADGM, the recently issued Fund Passporting Rules sets out the FSRA's requirements. The SCA has also just recently circulated its fund passporting rules.

Updates to the Financial Free Zones AML Regimes

In light of the upcoming FATF Mutual Evaluation of the UAE, the DFSA and the FSRA have initiated changes to its AML regime to ensure compliance with the 2012 FATF Recommendations.

In October 2018 the DFSA implemented its amendments to the Anti-Money Laundering, Counter-Terrorist Financing and Sanctions Module of the DFSA Rulebook ('**AML Rules**') and the DIFC Regulatory Law 2004. In summary, the various changes related to clarifying the DFSA's AML remit, the DFSA's supervision of Designated Non-Financial Business Professionals and the implementation of significant amendments to the AML Rules to ensure compliance with the FATF's 2012 Recommendations. The sections of the AML Rules updated include customer due diligence, record keeping, new technologies, wire transactions, reliance on third parties, internal controls and foreign branches and subsidiaries and higher risk countries.

On 11 February 2019, the FSRA issued a consultation paper on its proposed revisions to the AML regime in the ADGM.

New DIFC Companies Law and Enhancements to the DFSA's Funds Regime

As already discussed in greater detail in previous Al Tamimi updates, in November 2018 the DIFC introduced a new companies' regime which included the issuance of a new Companies Law (DIFC Law No. 5 of 2018) which came into effect on 12 November 2018. The new companies' regime aims to provide greater certainty and flexibility to companies by introducing the concept of private and public companies, where private companies are subject to less stringent requirements. Various other amendments were introduced including enhanced directors' duties. An important point to note in respect of the new DIFC regime, is that DFSA regulated firms, are exempt from the new Ultimate Beneficial Owner regulations.

Following this, the DFSA also introduced some enhancements to their funds' regime. Some of the changes include: a new distinction between a public and private company as introduced by the Companies Law; removing the investor number-based criteria in the Exempt Fund and Qualified Investor Fund definitions; introducing Exchange-Traded Funds as a new specialist class of fund; making some changes relating to Property Funds; and introducing a new model for internal management of an Investment Company, where such a company can be internally managed by its licenced sole corporate director, subject to certain requirements.

Regulation Crypto Asset Activities in the ADGM

Following on from previous a guidance issued by the FSRA in 2017 regarding its regulatory treatment of initial coin offerings, on 25 June 2018 the FSRA issued its framework for the regulation of crypto asset activities in the ADGM. This included introducing a new Regulated Activity of 'Operating a Crypto Asset Business' which covers exchanges, custodians and other intermediaries engaged in crypto asset activities.

In accordance with the ADGM's guidance operating a Crypto Asset Business involves undertaking one or more Crypto Asset activities in or from the ADGM. Crypto Asset activities include dealing, managing, advising, arranging and marketing in relation to Accepted Crypto Assets (as further defined in the FSRA's Rules) or operating a Crypto Asset Exchange or operating as a Crypto Asset Custodian.

Regulation of Private Financing Platforms in the ADGM

On 10 September 2018 the FSRA issued its framework for operators of financing or funding platforms for non-public companies, referred to as 'Private Financing Platforms'. The new Regulated Activity of 'Operating a Private Financing Platform' is defined to capture a number of alternative financing arrangements including equity funding, private placement and invoice financing. Under the new framework the FSRA has also updated its Conduct of Business Rulebook to include rules applicable to Operating a Private Financing Platform. They have also issued detailed guidance covering the authorisation criteria for potential applicants and ongoing regulatory requirements of operators of Private Financing Platforms.

Al Tamimi & Company's Banking & Finance team regularly advises on financial services regulatory matters. For further information, please contact Sarah El Serafy (s.elserafy@tamimi.com) or Margaret Elder (m.elder@tamimi.com).

DIFC Courts Enforce Ras Al Khaimah Order for the First Time

Peter Smith
Senior Associate
Dubai, UAE
p.smith@tamimi.com

DIFC – Ras Al Khaimah Co-operation Agreements

In December 2016, the Emirate of Ras Al Khaimah and the DIFC's Dispute Resolution Authority ('**DRA**') entered into a set of agreements and memoranda of understanding aimed at developing further co-operation between the two jurisdictions, as Ammar Haykal explained in our February 2017 edition of Law Update.

As Ammar noted, one of the key components of the new relationship was an Agreement on Judicial Co-operation with the DIFC Courts, which had been entered into by the Executive Council of the Government of Ras Al Khaimah, the Judicial Council of Ras Al Khaimah and the Ras Al Khaimah Courts on 12 December 2016. In that agreement, the Executive Council confirmed that the government agencies of Ras Al Khaimah, as well as any local or foreign investors operating in the Emirate, were now able to enter into contracts expressed to be subject to the exclusive or non-exclusive jurisdiction of the DIFC Courts.

The Agreement on Judicial Co-operation provides for the mutual enforcement of judgments and orders between the Ras Al Khaimah Courts and the DIFC Courts so that judgments issued in Ras Al Khaimah may now be enforced in the DIFC Courts in accordance with the Judicial Authority Law (no.12 of 2004 as amended). In return, the Ras Al Khaimah Courts agreed to directly enforce DIFC Court judgments of any kind, notably including interim orders as well as judgments relating to wills and probate matters, provided that the following conditions are satisfied:

- the subject of enforcement is within the Emirate of Ras Al Khaimah (whether property located in the Emirate or relating to a person legally residing there);
- the judgment is final, in the sense of being capable of execution, and accompanied by an execution writ issued by the DIFC Courts;
- the execution writ, along with a translation into Arabic, has been submitted to the execution judge of the Ras Al Khaimah Courts;
- the conditions set out in the Federal Civil Procedure Law have been complied with; and
- a letter has been received by the Ras Al Khaimah Courts from the DIFC Courts' Registry asking for the judgment to be enforced.

The effect of these provisions was to remove the need for claimants to take a DIFC Courts' judgment to the Dubai Courts for conversion into a Dubai Courts' judgment and subsequent referral on to the Ras Al Khaimah Courts under the so-called 'deputisation' process.

Putting the Agreements to the Test: the DIFC-RAK Mock Enforcement Exercise

The DRA approached Al Tamimi once the agreements were signed and had come into effect, asking us to participate in a reciprocal enforcement exercise to test the new mechanisms.

A mock order of the DIFC Courts was filed by Al Tamimi for enforcement in the Courts of Ras Al Khaimah, in an exercise that is still ongoing. After decisions in the Court of First Instance and Court of Appeal, the Ras Al Khaimah Court of Cassation is currently considering the mock enforcement application.

At the same time, we filed a reciprocal mock order with the Courts of Ras Al Khaimah for enforcement in the DIFC Courts. It is important to recognise that, although the facts of the exercise were made up and all judgments and orders made had no immediate effect, the legal machinery was tested as though the whole exercise were real.

The fictitious facts are relatively simple. A 'claim' for just under AED1m was brought in Ras Al Khaimah stemming from an alleged breach of an international commodity murabaha contract that was to operate as a tawarruq. The lender, 'Mohammad A. Bank LLC' (the '**Bank**') sued the borrower, 'Ahmed B. Ltd', (the '**Borrower**') for both the costs due under the agreement and the profit margin after the Borrower ceased making his due payments. The Court in Ras Al Khaimah 'awarded' the Bank around AED 1.7m in damages, representing the Borrower's outstanding obligations. The Borrower did not file any appeal within the prescribed time period, nor did he make any payment to the Bank in satisfaction of the judgment.

On the basis that the Borrower held property in the DIFC, the Bank filed an application in the DIFC Courts for the recognition and enforcement of the judgment pursuant to the DIFC Court Law (no.10 of 2004), the Judicial Authority Law, the Agreement on Judicial Co-operation, and an earlier memorandum of understanding entered into in 2010 between the Courts of Ras Al Khaimah and the DIFC Courts.

H.E. Justice Omar Al Muhairi considered the Bank's application and made a (mock) enforcement order granting the application. In doing so, he recognised the judgment as binding within the DIFC and permitted that it be enforced in the same manner as a judgment or order of the DIFC Courts in accordance with the DIFC's Court Law. Judgment was entered against the Borrower for the award amount plus costs and interest.

Application to Set Aside the Enforcement Order

The Borrower then applied to set aside the DIFC enforcement order. Numerous points were taken by the Borrower including arguments that may not have been made had the exercise been real. These arguments were made in the absence of the risk of a real adverse costs order against the Borrower and to better achieve the aim of the exercise, which was to test whether the DIFC-RAK agreements had proper legal effect and could deliver what they intended.

In November 2018, Judicial Officer Nassir Al Nasser handed down his order with reasons rejecting the Borrower's set-aside application. His consideration of some of the parties' arguments is worth noting.

Issue 1: did the DIFC Courts have an inherent jurisdiction to enforce the RAK judgment, was the enforcement lawful under the DIFC's own laws, and even if the RAK judgment were recognised, should enforcement be refused?

The Borrower contended that the DIFC Courts had no power under its Court Law to make the enforcement order as neither the Bank nor the Borrower fell within Article 5 of the Judicial Authority Law (there was no connection with the DIFC nor did they opt into the

DIFC's jurisdiction in the underlying agreements) nor did the Agreement on Judicial Co-operation constitute an 'enactment' for the purposes of Part 45 of the Rules of the DIFC Courts, which provides general rules for the enforcement of judgments and orders. The Bank said that Article 24(1)(b) of the Court Law provided sufficient authority, as it permitted the DIFC Courts to ratify any judgment, order or award of any recognised 'Courts of Dubai or [the] United Arab Emirates'. Judicial Officer Al Nassir rejected the Borrower's arguments, finding firstly that the DIFC Court Law is clearly a '*DIFC Law' for the purposes of the Judicial Authority Law and the RAK Court plainly a court of the United Arab Emirates. Accordingly, the DIFC Court has jurisdiction to ratify the RAK Court's Judgment.*'

He then went on to consider the doctrine of 'derived judgments', whereby a foreign judgment recognised and enforced by the DIFC Courts became a DIFC Courts' judgment that fell within the scope of Article 7(6) of the Judicial Authority Law. Article 7(6) says that judgments, decisions, orders and ratified arbitral awards rendered outside the DIFC by any Court other than the Dubai Courts shall be executed within the DIFC in accordance with the process prescribed in the Rules of the DIFC Courts. The doctrine was explained by then Chief Justice Michael Hwang C in the DIFC Court of Appeal in *DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings PJSC* [2015] DIFC CA 007 ('**DNB Judgment**'), building on the Court's earlier jurisprudence in *Bocimar International NV v Emirates Trading Agency LLC* [2015] DIFC CFI 008 (Justice Sir John Chadwick) and *Barclays Bank PLC & others v Essar Global Fund Limited* [2016] DIFC CFI 006 (Justice Sir Richard Field).

The DNB Judgment also provided sufficient authority for the proposition that the Judicial Authority Law and the DIFC Court Law were the necessary enactments required by the Rules of the DIFC Court. The non-binding nature of the Agreement on Judicial Co-operation was irrelevant. As a result, the enforcement order was not outside the powers of the DIFC Courts under its own rules.

The Borrower argued that the various RAK agreements could not be applied retrospectively to agreements between the Bank and the Borrower as there could not have been any contemplation at the relevant time by the Borrower that a dispute between the parties could lead to enforcement against his property in the DIFC or through the DIFC Courts. The 2010 memorandum of understanding was not legally binding and did not provide for enforcement in the DIFC. The Judicial Officer rejected these arguments on the grounds that the wording of Article 24(1)(b) was sufficient authority for enforcement, aside from the DIFC-RAK agreements.

Issue 2: was the RAK judgment final and conclusive?

The Borrower argued that the MOU with Ras Al Khaimah required the judgment for enforcement to be final and conclusive and that the mere fact that the Borrower had not appealed in time was not enough (although he did not argue that an averred dismissal or refusal of any appeal was required). The RAK judgment was theoretically open to judicial review and could not be characterised as final and conclusive. The Bank rejected this arguing the common law principles on recognition and enforcement applied whether or not they were stipulated by the agreements with Ras Al Khaimah. On the facts, the Borrower failed to appeal the RAK judgment within the prescribed period or at all. The Judicial Officer was not willing to go as far as the Bank invited him to go and imply the common law rules on recognition and enforcement into the RAK agreements, noting instead that the documents were '*aided and gaps filled by common law principles*'. The Judicial Officer instead noted that reciprocity of enforcement under the agreements (RAK to DIFC and vice versa) required that the judgments of each court be 'placed on an equal footing'.

Issue 3: was enforcement of the RAK judgment contrary to the overriding objective of the rules of the DIFC Courts?

The Borrower argued that enforcement was contrary to the Overriding Objective, which mandates, inter alia, that the Court is required to deal justly with the cases before it. Justice demanded that the enforcement order be set aside so the Courts in Ras Al Khaimah could re-hear the dispute and hear the enforcement application. The Borrower had been unrepresented before those Courts and he argued he had been deprived of the chance to present his case in full. The Bank opposed this on the grounds that it had a right to recognition and enforcement of its judgment, which was required by statute. To deny the force of this right would be procedurally unfair and giving effect to the Overriding Objective did not mean such a denial. In concurring with the Bank, the Judicial Officer noted that the RAK judgment was not, on its face, defective in any way, and the Overriding Objective could not be applied by the DIFC Courts to proceedings in other jurisdictions.

Issue 4: was enforcement of the RAK judgment abusive of the DIFC Courts' process because it was against assets located outside the DIFC?

The Borrower's final set of arguments turned on the fact that some of his assets against which the Bank sought enforcement were actually within the DIFC, i.e. 'onshore' Dubai. This raised the spectre, firstly, that the Bank would bring further proceedings in the Dubai Courts for enforcement, and second, this would trigger a referral to the Joint Judicial Committee established by Decree 19/2016 that decided on conflicts of jurisdiction between the Dubai and DIFC Courts.

The Judicial Officer and the Bank relied on the clear wording of Articles 7(6) of the Judicial Authority Law and 42 of the DIFC Court Law (the latter specifically states that judgments 'ratified by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law;). The Bank had the right to enforce in the DIFC and that could not be precluded by any other rights it had to enforce elsewhere. In any event, the Bank had the right to onward enforce the DIFC Courts' enforcement order in the Dubai Courts, in a sequential plan of attack.

The Borrower's application to set aside therefore failed in its entirety.

The future

As Ammar has previously noted, the real impact of the DIFC-RAK agreements will only be seen once they are used and become embedded in the respective legal systems. The reasoning in the DRA-RAK moot exercise is very important because it tests, in an adversarial format, the recognition and enforcement processes. As such, notwithstanding the necessarily limited factual matrix, this exercise will be an important precedent for actual enforcement applications in the future.

Al Tamimi & Company's DIFC Litigation team regularly advises on the recognition and enforcement of judgments from other UAE Courts. For further information, please contact Rita Jaballah (r.jaballah@tamimi.com) or Peter Smith (p.smith@tamimi.com).

Real Estate Development in the Emirate of Sharjah

Salman Khaled
Paralegal
Dubai, UAE
s.khaled@tamimi.com

A new legal framework governing real estate development projects in Sharjah was recently introduced by the Sharjah Executive Council. Developers, real estate brokers and other consultants should carefully consider this new regime and, in particular, the expanded regulatory function of the Sharjah Real Estate Registration Department ('**SRERD**').

The applicable law is Executive Council Resolution No. (34) of 2018 on Selling Real Estate Units in the Emirate of Sharjah ('**Resolution**'), which revokes the previous Executive Council Resolution No. (25) of 2011 and any other provisions inconsistent with the Resolution.

In this Article, we highlight and discuss the key elements of the Resolution.

SRERD - Expanded Regulatory Function

The Resolution provides SRERD with wider regulatory authority over real estate projects, and in particular, the ability to regulate and monitor off-plan developments (including aspects such as developer licensing, project registration, marketing and sales).

SRERD will also have responsibility for coordinating with other governmental or non-governmental bodies regarding the issue or suspension of relevant licences, and for supervision of development projects in the Emirate of Sharjah.

Project Registration - General

It is worth noting that the previous laws provided that project licences were granted on an exclusive basis to UAE nationals and GCC nationals. Other nationals must seek the approval of H.H. the Ruler of Sharjah.

The Resolution now provides in Article 4 that developers may be:

1. UAE nationals and GCC nationals; or
2. other nationalities (whether or not resident in the UAE) approved by H.H. the Ruler of Sharjah in respect of approved areas.

Project Registration - Additional Developer Obligations

The Resolution imposes a number of new obligations on developers, including the requirement to:

1. provide SRERD a copy of the building permit issued by competent authorities;
2. provide SRERD with a copy of the certificate of approval of name for the project issued by the competent authority; and
3. open a bank account in the name of project, from which funds shall be allocated for construction and management of the project in accordance with the Resolution.

These obligations indicate that SRERD will actively and closely monitor developers and the progress of development projects in the Emirate of Sharjah.

Bank Guarantee – Retention Amount

Similar to the previous position, the Resolution requires that developers provide a bank guarantee to SRERD as a condition of project registration (20 percent of the project value).

The Resolution divides the bank guarantee into four parts, where the first, second and third parts are released after the developer submits a technical report confirming the project completion percentage certified by the relevant authorities in the following manner:

Bank Guarantee	Percentage of Completion
The first part of (25%) of the total guarantee	25%
Second part of (25%) of the total guarantee	50%
Third part of (25%) of the total guarantee	75%

With respect to the release of the final 25 percent of the total guarantee, the Resolution requires that the following conditions now be satisfied:

1. the release of any mortgage affecting the property;
2. the developer has rectified any violations under the Resolution or applicable law, if any;
3. the connection of public services and utilities to the project;
4. a clearance certificate has been issued by Sharjah Electricity and Water Authority;
5. a certificate of completion has been obtained from Sharjah Municipality or the Roads and Transport Authority ('**RTA**');
6. sub-division of the development project and determine the areas in a scheme approved by the Sharjah Directorate of Town Planning and Survey;
7. all conditions and obligations arising from the plot purchase contract and with the government authorities have been fulfilled; and
8. title deeds (freehold or usufruct) for units in the project have been issued by SRERD.

Project Mortgage - Restrictions

Article 7 of the Resolution states that any property mortgage/development finance must be exclusively allocated for the construction, implementation and management of the project.

It further states that finance value shall not exceed (50 percent) of the project value (as approved in the building permit issued by the municipality or approved by infrastructure licence of the RTA). This value may be increased in exceptional cases with the consent of and under the conditions determined by the Sharjah Executive Council.

Further, Article 8 states that SRERD shall review the mortgage contract between the developer and the mortgagee before it is executed. SRERD may also contact the banks operating in the UAE, including the Central Bank, to ensure that any decisions issued by SRERD in this regard are put into effect and also to obtain proof of the release of the relevant mortgage prior to issuance of the building completion certificate for the project.

In line with the real estate laws in the Emirate of Sharjah, the real estate mortgage shall be valid only after registration.

Payment Milestones for Off-Plan Sales

Article 9 of the Resolution prescribes that purchasers' payments due under an off-plan sale and purchase agreement must be in proportion to the construction progress for the project. That progress shall be determined by the project status reports issued by Sharjah Municipality or the RTA (as applicable).

Further, the value of the first instalment paid by the purchaser must not exceed (20 percent) of the purchase price, unless the parties expressly agreed otherwise in the sale and purchase agreement.

Registration Fees

The Resolution provides for the following registration fees to be paid:

1. if the purchaser is a UAE national or GCC national: one percent of the purchase price paid by the seller and two percent of the purchase price paid by the purchaser; or
2. if the purchaser is not a UAE national or GCC national: four percent of the purchase price fully paid by the purchaser.

SRERD and the relevant authorities shall not register sale contracts that are not in the form ratified by SRERD.

Management of the Development

The Resolution retains the previous requirement that following completion, a developer retains ownership of at least 10 percent of the units in a project.

The Resolution now provides an alternative to that approach, whereby the developer may provide SRERD with a bank guarantee equal to 10 percent of the project value. This guarantee must be unconditional and payable on demand.

A developer may not dispose of the retained units or, if applicable, request the release of the bank guarantee unless it provides proof of the establishment of a unit owners' association for the project, including the election of its board of directors in accordance with Law No. (4) of 1980 Regulating Ownership of Multi-Storey Buildings, and any other relevant legislation in this regard.

Marketing of Real Estate Development Projects

Compared with the previous laws, the Resolution sets further obligations on the marketing and advertising of development projects in the Emirate of Sharjah. These include:

1. subject to coordination with the other relevant authorities, SRERD shall be responsible for issuing advertising permits for the marketing and sale of all properties;
2. all owners, developers and licenced real estate brokers in the Emirate of Sharjah must obtain written approval from SRERD prior to advertising properties for sale in various media, social networking sites and any other means; and
3. licenced real estate brokers outside the Emirate of Sharjah must obtain SRERD's prior approval to advertise projects located in the Emirate of Sharjah.

It is apparent from the above that SRERD intends to take a stricter approach with respect to the marketing and advertising of development projects.

> **Compared with the previous laws, the Resolution sets further obligations on the marketing and advertising of development projects in the Emirate of Sharjah.**

Cancellation of Real Estate Development Projects

The Resolution generally retains the previous regime for a developer to seek cancellation of a registered project.

Developers must still apply to SRERD for cancellation and provide details in support. If SRERD, in its discretion, accepts the developer's application, then the developer must follow a notification procedure.

Importantly, there is now a requirement that notification of the proposed project cancellation be published in two local newspapers and in both Arabic and English, using the prescribed form of declaration.

As per the previous regime the developer must also notify the purchaser(s) of the proposed cancellation of a development project through registered mail.

The time period in which purchaser(s) must notify SRERD of their objection to the cancellation application remains at 15 days from the date of receiving the developer's notification.

If the relevant period expires, without objection by any purchaser, then the cancellation procedures of the registration or suspension of services for the project shall be completed by SRERD and the relevant competent authorities. However, if a purchaser objects to the cancellation of the project, within the period specified in the declaration, then the cancellation procedures shall be suspended by SRERD until the developer has settled all related disputes and objections.

Violations and Penalties

The Resolution broadens the scope of violations, and it identifies further violations that are subject to penalties. These are detailed in the schedule attached to the Resolution.

In summary, the penalty regime prescribes that:

1. penalties may be imposed for the contravention of the Resolution and decisions issued thereunder;
2. the penalty amount may be doubled in the event of a repeat violation within one year from the date of the first violation;
3. in the case of repeat infringements, relevant authorities may temporarily or permanently cancel or suspend the developer's licence; and
4. concerned parties shall refrain from continuing to provide government services and stop all work, unless a defaulting developer amends all violations within the period determined by SRERD in accordance with the Resolution.

In conclusion, the issuance of the Resolution provides SRERD (and other relevant authorities in coordination with SRERD) with wider regulatory authority over real estate development projects in the Emirate of Sharjah. The authority for SRERD to more rigorously monitor and ensure compliance by developers and other parties operating in the real estate market in the Emirate of Sharjah can only boost confidence of investors in the real estate sector. Developers, in particular, should familiarise themselves with these new regulations to ensure compliance going forward.

Al Tamimi & Company's Real Estate team regularly advises on real estate matters. For further information, please contact Andrew Balfe (a.balfe@tamimi.com) or Salman Khaled (s.khaled@tamimi.com)

A Detailed Look into the Implications of the Tax Blacklisting of the UAE and Oman by the EU

Shiraz Khan
Head of Taxation
Dubai, UAE
s.khan@tamimi.com

On 12 March 2019 the EU issued an updated list of non co-operative tax jurisdictions (commonly referred to as the '**EU tax blacklist**') and added the UAE and Oman along with eight other jurisdictions to the previous EU tax blacklist of five countries. This article sets out the background and discusses the implications of the blacklist for businesses operating and seeking to invest in the UAE.

What Happened and Why?

The EU published an initial tax blacklist of 17 countries including the UAE and Bahrain on 5 December 2017. At that time, Oman and Qatar were included on a watch list of jurisdictions that had committed to change their tax rules to comply with EU requirements and would be monitored based on these commitments (known as the 'grey list'). However, on 23 January 2018 and 13 March 2018, the UAE and Bahrain respectively, together with 10 other countries, were subsequently removed from the EU tax blacklist and transferred to the 'grey list' based on commitments that were made by these countries to meet EU standards.

Unlike five countries that made no commitments to the EU, both the UAE and Oman were transferred to the current EU tax blacklist not due to lack of commitment but rather the time it has taken to implement the commitments previously made to the EU in 2017. The UAE had committed to enact substantive legislation on local substance requirements (i.e. the minimum level of presence required in the UAE in order for an entity resident in the UAE to qualify for benefits under a double taxation treaty concluded by the UAE) by 31 December 2018. Oman had committed to implement the automatic exchange of information and ratify the OECD Convention on Mutual Administrative Assistance in Tax Matters ('**MAC**') by the same date. However, both the UAE and Oman were unable to deliver on this promise by the agreed deadline and the subsequent monitoring period (which had been extended to February 2019) and thus were added to the blacklist.

Currently, 34 countries are on the EU 'grey list' and these jurisdictions will continue to be monitored for progress based on commitments made in 2019. It is understood that around 25 countries were removed from the previous 'grey list' and are now considered to be 'co-operative jurisdictions' after they made changes to their domestic laws to meet tax transparency requirements, fair tax competition criteria and the OECD's Base Erosion and Profit Shifting ('**BEPS**') minimum standards.

EU Listing Criteria

The EU assessed jurisdictions for good tax governance based on the following agreed listing criteria:

- *Tax Transparency:* Compliance with international standards on automatic exchange of information and information exchange on request as well as ratification of the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known as '**MLI**') or conclusion of bilateral tax agreements with all EU counties to facilitate this information exchange. Until June 2019, countries only need to satisfy two out of three of the transparency criteria. Subsequently, countries will have to meet all three transparency requirements to avoid being listed;
- *Fair Tax Competition:* The country should not have harmful tax regimes and should comply with the EU's Code of Conduct or the OECD's Forum on harmful tax practices. Countries that have no or zero-rate corporate taxation should introduce substance requirements to ensure that they do not facilitate artificial offshore structures designed to attract profit which do not reflect real economic activity in the country; and
- *Implementation of anti-BEPS measures:* A commitment to implement the OECD's BEPS minimum standards.

It is important to note that the EU blacklist and grey list are not fixed and will be monitored and updated at least on an annual basis. Countries on the blacklist that bring their tax systems fully in line with the EU's good tax governance criteria may be de-listed while other jurisdictions on the grey list that fail to deliver on commitments to the EU by the agreed deadline may be transferred to the blacklist in the future. The EU will also assess whether any other countries should be included in the EU listing process. It is possible that the EU tax blacklist may expand this year due to stricter transparency requirements that will be imposed by the EU from June 2019.

The EU blacklist is not the first 'tax blacklist'. In July 2018, at the request of the G20, the OECD also prepared a limited 'blacklist' of countries that failed to meet international transparency standards. However, the EU list is based on broader criteria and covers fair taxation and compliance with BEPS standards in addition to the requirement of transparency.

Some individual EU Member States including Spain, Belgium, Italy, France and the Netherlands and other countries like Brazil and Mexico also have their own domestic blacklists of non co-operative tax jurisdictions. In 2015, the European Commission ('**EC**') published a 'pan-EU' blacklist which was a consolidated version of the individual lists in EU countries rather than a list agreed by all EU countries.

However, the EC suggested that a common EU list would be a more effective way of encouraging fair tax competition and clamping down on abusive tax practices employed by various countries. In addition, a single EU blacklist would add more weight than arbitrary individual blacklists adopted at the Member State level based on varying criteria.

Progress made by the UAE and Bahrain

The UAE has made significant progress to bring its domestic tax system into line with international standards and enhance transparency as well as facilitate the exchange of information for tax purposes.

The UAE has a wide tax treaty network with over 80 double taxation treaties in place with other countries and many of these treaties already contain provisions on the exchange of tax information on a bilateral basis. The UAE has also implemented the Common Reporting Standard ('**CRS**') for the automatic exchange, amongst tax authorities, of financial account information of foreign tax residents. In this regard, the UAE signed the MAC on 21 April 2017 and ratified the same in April 2018. In July 2018, the UAE signed and subsequently ratified the Multilateral Competent Authority Agreement ('**MCAA**') to complete the implementation of the CRS and to facilitate compliance with various BEPS transparency measures including the exchange of country-by-country

reports under BEPS Action 13. The UAE also committed to the first exchange of information under the CRS by September 2018 and, in line with this commitment, shared information with 41 countries during 2018.

The UAE also became a BEPS inclusive member in May 2018 committing to the implementation of four minimum BEPS standards and a signatory of the MLI on 27 June 2018.

Bahrain also ratified the MAC and MCAA and provided information to 37 countries in 2018 and became a BEPS inclusive member in 2018 which led to its removal from the blacklist.

Consequences of an EU Tax Blacklist

The EU tax blacklist will have an impact for the blacklisted countries and for companies seeking to do business in or through those countries.

There are reputational issues for countries included on the blacklist and companies may be reluctant to use structures, enter into transactions and/or invest in or via the blacklisted countries which would impact inbound investment into those countries. There is also a risk that individual EU countries, as well as other countries, may use the EU tax blacklist as a basis for their own blacklists.

The EC has encouraged EU Member States to agree on co-ordinated sanctions to apply at national level against the listed jurisdictions. At the individual Member State level, a set of administrative and legislative tax counter measures have been agreed. Administrative tax measures include increased monitoring of transactions and more audits for taxpayers benefitting from such regimes or using structures via the blacklisted countries. Legislative tax measures include non-deductibility of costs, controlled foreign companies' rules, withholding tax measures, limiting any participation exemption, special documentation requirements and anti-abuse provisions.

Additional counter measures are in place at EU level. EU legislation restricts certain EU development and investment funds from being channelled or routed through entities in the blacklisted countries. Further, under EU's Directive on Administrative Cooperation in the field of taxation ('**DAC 6**'), there is a requirement to disclose and exchange information related to certain transactions between associated enterprises that are resident in an EU or blacklisted jurisdiction including cross-border payments between such enterprises. Finally, the country-by-country reporting includes stricter reporting requirements for multi-nationals with activities in the blacklisted countries.

"Companies operating in or seeking to invest in and/or through the UAE should review their existing level of economic substance in order to be compliant with new substance requirements in the UAE."

Is the Approach of the EU Fair?

Whilst the EU's listing approach is transparent and will no doubt facilitate fair tax competition globally, the EU must apply the same standards to all countries on a uniform basis in order to gain universal acceptance.

EU Countries were excluded from the scope of the EU listing process because the focus was on external threats to the tax base of EU Member States and so only non-EU countries dealing with the EU Member States were assessed. It is possible that some EU countries would have been blacklisted if they had been screened and subjected to the same criteria applied to non-EU countries. The list may also not be complete at this stage because developing countries, without financial centres, were either completely omitted or given more time to address their shortcomings and countries with constitutional restraints were also given additional time.

There was also discussion on the status of the US because it has not signed up to the CRS and so does not strictly meet the EU's tax transparency requirements however, it is currently not included on the backlist. The EC has indicated that all countries that have not adopted the CRS or have bilateral treaties with all EU countries will be automatically blacklisted in 2019 due to more stringent transparency requirements which will be applied from June 2019. It remains to be seen whether this will be the case.

It is also worth noting that the EU and the OECD have been introducing measures to tackle international tax avoidance and a key driver of these measures has been multi-national companies headquartered in more established and mature western tax jurisdictions that were perceived to be reducing their overall tax burden by artificially shifting profits from high tax jurisdictions to jurisdictions with a low rate or no tax rather than companies from countries in the Middle East. By comparison, the tax regimes across the Middle East are relatively less sophisticated and still developing.

The UAE is not a tax haven. Unlike many typical tax havens, companies establish and operate in the UAE because it is a regional hub for logistics and operations rather than for purely tax reasons. The UAE has also taken various measures to demonstrate that it is fully committed to being compliant with international tax standards. As noted above, the UAE and Oman were included on the blacklist because they did not implement the commitments made to the EU by the agreed deadline rather than the failure to co-operate with the EU. Due to the complex nature of tax related legislation, it is common in the region for legislation to take time to be introduced. The expectation is that the substance legislation will be finalised by the UAE during this summer and Oman is also likely to take the necessary action shortly. Accordingly, it is expected that both the UAE and Oman should be removed from the blacklist in due course which will be a welcome development.

What should Businesses do now?

Both the UAE and Oman are expected to address EU's concerns in the next few months which should pave the way for their removal from the EU tax blacklist. Therefore, the negative consequences for the UAE and Oman are expected to be limited. However, there are a number of action points to be considered by businesses operating in the UAE as a result of changes that will be required to be made to domestic legislation.

The EU tax blacklist is constantly evolving. As highlighted above, from June 2019 more stringent transparency criteria will be applied by the EU so all jurisdictions currently on the grey list will be re-assessed to ensure that they are compliant which may potentially result in the expansion of the blacklist. Businesses in the GCC should monitor these developments.

The UAE is in the process of introducing legislation on local substance requirements and it is likely that this legislation will not be limited to transactions with the EU. Companies seeking to invest in and/or through the UAE and businesses operating in the UAE should review their level of economic substance in order to be compliant with the future substance requirements in the UAE. Previously, companies in the UAE may have been able to obtain a tax residency certificate based on certain requirements and avail of certain benefits under double taxation treaties which the UAE has in place with other countries. Going forward, additional requirements will likely apply at the UAE level and existing level of operations may not be sufficient to meet the new criteria. In simple terms, this means UAE companies must have a genuine economic activity in the UAE through the presence of employees, important functions and assets etc. Accordingly, is important for UAE businesses to undertake a health check on their existing level of substance in anticipation of the new substance legislation that will be introduced in the UAE shortly.

The UAE has also signed the MLI and will introduce new domestic legislation in due course to implement the MLI. In view of the ratification of the MLI by the UAE, based on the final positions taken by the UAE, many of the UAE's double taxation treaties may be modified. It is important for companies to review their existing structures and assess the impact of the MLI on the UAE's double taxation treaties and their holding, financing, intellectual property and operational structures.

The above considerations are equally relevant for other GCC countries which may potentially follow suit and introduce local substance legislation. In addition to the UAE, Saudi Arabia, Kuwait and Qatar are also signatories to the MLI and, with the exception of Kuwait, all GCC countries are members of the BEPS inclusive framework. As a result of the shifting global tax landscape, in order to be able to access the benefits under double taxation treaties, the maintenance of an appropriate level of substance will be critical in the future. GCC businesses will also have to be mindful of any potential modifications to the double taxation treaties entered into by their country of residence as a result of the implementation of the MLI in the country.

Al Tamimi & Company's Tax team regularly advises on international tax matters. For further information, please contact Shiraz Khan (s.khan@tamimi.com).

Delivering the Telco Deal Right: Practical Considerations for Suppliers Managing Compliance Risk

Martin Hayward
Head of Technology, Media and Telecommunications
Dubai, UAE
m.hayward @tamimi.com

Introduction

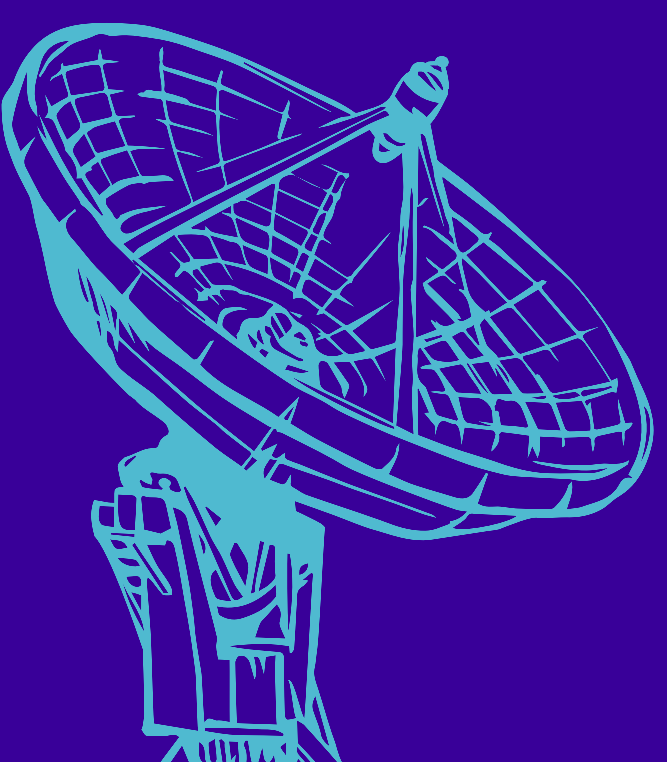
The rollout of big telecommunications infrastructure projects in the Middle East and Africa ('**MEA**') by international telecommunications suppliers subject to key internal compliance mandates, poses material, complex challenges for the suppliers.

As the MEA continues to experience heavy investment in telecommunications infrastructure, both in terrestrial and submarine cable systems, suppliers are increasingly seeking ways to take advantage of these opportunities whilst effectively managing their compliance risk.

The financial cost (both in fees, fines and penalties and, for listed suppliers, possible share price losses) caused by a compliance breach, along with the management time taken in managing a compliance breach and resulting investigation, follow-up remediation, additional controls and oversight, can have such a material adverse effect on a supplier that it can take years to recover from.

The brand and reputational damage can be even more damaging with the loss of key clients and potential blacklisting from lucrative government contracts. In addition to this, suppliers can face civil and criminal actions against its directors and officers (including shareholder actions).

This article looks at the key compliance issues and the practical mitigation strategies considered by suppliers as they evaluate MEA opportunities and then deliver the telecommunications infrastructure projects.



Due Diligence During the Bidding Stage

Central to telecommunications suppliers' evaluation of whether to bid or not is the potential compliance risk of delivering the project. These projects can cover multiple MEA countries, particularly if it is a submarine cable consortium project; countries often with very different compliance risk profiles. The projects can have multiple customers, often involving government owned or controlled companies, which only heightens the compliance risk.

Suppliers will often start with a high-level analysis drawing on resources like international risk indexes to identify high risk countries and using publicly available sources to highlight early in their decision-making process any key compliance issues that need to be factored in.

This data forms a key part of the decision-making matrix as the supplier determines whether to apply the resources to bid for a project which, depending on the type and size of the project, may last many months. Also, it will enable suppliers to add costs to their commercial offers upfront to cover the cost of compliance mitigation.

Identifying the Right Partners

Many deals will be in MEA countries where suppliers do not have an on-the-ground presence. As a result, suppliers face an added layer of compliance risk engaging with both sales partners, through which the supplier will sell, and/or service partners, through which the supplier will outsource all or part of the project delivery. Identifying the right partners is critical. Suppliers cannot avoid compliance risk by partnering; but they can mitigate their risk by identifying the right partners and ensuring that 'adequate procedures' are in place to ensure ethical and robust procedures are implemented.

Depending on their assessment of compliance risk, suppliers will conduct enhanced due diligence on all or part of the partner supply chain, identifying and evaluating all partners, including, in many cases, any contractors sub-contracted by one of the partners to deliver a particular element of the project.

Full details of each partner will be collected through compliance questionnaires, verifying their corporate identity. Government affiliations will be analysed. Key shareholders, officers, directors and employees at each level of the partner supply chain will be identified and screened against the relevant denied party watchlists.

Partners will be expected to sign undertakings confirming their compliance with compliance laws and the supplier's compliance policies and procedures as well as to undertake not to place the supplier in breach of any such laws, policies or procedures. Similar undertakings will be included in the supplier's contract with the partners who will indemnify the supplier against the cost of a compliance issue (not only in terms of potential fines and penalties but also internal costs). Partners will be contractually obliged to flow these terms down to their subcontractors and to undertake similar due diligence.

Partners will be evaluated based on their internal compliance programmes and the level of executive awareness and (active) sponsorship of the internal compliance programme within the partner. Partner policies and procedures will be reviewed along with how effective their responsive processes are in the event of a regulatory breach. Their compliance training will be reviewed from a frequency and content perspective. Partners may undergo specific tailored compliance training delivered by the supplier's legal or compliance teams or outsourced to compliance professionals (often with a focus on key practical issues to enable the partner to identify and avoid situations that may increase compliance risks).

Training will cover the supplier's compliance policies and procedures so partners have a clear understanding of the internal rules governing the supplier. Scenarios will be role played to prepare partner personnel for dealing with key compliance challenges that may arise as part of the project (e.g. how to recognise and avert unethical business practices). The supplier's own personnel on the ground during the delivery stage will receive similar training. More on this below.

Post Award, Prior to Delivery

Key risk countries identified during the due diligence process will be subject to detailed assessment to identify the key compliance risks relating to importing, storing, transporting and delivering telecommunications equipment to partner warehouses, staging sites and/or the customer sites and moving personnel in and out of the country as part of the project delivery.

Compliance risk in delivering telecommunications (and technology) projects in the MEA is a real threat to supplier's businesses. It can be effectively managed through proper due diligence and oversight.

Entering the Country

The first key challenge to overcome is importing equipment and bringing personnel into MEA countries where the project is to be delivered.

Depending on the size of the shipments, one of the country's airports will likely be the importation point. Suppliers will analyse, often with the help of their logistics teams and forensic investigation experts, the level of risk at the chosen point of entry.

The first question will be whether there is a choice of airport. This is key. Suppliers may wish to choose an airport closest to their final destination for the speed of delivery. This may not be the best port of entry for the reasons summarised below.

Importation is normally handled by third party logistics/customs clearance agents. Suppliers need to have properly assessed these partners, carrying out the due diligence set out above. Suppliers will often choose international logistics providers with established compliance policies and procedures, and who are also subject to international extraterritorial laws governing business integrity, rather than local logistics agents.

The systems that suppliers will need to navigate as part of the customs clearance process need to be carefully researched. Is it electronic or manual and paper based? Can documentation be uploaded in advance to speed up the process? A complete set of the right paperwork avoids delays and potential compliance situations. Also, knowledge of how long the process normally takes, the steps involved, if it is a particularly difficult or complex process (and if so what aspects (e.g. do certain products require technical inspections; regulatory approval, etc.?)), if there are fast track or VIP services that can be used (and the cost) are all important considerations.

A clear understanding of the customs fees in each country is important. How much should the supplier be paying? Are the fees officially published? Are there any hidden fees or charges? Checks need to be put in place to ensure that this is confirmed and that there are no hidden or unusual fees or payments that could be interpreted as bribes or facilitation payments. Are there any deposits or down payments that need to be made? Are they legitimate and how difficult will it be to get these payments back? All these points need to be assessed. To the extent that any such payments can be made, online in advance through official portals, this should be done to limit any financial exchanges.

Suppliers will likely be subject to customer timelines (often with heavy penalties attached). Delays on entry, of both products and personnel, need to be managed properly to avoid the penalties that suppliers can incur. This needs to be balanced, though, against managing the compliance process correctly.

Personnel from particular countries may enter countries with greater ease and less bureaucracy. The more bureaucracy, the greater the potential compliance risk and delay to the project. Personnel need to make sure their documentation is in order (e.g. passports with over six months' validity; e-visas secured if possible beforehand; entry paperwork filled in on the plane over, etc.). Suppliers should, to the extent possible, carefully choose the personnel they send into certain countries to limit the bureaucracy. They should ensure their partners do the same. In addition, any intelligence on complications with the security process, baggage collection, etc. is useful to prepare personnel for entering the country. It should be clearly understood if visas fees are payable. To the extent these fees can be paid in advance, online through official portals, this should be done to limit any financial exchanges at the point of entry.

All the same issues need to be considered on exit, in addition to entry, for personnel.

Enforcement of local laws, and proper oversight of local immigration and customs officials will be assessed to help determine the likelihood of illicit activity being properly deterred (and/or punished) along with the level of compliance training local immigration and customs officials receive (along with the general levels of professionalism). Official policies and procedures governing the immigration and customs officials need to be reviewed. In addition, it needs to be determined if the officials are government officials or privately contracted.

Particular times of the day, or days of the week (e.g. before a weekend or before a public holiday) will be identified if they carry increased compliance risk for suppliers and partners entering particular countries and dealing with customs and/or immigration officials.

In Storage

Customs delays are frequent in the MEA. Products can be in storage for long periods as they are processed through customs clearance. This is not only a cost for telecommunications suppliers but also a potential compliance risk. Details of where products are being warehoused, the cost of storage and for how long they will be stored need to be well understood. Most importantly, the process for releasing products from storage needs to be clear.

On the Road

Once people and products are through the entry point and in transit to partner warehouses or stages points and/or on to end customer sites, the compliance focus switches to understanding the key challenges on the routes that the telecommunications supplier's third party freight forwarders will be managing on the ground.

Once again, due diligence is key. There are some important questions to ask: Has the right freight forwarder been chosen? Has their local customer base been analysed? Does it include international customers, government departments/ministries, etc.?

What is the route? Are there any alternatives? How long should the journeys take? Are there tolls or security checkpoints that need to be traversed? Is the local transport police active on these routes and do they have a reputation for stopping traffic (particularly vehicles shipping goods)? If a vehicle is stopped, what paperwork can the transport police legitimately ask for and what type of inspections are they legally allowed to carry out? Can (and do) they apply on the spot fines and penalties? All this information helps avoid difficult situations and prepare supplier (and partner) personnel for dealing with such situations.

Routes (and travel times) need to be chosen carefully to avoid such challenges. If tolls are in operation, what are the tolls? Will extra charges be demanded? If there are checkpoints, are any legal payments required (and if so, what are they?). These are important details for suppliers and their partners, including third party freight forwarders, to have (and be trained on, if necessary) to equip them to manage any such challenges and minimise delays.

In addition to the above, the security risk of hijacking or other criminal activity on the roads needs to be assessed and managed.

Accessing Customer Sites

Proper due diligence is required to understand the requirements to secure access to customer sites. Access may often require additional paperwork and customer employees in attendance. All this needs to be thoroughly checked in advance. Site hours need to be checked to make sure arrival is timed correctly and customer staff are available, reducing the potential for requiring special actions from customer staff and possible resulting compliance issues.

Acceptance of the Initial Project

Acceptance, post-delivery and implementation, is a key stage in any major telecommunications infrastructure project and often a difficult and time-consuming process. These projects are usually contracted on a turnkey basis with the majority of payment back ended to acceptance (i.e. once the equipment has been installed and the installed tested and accepted by the customer). It is critical for suppliers to ensure acceptance is swiftly and successfully executed so cash can be collected (and, depending on the supplier's accounting rules, project revenue (whether in whole or in part) recognised)). Supplier involvement during this stage is critical to manage any compliance issues as the supplier's personnel and/or its partners work closely with customer personnel to secure acceptance.

After the Initial Project is Completed

Ongoing support and maintenance and the importation of spare product parts will continue to bring the supplier and its partners in and out of countries where the initial project was delivered and engaging with multiple third parties. Continued diligence after initial project completion is critical to ensure that issues do not occur post-implementation, particularly if partners change over time.

Reporting

Everything happening on the project needs to be reported to the supplier by its personnel and its partners and a simple and effective process needs to be put in place (and supplier personnel and partners trained on that process) to facilitate this. Things that are known about can be more effectively managed. The sooner the supplier knows of an issue, the sooner the supplier can evaluate it, take appropriate action and mitigate its risk. Key to the supplier successfully managing compliance risk is a well-resourced project management team with deep compliance experience. Key to ensuring that the supplier has timely access to information is a culture where supplier employees and partners are comfortable that they can report any issues without fear of supplier retaliation.

Conclusion

As this article seeks to demonstrate, proper due diligence and planning are key to managing MEA compliance risk. This applies both in the telecommunications industry, and across industry sectors, and companies benefit from ensuring that they fully understand every aspect of the delivery and implementation of a major project (and any post-implementation challenges) in advance.

Al Tamimi & Company's TMT team regularly advises customers and suppliers on the delivery of large scale, business critical MEA telecommunications and technology projects. For further information, please contact Martin Hayward (m.hayward@tamimi.com)

Testing the Limits: Is it Finally Possible to Establish a Limitation Fund in the UAE?

Omar Omar
Partner, Head of
Transport & Insurance
Dubai, UAE
o.omar@tamimi.com

Adam Gray
Associate
Dubai, UAE
a.gray@tamimi.com

Introduction

In 1997, the UAE became a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 ('**LLMC 1976**') by enacting Federal Decree No (118) of 1997. The limitation regime serves to establish a total liability sum which can be recovered by all prospective claimants arising from any one incident and the calculation of that capped sum is linked with the gross tonnage of the subject vessel. The LLMC 1976 was preceded by the Brussels Convention 1957 and amended by the LLMC Protocol 1996. The 1957 and 1976 conventions provide for lower limitation caps than the 1996 Protocol (as amended) which often leads to 'forum shopping' by defendant shipowners. One or more of these limitation conventions has been ratified and enacted through local legislation by the majority of nations across the world. The UAE has not ratified the 1996 Protocol which has the effect of retaining the very low limits of liability of the LMCC 1976. In contrast, the United Kingdom is a signatory to the 1996 Protocol (as amended).

However, whilst the UAE has ratified the LLMC 1976, it is widely accepted that the UAE Courts will not constitute a limitation fund in the UAE even if a limitation fund would ordinarily be constituted in other contracting States in the same circumstances. In light of this status quo, this article explores the implications of the judgment in the Dubai World Tribunal ('**DWT**') claim no. DWT-001-2017, 'The CENTAURUS', and contrasts this with developments in a case before the Fujairah Court last year on similar substantive issues.

'The CENTAURUS'

'The Centaurus' case was heard before the DWT, a specialist Tribunal constituted in response to the global economic turmoil of 2008. The jurisdictional mandate of the DWT is limited to 'all claims and demands by and against Dubai World or any of its subsidiaries and the 'onshore' Dubai Courts' jurisdiction is excluded for such matters. The DWT adopts rules and court procedure based on the English legal system, but it applies UAE substantive law. The Tribunal in 'The Centaurus' comprised three English judges.

The DWT was asked by the claimant shipowner to either constitute a limitation fund in the UAE, by deposit of a P&I Club letter of undertaking, pursuant to the LLMC 1976, or to make a declaration that a limitation fund for the maritime claims brought against it could be established. Whether the provisions of the LLMC 1976 applied on the facts was not in contention and the LLMC 1976 would ordinarily apply. The crux of the dispute was whether: (1) the DWT had jurisdiction to hear the claim; and (2) if the DWT did have jurisdiction, whether it should exercise it.

With respect to jurisdiction, the defendant principally argued that the DWT does not have 'subject matter jurisdiction' (jurisdiction to regulate the defendants' affairs on a world-wide basis) and that the claimant shipowner could not pre-emptively invoke limitation of liability under the LLMC 1976 in a jurisdiction of its choice.

If the Tribunal considered itself endowed with jurisdiction (which it did) the defendant averred that the request to constitute a limitation fund (or to give direction as to how to do so) or make a limitation decree should be dismissed and jurisdiction not be exercised because: (i) it is established practice of the Dubai Courts to permit defensive applications for limitation of liability, but not pre-emptive offensive applications where no claim has been brought against it; and (ii) there is no mechanism in the UAE to constitute and manage a limitation fund in the UAE.

The provisions of the LLMC 1976 under scrutiny were Articles 11.1 and 11.2, which read as follows:

Article 11.1

> *"Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation…"*

Article 11.2

> *"A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority."*

In support of these propositions, defendant's counsel submitted that a Club LoU was not considered by the UAE Courts as good security in similar maritime matters such as vessel arrests and therefore should not be considered acceptable in the present case because it would not be accepted by the Dubai Courts. According to the Tribunal no evidence was put before it to support the proposition that pre-emptive actions cannot be made.

The Tribunal dismissed the defendant's arguments regarding jurisdiction on the basis that the LLMC 1976 itself provides for jurisdiction by a contracting State over the defendant to constitute a fund or grant a limitation decree, even if liability is being litigated in a different jurisdiction. Further, it concluded that the DWT has exclusive and unfettered jurisdiction to decide the issue of limitation and therefore the practice of the 'onshore' UAE Courts, which had no such jurisdiction, had little or no influence on the DWT's considerations. The DWT also concluded that there was a lack of evidence for the propositions as to UAE law and practice although it did acknowledge that had sufficient evidence of 'settled practice in Dubai Courts' been put before it then it would have been led to follow that practice.

Fujairah Court of First Instance Judgment

Last year, the Fujairah Court of First Instance addressed similar issues to those heard in 'The Centaurus'. The claim arose from a collision between the parties' vessels. The claimant shipowners sought to limit their liability before the Fujairah Court pursuant to LLMC 1976 and requested the Fujairah Court to accept the deposit of an UAE bank guarantee to constitute the fund.

The defendants, represented by Al Tamimi & Company, raised two principal arguments against the claimant's petition. With reference to Article 11.1 of the LLMC 1976, the defendants argued that the Fujairah Court was not the proper entity to constitute the fund. They submitted that the Court's mandate under the LLMC 1976 was limited to considering liability only, and not to constitute or establish the fund itself. On the contrary, the defendants averred that the 'competent authority' was the Federal Land and Sea Transport Authority ('**FTA**') responsible for shipping matters and accordingly the Fujairah Court did not have jurisdiction to constitute a fund. Secondly, the defendants asserted that even if the Fujairah Court could constitute a fund, there is no domestically enacted legal framework or mechanism in place to create or govern a limitation fund.

> **...until a LLMC 1976 facilitative framework is implemented by UAE legislators, a claimant's attempt to establish a limitation fund under the LLMC 1976 will fail.**

To seek guidance, the Fujairah Court enjoined the FTA as a party to the case in the 'interests of justice' and to ascertain which institution or body was authorised and responsible for administering a limitation fund constituted in accordance with the LLMC 1976. The FTA submitted a memorandum in the case requesting the Court to dismiss the case on the grounds the Fujairah Court did not have jurisdiction to consider the claimant's request to establish a fund, because such jurisdiction was reserved for itself, and that there was no legal mechanism in place to constitute a limitation fund.

The Fujairah Court dismissed the claimant's application to constitute a limitation fund on the ground that there is no mechanism for constituting a limitation fund within the UAE. Notably, the judgment specifically recognised that, to date, a limitation fund has never been constituted in the UAE and the FTA has not enacted 'internal legislations' to provide for a framework within which a fund could be established.

Fujairah Court of Appeal Judgment

On 24 September 2018, the Fujairah Court of Appeal upheld the Court of First Instance's decision in its entirety and added that the UAE Federal Law No. 26 of 1981 (the '**UAE Maritime Code**') applied for the purposes of determining the limitation of liability for collision claims, not the LLMC 1976.

Comment

The two cases, once again, bring into sharp focus the question of limitation of liability for maritime claims in the UAE. At the time of judgment, it was suggested that 'The Centaurus' was a landmark decision which could open the door to parties to establish limitation funds in the UAE, or at least in Dubai. Whilst this may be possible in the DWT, representing a very limited number of cases, in the author's opinion the DWT judgment in 'The Centaurus' is expected to have no impact on the practice of the onshore UAE Courts. We expect that the UAE Courts will still resist requests to constitute maritime limitation funds under the LLMC 1976 as has been the longstanding practice for the following reasons.

The DWT judgment, whilst a precedent for future decisions within the DWT, is a marked departure from onshore UAE court practice and application of the law. It appears that the DWT judges applied UAE law in a manner which was inconsistent with that of onshore UAE Courts. The primary justification for such departure was that the defendants did not adduce evidence of the application of UAE law by the UAE Courts or of trends and practice. Whilst we expect that such evidence could have been provided by way of expert evidence, we acknowledge that evidence of precedent would have been difficult to produce given that the UAE Courts do not publish its judgments and judicial practice is not recorded.

It is the author's opinion that the DWT had the prerogative to determine its own jurisdiction and it was within its right to assume it. However, the DWT's jurisdiction is exclusive to claims brought by and against Dubai World or any of its subsidiaries and so assumption of jurisdiction by the DWT cannot be deemed indicative of what the onshore UAE Courts would do. Indeed, the FTA confirmed that it is the 'competent authority' empowered to establish a limitation fund within the meaning of Article 11 of the LLMC 1976 itself. Therefore, it would be erroneous to conclude that the UAE Courts would assume jurisdiction on the basis of the same reasoning that the DWT did.

Furthermore, the FTA also commented that it was unable to constitute a fund without extant 'internal legislations' providing a facilitative framework for doing so.

At a more granular level, the DWT accepted a Club LoU could be used to constitute a limitation fund which is, in essence, a form of security. However, Club LoUs have long been rejected by the UAE Courts as a good form of security. There is no known direct authority on this, nor guidance from the highest Courts of the UAE, yet this is established practice. This was impliedly supported by the claimant's submission of a UAE bank guarantee in the Fujairah case despite the fact that the claimant shipowner was supported by its P&I Club. In the author's opinion, the UAE Courts would deem a Club LoU insufficient to satisfy the requirement in Article 11.2 of the LLMC 1976 that the guarantee be 'acceptable' to the 'competent authority'.

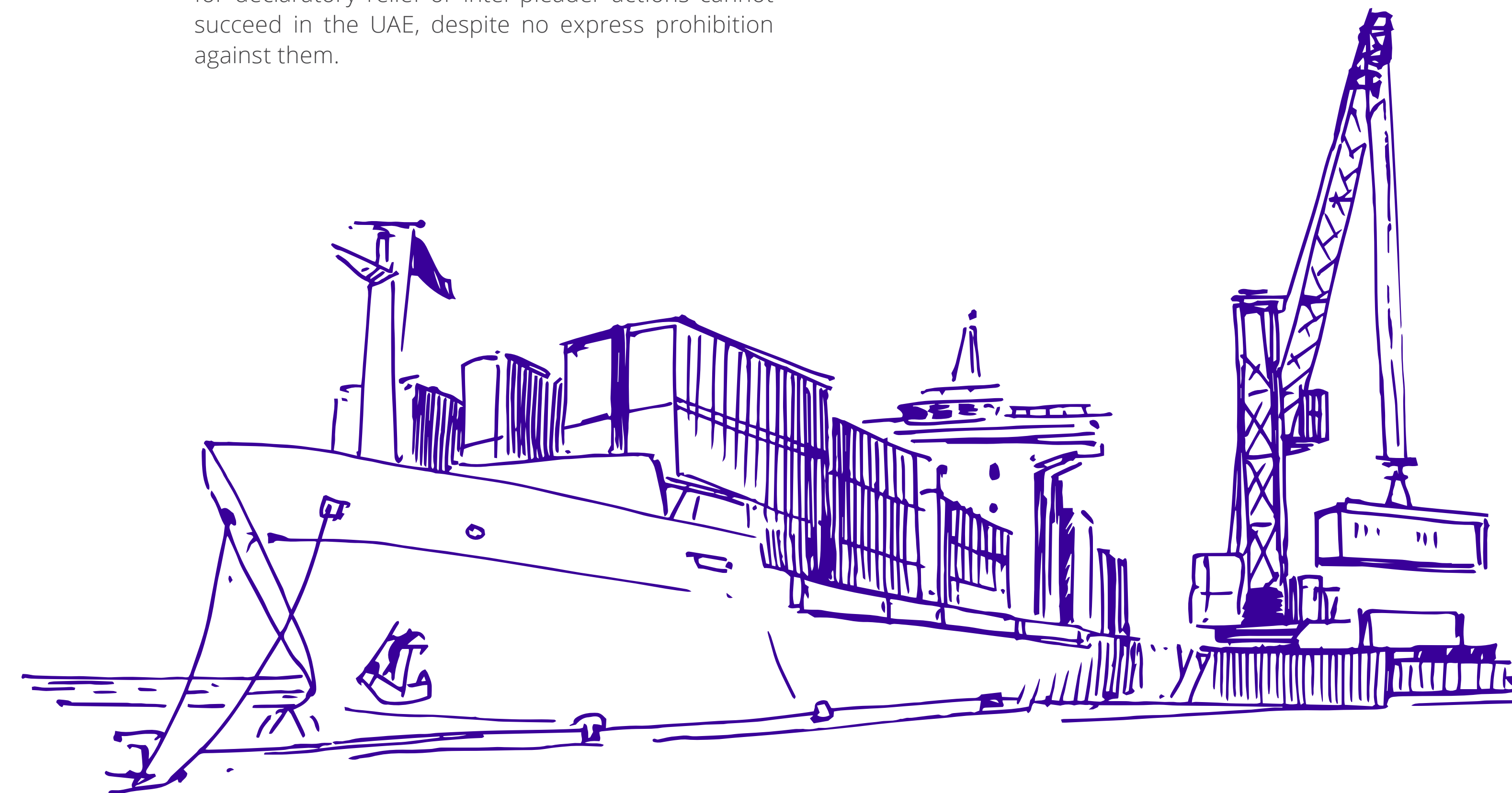
It may be that the DWT was prepared to accept a Club LoU as capable of constituting a limitation fund because of the emergence of the practice in the English courts subsequent to the Court of Appeal decision in Kairos Shipping Ltd v Enka & Co LLC and Ors [2014] EWCA Civ 217 (the '**ATLANTIC CONFIDENCE**' case). However, the decision is reflective of the evolution of English jurisprudence, not UAE jurisprudence.

Furthermore, the DWT permitted a pre-emptive action by the claimant shipowner to seek to establish a limitation fund guaranteed by a Club LoU despite the fact that the UAE Courts have long considered pre-emptive claims to be unfounded. UAE Federal Law No. 5 of 1985 (UAE Civil Code) implies that a defendant can only respond to a claim once the claimant has initiated proceedings. To this end, pre-emptive claims for declaratory relief or inter-pleader actions cannot succeed in the UAE, despite no express prohibition against them.

In summation, the UAE Courts have never before established a limitation fund and there is no indication that this position is changing. The DWT said it did not hear evidence of the application of UAE law by the UAE Courts. As the DWT presiding judges freely admitted, had they been aware of judicial trends and practices then they may have followed the practice of the onshore UAE Courts.

It is suggested that the Fujairah Court of Appeal decision will have a far greater impact on clarifying the issue of limitation of marine claims within the UAE and we fully expect that, until a LLMC 1976 facilitative framework is implemented by UAE legislators, a claimant's attempt to establish a limitation fund under the LLMC 1976 will fail.

Al Tamimi & Company's Transport & Insurance team regularly advises on shipping matters. For further information, please contact Omar Omar (o.omar@tamimi.com) or Adam Gray (a.gray@tamimi.com).



Taming Financial Crime Beasts in the Middle East Region: Welcome to the Concrete Jungle

Welcome to the Regional Financial Crime focus issue of Law Update, which this year takes the theme of a Concrete Jungle and explores many of the financial crime issues that have been growing throughout international markets, as new threats emerge and the legal landscape responds.

Changes to the geopolitical ecosystem have had a profound effect on several financial crime issues. Widening rifts between the US and its traditional European allies have broken new ground for divergence in the sanctions' framework regarding Iran, and the impending Brexit process of extricating the UK from the EU calls into question how the UK will legislate to protect against financial crime, and how this will be applied extraterritorially to companies in the Middle East. Both of these issues are explored in greater detail in this issue, alongside other international developments, including how China's shifting trade flows could provoke potential financial crime issues for Middle Eastern businesses, and global trends in corruption unearthed by Transparency International's Corruption Perceptions Index 2018.

Forces from within the Region's borders are also stirring up change. The Middle East and North Africa Financial Action Task Force's ('**MENAFATF**') ongoing second round of Mutual Evaluations has left clear footprints across the AML/CTF defences of member countries that are eager to gain favourable recognition by addressing previously identified areas of concern. Following the publication of Saudi Arabia's and Bahrain's reports in October 2018, the UAE faces onsite evaluation by MENAFATF experts in the second half of 2019 and has taken proactive measures to fortify its combative framework in FATF evaluations. Changes in AML regulations are subject to a constant state of revision, driven by the need to respond to emerging threats and challenges, and two of our featured articles are dedicated to the ways in which the UAE and Egypt are modernising AML/CTF techniques.

Other articles delve into the anti-corruption approaches of several regional countries, including an inside view of Saudi Arabia's National Anti-Corruption Committee ('**Nazaha**'), the recently established anti-corruption strategy of Kuwait, and Oman's broader financial crime framework. Using the example of the UAE, the remainder of this Focus section's contributions offer an overview of how holistic reform contributes to fortified financial crime defences, including the long-awaited new Foreign Direct Investment law (specifically for the booming technology sector), establishment of Dubai's new Federal Audit Authority, and protections applied to the healthcare industry as a key sector driving economic development.

We hope you find this special edition interesting. For any queries related to any financial crime issues, please feel free to contact either Khalid Al Hamrani or Ibtissem Lassoued.

Khalid Al Hamrani
Partner,
Head of Regional Financial Crime
Dubai, UAE
k.hamrani@tamimi.com

Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

Contents

The Falcon's View: What the European Union's SPV for Trade with Iran Means for Businesses in the Middle East 39

Tackling the Prickly Issues: Nazaha's Efforts to Unearth Corruption in Saudi Arabia 45

Wars & Walls of the Dragon: China's Geopolitical Ties and Sanctions Risks in the Middle East 51

Still A Good Guard Dog? A review of the United Kingdom's financial crime structures post-Brexit 57

Going After the Lion's Share: The UAE's Changing Approach to Foreign Direct Investment in Technology and its Financial Crime Implications 61

Float Like a Butterfly, Sting Like a Bee: Kuwait's National Anti-Corruption Strategy to Take the Fight to Graft 67

Can a Leopard Change its Spots? Lessons from the Transparency International Corruption Perceptions Index 2018 71

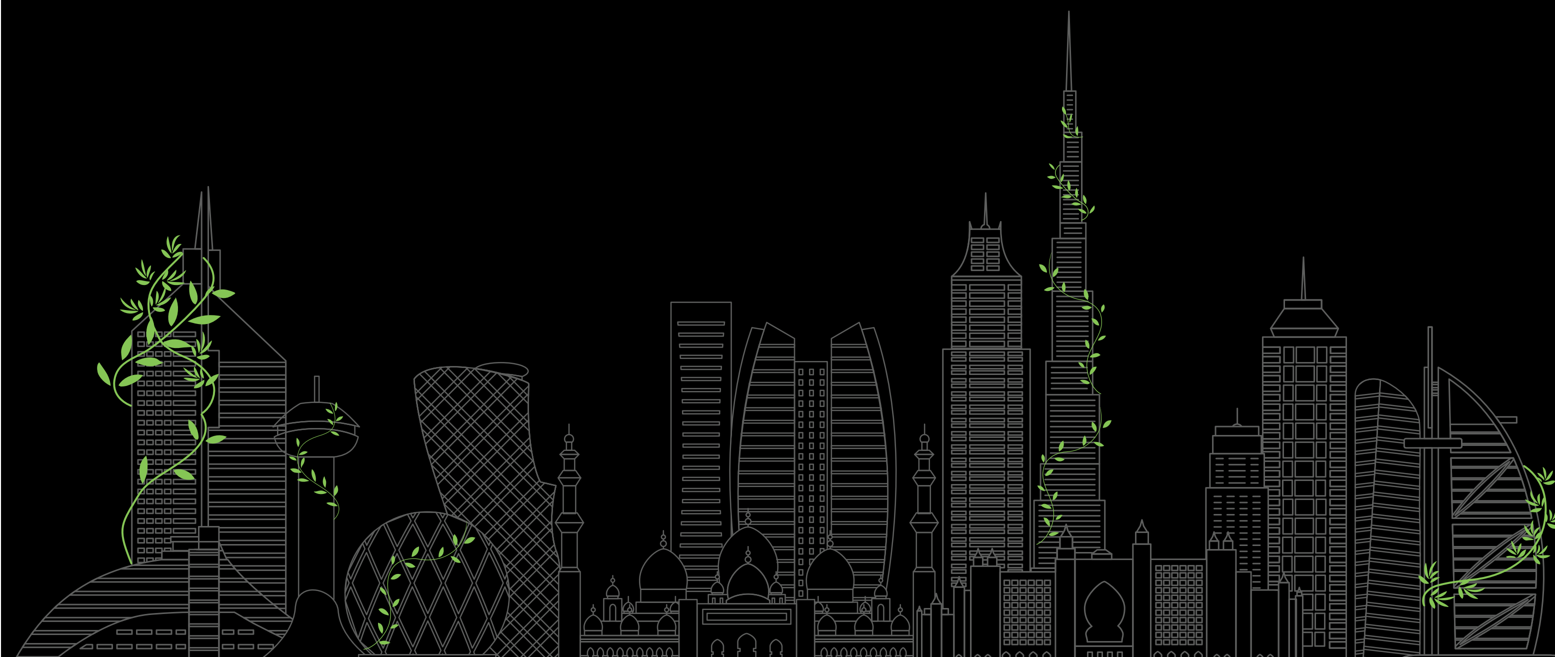
Sniffing Out Dirty Money: Combining the Ancient and the New in Egypt's Anti-Money Laundering Policy 77

Showing the Sharp End to Public Corruption: Dubai's New Financial Audit Authority 83

Learning to Adapt: The UAE's New Anti-Money Laundering Law and Matching FATF Standards 89

Serpents in the Sand: Kickbacks in the Healthcare Industry 95

Reaching New Heights: Fighting Financial Crime in Oman 99



The Falcon's View: What the European Union's SPV for Trade with Iran Means for Businesses in the Middle East

Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

Florence Jerome-Ball
Paralegal
Regional Financial Crime
Dubai, UAE
f.ball@tamimi.com

When the United States ('**US**') announced its withdrawal from the Joint Comprehensive Plan of Action ('**JCPOA**') in May 2017, the international sanctions framework was plunged into a state of chaos, as the fragile consensus concerning trade with Iran was rent apart. With the reintroduction of secondary sanctions by the US Office of Foreign Assets Control ('**OFAC**'), an unprecedented divergence between US and EU foreign policy positions created a divide in the international sanctions framework and darkened the cloud of confusion surrounding all dealings with Iran. The latest step taken by the E3 countries to establish a Special Purpose Vehicle ('**SPV**') to facilitate continued trade with Iran has the potential to push the system into murkier waters still. Middle Eastern businesses that have long been caught in the fluctuating application of Iran sanctions may view the new vehicle with hope that it will bring much needed clarity to trade permissibility, but it will be some time before the SPV offers any clear direction or plausible route for trade.

The Ins and Outs of INSTEX

Backed by the E3 countries, namely France, Germany and United Kingdom ('**UK**'), though with the full support of the entire EU, it was announced on 31st January 2019 that the new SPV known as INSTEX (short for Instrument in Support of Trade Exchanges) will be based in Paris and will form the lynchpin of the EU's efforts to wedge an open channel of trade with Iran, even as the US pushes its campaign of maximum economic pressure.

Under its existing structure, the SPV will allow European businesses to trade in limited specific goods with Iranian entities by providing an alternative payment structure that does not involve cross-border payments with Iranian financial institutions. It will further avoid the extensive reach of US sanctions at this stage by dealing only in goods that are currently exempt from US sanctions under the Countering America's Adversaries Through Sanctions Act of 2017 ('**CAATSA**'). Exempted goods are so classified based on their link to humanitarian requirements, and specifically include agricultural produce, medicine and medical equipment. In practice, INSTEX will match trade partnerships between EU and Iranian companies in a mirror-transaction system, so that EU businesses receiving goods from Iran can effect payment to European businesses due to receive funds for goods provided to Iranian entities, thereby eliminating the need for cross-border transactions.

In Between INSTEX and Operations

A number of obstacles still lie between INSTEX and full functionality. Its establishment in Paris, though no small feat (considering the reluctance of many countries to openly act in contravention of US foreign policy and risk losing access to the US financial system), is only the first hurdle, and it will be several months before the E3 powers have finalised the necessary technical legal and operational mechanisms for the SPV to grind into action. Additionally, for this system to work, an INSTEX equivalent will need to be established in Iran, so that

payments due to Iranian entities can be coordinated simultaneously in the same way. This should not be taken for granted, as Iran's mirror company will likely face pressure from both EU countries and the US to maintain a high degree of transparency, as well as robust anti-money laundering and counter terror financing standards – areas where Iran has historically struggled to satisfy international requirements despite enduring efforts by the Financial Action Task Force ('**FATF**'). In addition, the efforts of the Iranian Government will likely face staunch domestic opposition to continued co-operation with the remaining JCPOA signatories, which may hinder its progress.

private sector even during the brief sanctions relief effected under the JCPOA. INSTEX will not facilitate trade in oil or other goods beyond those that are the bare minimum for Iran's population, and it is unlikely to provide enough assurance to tempt large corporations that face higher exposure to the US financial system and fear punitive actions by US authorities. Due to the dominance of the US dollar in the international trade system, and its almost exclusive primacy as the denomination of global oil contracts, any measure that could release oil exports from the vice of OFAC sanctions is a distant concept at best. Rather, INSTEX's limited initial mandate is a modest application of the

INSTEX will not facilitate trade in oil or other goods beyond those that are the bare minimum for Iran's population, and it is unlikely to provide enough assurance to tempt large corporations that face higher exposure to the US financial system and fear punitive actions by US authorities.

Outside the INSTEX Mandate

In its current form, INSTEX is not quite the open declaration of defiance by the E3 powers that was reported when the prospect of an SPV was first announced in the aftermath of the US withdrawal. Early statements made by Federica Mogherini, the EU Chief Diplomat, and E3 Finance and Foreign Affairs Ministers, hinted at more grandiose plans for access to Iran's market, primarily aiming to continue the spirit of the JCPOA and allow legitimate trade shielded from US sanctions. In practice, however, under its current proposed structure the SPV will be neither as extensive nor as mobile as hoped by the E3 countries.

Early sceptics who doubted the SPV would ever be robust enough to protect risk-resilient oil traders from the full weight of US secondary sanctions have been proven mostly right. Despite its sovereign backing by three of Europe's largest economies to mitigate against the strength of Washington, the diplomatic shield around INSTEX will not completely remove the risk of punitive sanction that has afflicted and restricted the E3 intentions to preserve Iran's sanctions relief and in its nascent stages will mostly target small businesses with limited ties to the US' sweeping jurisdiction.

Transatlantic Drift

n establishing the SPV, the EU is effectively signalling its intent to continue to pursue the merits of the JCPOA and protect the interests of its member states where they are not aligned to US foreign policy.

This resounding sentiment has been echoed across other EU statements and actions. In December 2018, the EU published a report entitled 'Towards a Strong International Role of the Euro', advocating the need to strengthen the relative clout of the Euro against the US Dollar. One of the prominent motivations given for doing so was the creation of sufficient leverage that EU States could wield economic sovereignty, and reduce their exposure to unilateral actions taken by third party countries, such as economic sanctions.

The International Response

US responses to the SPV have been muted to date, due to the SPV's narrow scope of application to compliance trade. US authorities will, however, likely watch the impending process of bringing the SPV into operation with a wary eye, watching for any attempts by EU powers to move into a position of outright circumvention. Future measures taken to expand the INSTEX mandate have the potential to bring it into more direct conflict with US sanctions, and E3 countries have already confirmed aspirations that the vehicle will be opened to third party countries once operations have been established. From a US perspective, there will be acute concerns that an expanded EU SPV may provide both means and direction to other countries seeking ways to limit their own exposure to the punitive reach of OFAC sanctions.

Responses from Iranian authorities meanwhile have been similarly restrained. Whilst the initial announcement was greeted by relative optimism, an undercurrent of dissatisfaction with the delay and inadequacy of the E3's efforts with INSTEX has become apparent in subsequent statements. Growing domestic pressure in Iran will mandate that it demand more tangible progress from EU countries on this front sooner rather than later.

A Falcon's Eye View: The Middle East Perspective

The establishment of INSTEX should not be interpreted as a sign that trade with Iran is broadly more acceptable, or has finally cleared the period of flux that has dominated trade restrictions. For now, the vast majority of trade with Iranian entities remains prohibited under the full extent of US economic sanctions as of 4 November 2018, and even non-US persons will need to be careful to trace their connections to US jurisdiction before taking any action contrary to US foreign policy. Middle Eastern businesses, for example, in addition to their obligations under applicable United Nations Security Council Resolutions, will need to evaluate key issues such as whether any US dual-nationality employees, trade in US-origin goods, ties to the US banking system or US-based resources are sufficient to bring their activity under the remit of OFAC restrictions.

Aside from goods exempted under CAATSA, the only trade permissible under the current sanctions framework is the reduced oil trade by Iran's biggest oil exporters under temporary waivers granted by

Middle Eastern businesses that have long been caught in the fluctuating application of Iran sanctions may view the new vehicle with hope that it will bring much needed clarity to trade permissibility, but it will be some time before the SPV offers any clear direction or plausible route for trade.

the US, namely China, India, South Korea, Japan, Italy, Greece, Taiwan and Turkey. These are not permanent exclusions, however, and have been granted only to alleviate the shock of US snapback sanctions on the oil market. The waivers have a fixed duration of 180 days, after which the US will resume its efforts to reduce Iran's oil exports to zero and may refuse to grant any extensions after they expire in early May 2019.

Caught in the Middle, or choosing a side?

Initially, INSTEX will only be available to EU countries, though it is possible that third party countries will be invited to join the initiative once its operations are established, subject to its efficacy. Middle Eastern businesses that are resolved to trading with Iran, meanwhile, will still have to face the seemingly insurmountable challenges that currently restrict trade flows. Notwithstanding the intricacies of identifying US jurisdiction, even compliance trade with parties not subject to OFAC sanctions is effectively blocked by the unwillingness of international banks to act as conduits for Iranian trade.

Middle Eastern banks and businesses have not been immune to the impacts of the US' 'maximum pressure campaign', as de-risking, involving the severance of ties by most Financial Institutions to their Iranian counterparts, has effectively prevented all trade with Iranian entities. The absence of viable legitimate routes to trade has driven frustration for businesses looking to trade permitted goods with Iran. Due to the closer proximity with Iran, Middle East-based businesses face an increased risk of abuse by criminal actors attempting to circumvent sanctions by means of disguising or smuggling prohibited goods intended for or originating from Iran, or carrying out restricted business under the anonymous cover of a steady stream of cross-border cash payments. Cryptocurrencies are also emerging as a potential means to disguise flows of funds, with the appeal of anonymity bolstered by the absence of the heavy regulation, monitoring and compliance requirements that dominate the global financial system. Many financial regulators worldwide are already attempting to bring this flow of funds under supervision, with some Middle Eastern jurisdictions consciously trying to balance the potential of emerging technologies with defending against potential risks.

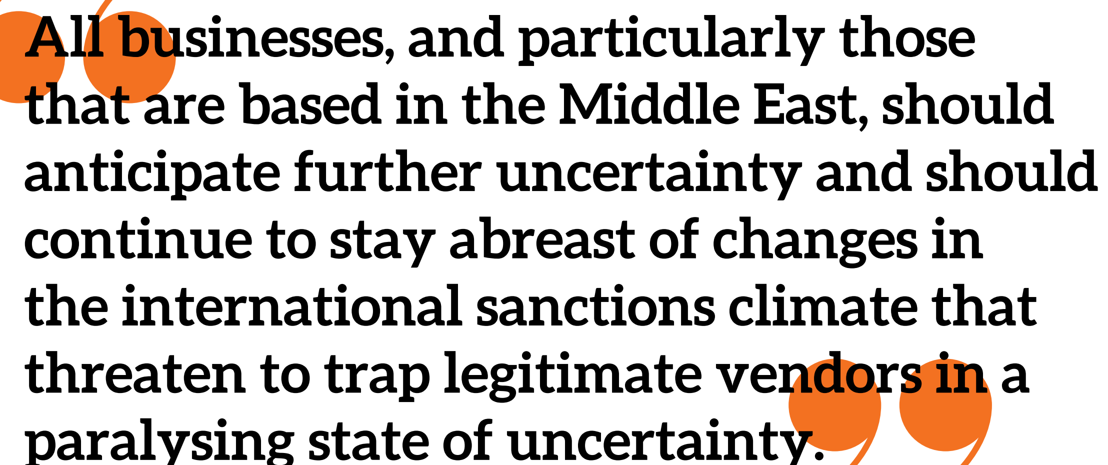
For Middle East businesses with EU registered affiliates, the SPV may provide an option for legitimate trade, but the true extent of INSTEX's accessibility will remain a nebulous concept until the E3 powers have made significant headway in establishing its underlying legal mechanisms.

A State of Disarray?

The global sanctions framework remains in a state of disarray, with the unprecedented divergence between EU and US positions casting confusion over compliance trade with Iranian entities. Ripples of this uncertainty have spread to every part of the international system, and Middle Eastern companies have found themselves trapped between the regulatory environment and threats posed by geographical proximity to Iran.

Crucially, INSTEX is not a mechanism to circumvent the US' extensive economic sanctions regime on Iran, and its sovereign backing will not offer European businesses carte blanche to trade with Iran without fear of US punitive action any time soon. Future steps to widen the channel of trade through the SPV will be contingent on a number of factors, including proof of its effectiveness in its early stages, support for increased trade from third party countries outside of the EU, and any retaliatory blocking actions taken by the US authorities to prevent efforts to undermine its sanctions regime. This will be an interesting development to monitor over the coming months as further details of INSTEX's reach and operations are released.

Perhaps the greatest factor that will determine the future of the SPV is the continued divergence between EU and US policy positions, and the ensuing discord within their respective sanctions regimes. As an added complication, the ensuing departure of the UK from the EU has the potential to again create a further divide in sanctions practices where previously there has been reliable unanimity. The recently released UK post-Brexit Sanctions Guidance, for example, highlights the areas in which the UK will have renewed freedom to apply its sanctions with impunity, and may spark further dissonance within the sanctions ambit of the Western hemisphere. Though these developments may appear as distant concerns to Middle East businesses, the global span of US and EU extraterritorial jurisdiction, not to mention the political flexing that often accompanies policy changes, brings sanctions issues into immediate importance on a universal scale. All businesses, and particularly those that are based in the Middle East, should anticipate further uncertainty and should continue to stay abreast of changes in the international sanctions climate that threaten to trap legitimate vendors in a paralysing state of uncertainty.



Tackling the Prickly Issues: Nazaha's Efforts to Unearth Corruption in Saudi Arabia

Khalid Al Hamrani
Partner,
Head of Regional Financial Crime
Dubai, UAE
k.hamrani@tamimi.com

Abdullah Alabdali
Associate
Regional Financial Crime
Riyadh, Saudi Arabia
a.alabdali@tamimi.com

The Kingdom of Saudi Arabia's current approach to anti-corruption was initially launched in 2007 with the initiation of its National Strategy for Maintaining Integrity and Combating Corruption ('**National Strategy**'), which brings together principles of Shari'a, domestic and international law. The National Strategy determined that, as corruption issues have grown more complex over time, comprehensive reform programmes should be launched to ensure that the Kingdom's defences are efficient at identifying the problem and suggesting solutions, whilst also ensuring that Saudi Arabia meets its obligations under international anti-corruption conventions.

Efforts to eradicate corruption have been undertaken in recognition of the fact that corrupt practices are not isolated by nature but are, in fact, direct causes of other widespread social, economic and national security problems. The cost of unlawful practices is reflected at every level of society, and has the potential to severely damage the prosperity of the country if they are not adequately addressed with measures to combat institutional corruption.

Tackling the Prickly Issues: The Role of Nazaha

On establishment of the National Anti-Corruption Commission in 2011, Nazaha (as it is more commonly known) became the first regulatory body in the Kingdom to monitor the implementation of the National Strategy. Nazaha exercises its jurisdiction over the public sector and all companies that are owned 25 percent or more by the state, and is fully independent in that it reports directly to the King and is not answerable to any other state institutions and no other state bodies have the authority to interfere in its work.

Although the Commission is only eight years old as an institution, it has already benefited from efforts to modernise its operations, in respect of both legislative changes and technological advancements. In November 2017, in a bold step towards eliminating corruption, His Excellency King Salman bin Abdulaziz Al Saud declared the establishment of the Supreme Committee against corruption comprising leaders from relevant government ministries to support the work of Nazaha and add an additional level of authority in order to prosecute corruption offences at the highest echelons of government. The Supreme Committee was established to supplement the efforts of Nazaha rather than supersede it, and the two organisations continue to work in unison to protect the integrity of Saudi Arabia's market.

From a technology perspective, in order to increase the effectiveness of its supervisory capacity, Nazaha has also started using electronic surveillance technology, which acts as a direct technological link between the Commission and other agencies and increases Nazaha's ability to monitor processes and activities. For example, this link enables Nazaha greater access

to check projects or programmes that fall under the Government Tender and Procurement Law (Royal Decree No. M/58 of 27/09/2006). Public procurement is universally considered to be a particularly potent area of risk for corruption, so Nazaha's increased oversight of public activity in this arena has the potential to detect and prevent a considerable quota of illicit activity. In addition, Saudi Arabian authorities released a draft version of an updated Government Tender and Procurement Law for public comment in 2017 which contained extensive amendments to the public procurement process. Whilst the deadline for comments has long since closed, there has as yet been no update as to when the new law is expected to be implemented.

Reports under the commission's jurisdiction
46%

Reports not under the commission's jurisdiction
54%

Aligned with the National Strategy, Nazaha is more than a symbolic addition to the Government's integrity framework, and plays a critical role in implementing a full range of initiatives designed to combat corruption across both the public and the private sectors. From a public sector perspective, Nazaha is responsible for ensuring that all of the government institutions that fall under its jurisdiction adopt effective internal policies and programmes to prevent corrupt activity. Beyond the confines of public service however, and in line with the second chapter of the National Strategy, Nazaha also aims to cultivate the appropriate environment for successful development, particularly in social and economic spheres. By creating a culture of integrity, Nazaha is fostering a zero-tolerance approach to corrupt practices across society.

Societal outreach is a pivotal part of Nazaha's activity due to its role as the designated authority to receive and investigate reports of corrupt behaviour, which forms a substantial part of its oversight responsibilities. The reporting process is therefore a fundamental mechanism for Nazaha's operations.

Digging for Answers: Nazaha's Reporting Process

A core part of the Commission's efficacy as a reporting mechanism is the continued confidence of Government institutions and the wider population in its resilience to corruption. In this respect, Nazaha is heavily reliant on the integrity of its personnel to form a first line of defence against improper activity. As part of its administrative and financial independence, Nazaha is able to hire specialised personnel with the necessary expertise and moral standing to undertake supervisory work over other bodies. Moreover, for particularly complex cases, Nazaha is authorised to consult external sources for additional assistance and guidance. The required skills and qualities are stated under Article 9 of Nazaha's Statute (Council of Ministers Resolution No. 165 of 02/05/2011) as follows:

'A person assuming any duties relating to the Commission shall meet the following conditions:

1. *Be a person of wisdom, honesty, integrity and neutrality;*
2. *Not have been sentenced to a had (punishment prescribed by Sharia) or ta'zir (discretionary punishment), convicted of a crime impinging on honour or integrity or subjected to a disciplinary decision dismissing him from a public office, even if rehabilitated;*
3. *Submit a financial declaration; and*
4. *Not engage in any work – directly or indirectly, paid or unpaid, in government or private sector – while employed by the Commission.'*

Positive Reporting Practices

As per Article 3(12) of Nazaha's Statute, which sets out the Commission's Objectives and Powers, Nazaha is mandated to:

'Provide direct communication channels to receive and verify reports from the public on acts involving corruption, and take necessary measures thereon.'

Accordingly, Nazaha has established capacity to receive reports in a variety of ways including via hot lines, fax, email, website and even telegraph. As a further aspect of its modernisation, Nazaha also recently launched a smart phone application which operates as an additional platform for reporting, and has emerged as one of the most efficient and engaging methods of connecting with the general population, constituting almost 30 percent of all reports received in 2018. Rather than operating singularly as a means for receiving reports, the App also has a secondary function to survey perceptions of integrity amongst public and private sectors. For expediency, the submission platform on the App also supports media attachments such as pictures, documents or video files that can be used as evidence for the report, enhancing the initial review of the report for Nazaha officials.

After receiving a report, an initial assessment is conducted by a Nazaha specialist who would be designated according to the subject of the case. For example, in the case of a construction project that has not been executed in a proper manner, the assessment will be held by either a legal background expert, an accountant or an engineering expert, subject to the alleged type of infraction. A second review will then be undertaken by a higher-level committee conducted by an appropriate expert. The committee would decide whether the case should proceed or alternatively, in cases where the matter is beyond Nazaha's jurisdiction, should be saved and referred to another competent authority. In such instances, the reporter will be notified and Nazaha will follow up with the relevant authority until the issue has been resolved.

If the reported incident is within Nazaha's jurisdiction and the recommendation is to proceed, the Commission will appoint one of its experts to gather the available evidence, including witness statements,

"Societal outreach is a pivotal part of Nazaha's activity due to its role as the designated authority to receive and investigate reports of corrupt behaviour, which forms a substantial part of its oversight activities."

and will subsequently refer the case to the Public Prosecution. As part of Saudi Arabia's significant anti-corruption reform over recent months, dedicated specialised anti-corruption units have been set up within the public prosecution, which were established with an emphasis on investigative and judicial powers to address corruption instances with the necessary urgency. Due to the importance of investigative effectiveness in such cases, Nazaha' has also been empowered by several Royal Decrees (No. 4795 of 22/12/2012, No. 37993 of 04/07/2012 and No. 25686 dated 15/04/2012) to enhance the Commission's investigative capacity in all governmental tenders and procurements, ensuring that the services provided to the public are implemented according to proper standards of public service.

Assessment Mechanism

Nazaha has signed agreements with other investigative departments such as the Public Prosecution and the National Security Council in order to facilitate its investigative process. Accordingly, Nazaha experts would refer cases based on the following criteria:

- For bribery cases, the Commission will report to the competent authority (National Security Council) within eight hours, and will get a report back from the National Security on the result of the case once it has been duly processed;
- For administrative offences, such as the misuse of power or a crime of embezzlement, the Commission will take responsibility for the initial gathering of evidence by sending either one or a team of experts to visit the relevant agency. If the evidence is substantial, the case will be referred to either the Public Prosecution or to the Monitoring and Investigation Commission to conduct further investigation;
- In addition, Nazaha has the power to monitor public services provided to the population and ensure that they are applied at the highest level. This particular authority allows the Commission to assess all projects across all sectors to make sure that public policy programmes are accurately applied and supplied by competent providers. This is a particularly broad mandate and has historically included, for example, an assessment of the effectiveness of rainwater drainage programmes all over the country; and
- A specific department in the Commission is dedicated solely to overseeing mega projects which are viewed as instrumental to the development of the country. This is a discretionary and holistic process, whereby the commission selects a project to survey from its outset, looking for breaches in procedural protocol that may indicate improper practices.

Finally, as an original part of its mandate, Nazaha offers protection to whistleblowers by assuring the confidentiality of their identity and, if the whistleblower's identity is discovered, Nazaha will honour the reporter's efforts to combat corruption by providing its protection against retaliatory action. Additionally, in order to encourage societal vigilance against corruption, Article 13 of Nazaha's statute authorises the provision of moral and financial incentives for whistleblowers. Accordingly, Article 17 of the Anti-Bribery Law (Royal Decree No. M/36 of 30/06/1996) authorises rewards for whistleblowers under certain circumstances of at least SAR 5,000 and up to half of the total money confiscated in punishment of the reported crime. Higher amounts may even be rewarded in exceptional cases where it is deemed appropriate.

Whistleblower protection is a relatively underdeveloped legal concept in the Middle East compared to other international jurisdictions, but Saudi Arabia has recently taken promising steps to enhance its existing reporter protection. Via Royal Decree No. 41043, issued in May 2018, full protective measures are now applied to anyone that reports corrupt activities, including a prohibition against employers taking punitive action against employees who have exposed illicit internal practices. These measures, though significant, are only a prelude to the impending full issuance of a law of protection of witnesses and victims of corruption, which is expected to be implemented in the imminent future following Nazaha's announcement of its completion at the end of February 2019.

A Barb in the Side of Corrupt Actors

Nazaha has played a prominent role in the Kingdom of Saudi Arabia's anti-corruption efforts since its establishment in 2011, and its preeminent position is increasing in line with greater public engagement in corruption issues; in 2018, Nazaha reported a 50 percent increase in the number of reports of suspicious behaviour received compared to 2017. Even as the Kingdom implements additional measures to take a more pro-active stance against corruption in the public sector, Nazaha's role as the primary point of contact between the public and private sectors for corruption concerns ensures that it remains the touchstone for public sector integrity.

Consequently, its reporting mechanism and procedures are of fundamental importance. Efforts to enhance Nazaha's internal capacities, such as increasing its utilisation of technology and establishing methods of cooperation with specialised investigation units, play a broader role in the overall anti-corruption efforts and may prove to be a well-placed barb in the side of corrupt actors in the Kingdom.

"Even as the Kingdom implements additional measures to take a more pro-active stance against corruption in the public sector, Nazaha's role as the primary point of contact between the public and private sectors for corruption concerns ensures that it remains the touchstone for public sector integrity."

Financial and Administrative Corruption | 74.3%

Lack of Services | 19.9%

Lack of Completed Projects | 4.5%

Lack of Laws and Work Procedures | 0.9%

Request of Whistleblower Protection | 0.4%

Wars & Walls of the Dragon: China's Geopolitical Ties and Sanctions Risks in the Middle East

Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

As a result of the ongoing trade war between the United States ('**US**') and China, a web of new dynamics has ensnared the international system, giving rise to new forces, tensions and breaks, that are in turn causing wide-reaching consequences across political, economic and legal spheres, and impacting the global economy. Trade relations represent just one juncture of these interconnected fields, and yet entail multi-faceted and nuanced ramifications across the global business market.

China is becoming increasingly prominent as a regional strategic partner; as its energy security and Belt and Road initiatives drive its investments and interests in the Middle East, the national development visions of regional countries have created a symbiotic drive for opening up to international investors. In 2017, China overtook the US as the leading investor in Saudi Arabia, rendering it the primary trade partner for the Region's top two economies – both Saudi Arabia and Iran. The Middle East's central location also increases its significance in China's global expansion plans; the UAE alone sees up to 60 percent of China's trade with Europe and Africa which passes through its ports in transit to the Eastern hemisphere. With emerging alignment between the interests of China and regional countries, it is perhaps not surprising that trade ties between the region and the largest economy in the world have proliferated. Yet with China's current trade troubles that have flared in its competition with the US, Middle Eastern countries may be increasingly exposed to disturbances in global trade dynamics caused by rising tensions beyond their borders.

The dominant forces that are currently disrupting China's trade flows at the global level can largely be attributed to two sources: political tensions and legal mechanisms. The Middle East region is one that is often described as being volatile, but events that are currently unfolding across the global stage reveal that destabilising forces do not discriminate on the basis of geography.

Trade Wars: The Spill-Over Effect of US-China Tariffs

Political tensions are the driving force behind the ongoing US-China trade war, which has been escalating since President Trump implemented tariffs on imported steel and aluminium (for all nations, not only China) on 9March 2018. This policy was borne out of the protectionist 'America First' rhetoric that has pervaded the objectives of the current White House administration, though tariffs imposed by targeted countries in response have also cost the US economy. China responded by imposing a $3 billion tariff on US imports, prompting an escalatory chain of measures that resulted in the US and China jointly imposing almost $350 billion in tariffs. The tension between the US and China has subsequently calmed, with both countries having reached a détente, and President Trump pledging to indefinitely freeze the imposition of 25 percent tariffs pending negotiations over a new comprehensive trade deal between the two countries.

Despite the bilateral narrative surrounding the US-China trade war, in the event that the negotiations for a new deal should fail and elevated tensions spark a full-blown trade war, the World Economic Forum estimates that it could reduce global Gross Domestic Product ('**GDP**') growth by as much as 0.7 percent, negatively impacting economic development across every continent. This is based on a worst-case scenario of a US 25 percent tariff on $505 billion imported by China, and a corresponding increase by China of 50 percent of that total. In an equally pessimistic outlook, the International Monetary Fund ('**IMF**') cut its forecast for GDP growth based on tariffs that had been imposed by October 2018, predicting that GDP growth would grow only 3.7 percent over the course of 2018-2019, 0.2 percent lower than its forecast of just three months earlier in July 2018.

Importantly, the US is not only pressing trade disputes with China but has approached re-negotiations of several of its major trade agreements in a way that has brought it to adversarial ground with several historic major trade partners, including Canada, Mexico, and the EU. The sheer scale of the tariffs and magnitude of commerce impacted at the global level makes it inevitable that such disruptive practices have spill-over consequences far beyond the borders of the US or China.

Caught in the Middle East: Key Sectors Feeling the Heat?

Both the US and China are key strategic trade partners of many Middle Eastern counties. The US has a long history of diplomatic and commercial involvement in the region, whilst China's continuing rise to global prominence has necessitated stronger ties with energy-producing nations. In July 2018 at the 8th Ministerial Meeting of China-Arab States Cooperation Forum, China pledged a loan package worth $20 billion to Middle Eastern nations to boost oil and gas development, enhancing relations that have already been intensified through China's pursuance of its strategic Belt and Road initiative. Both of these countries represent significant investors with deep ties to the region across politics, trade and foreign affairs.

As a result, though not directly targeted by the tariffs, knock-on impacts have been felt to an extent across a number of sectors. The aluminium industry for example, is one where the UAE is exposed to the imposition of the US' 10 percent tariff, as the third largest exporter to the US, accounting for 13 percent of aluminium imports behind only Canada and Russia (with 54 and 17 percent respectively). Qatar, Saudi Arabia and Bahrain are also amongst the top 10 exporters of aluminium to the US, with oil fuelling cheap production. Despite this, the UAE steel industry has been relatively insulated from the trade dispute, as it exports only five percent of its aluminium to the US. Other business leaders from the UAE's industry have also reported increasing practical difficulties in trading with China, impacting overall growth and placing additional burden on the national economy.

> **"Though trade tariffs and sanctions are distinctly different mechanisms for influencing economic flows, there are instances where their application can become conflated, blurring the lines between legal and geopolitical restrictions."**

This does not necessarily mean however, that the consequences will be negative for all markets. The region is largely shielded by its status as a net exporter of hydrocarbons and some markets are well positioned to benefit from shifting trade flows. Saudi Arabia, for example, has taken specific steps to develop its solar energy industry, increasing its attractiveness as a manufacturing destination for Chinese companies looking to avoid the 40 percent tariff levied by the US against all solar imports.

The ability of targeted countries and businesses to shift their global operations in order to avoid negative measures represents a key distinction between trade tariffs and trade sanctions. Whilst the extent and magnitude of the trade war that rose to a crescendo in 2018 has indubitably impacted trade flows through and around the Middle East, the risks involved are largely geopolitical and commercial in nature. By contrast, trade sanctions carry additional legal and reputational risks that are also instrumental in diverting global trade flows.

Trade Walls: China's Interactions with Economic Sanctions

Economic sanctions, due to their targeting and selective application, do not yield the same economic clout as the tariff war between two global trade titans. Their application, however, and the punitive sanctions that they carry, can amass devastating damage on small economies and private businesses that fall on the wrong side of the law.

The current international economic sanctions framework is currently delineated by the fragmented remnants of the Joint Comprehensive Plan of Actions ('JCPOA'), also known as the 'Iran Deal'. On 8 May 2018, President Trump announced that the US was pulling out of the Iran Deal, that had been agreed between the permanent members of the UN Security Council (UK, China, Russia, France, US, the EU, Germany and Iran), on 16 January 2016. Following the announcement, the US President provided a National Security Presidential Memorandum directing preparation for the re-imposition, or snap-back, of all US sanctions that had been lifted or waived following the Iran Deal. 4 November 2018 was set as a hard deadline for all US persons to wind up their dealings with Iran. In effect, this means that both primary sanctions covering all US persons, as well as secondary sanctions against non-US persons, are in full effect across a range of prohibited activity.

The new position of the US is at odds with that of the other signatory parties of the Iran Deal, with EU countries resolved to salvaging some protection for European companies dealing with Iran. The diversion in approaches adopted by major geopolitical players to trade with Iran adds tension to an already sensitive situation and is a further issue that will test both political and business relations in the Middle East. In this context, China's ongoing trade with Iran is likely to prove a flashpoint for its future activity in the Middle East.

The direct effect of the US' position means that secondary sanctions, namely sanctions that impact non-US actors that interact with Iranian entities, have been re-imposed and will likely lead to non-US actors being subject to censure and punitive action from the US. Although China is currently permitted to continue exporting oil from Iran under its temporary waiver granted by the US to eight of Iran's key oil exporters, China may need to re-evaluate its position when the waiver expires on 1 May 2019. The US has indicated that it will not renew any of the waivers and will continue to pursue its 'maximum economic pressure' campaign by driving Iran's exports down to zero. Although China has reiterated its commitment to developing strategic ties with Iran, China's continued reliance on energy imports has formed the basis of its trade relationship with Iran and it is unclear how it will maintain its current oil-dominated relations once it becomes subject to the full extent of US sanctions.

As a primary obstacle, any trade in Iranian oil which is financed by transactions passing through the sanctioned Central Bank of Iran will become subject to secondary sanctions, which carries daunting concerns for China's financial institutions. Moreover, the Chinese state-owned Bank of Kunlun, which channels a large proportion of China-Iran trade transactions announced its new policy in January, stating that it would only service trade in goods exempt from sanctions, in full compliance with the US legal restrictions.

The ability of the US to use economic sanctions as a means to influence trade between third party countries, despite a lack of alignment between their respective foreign policy agendas, has caused some countries to explore ways in which to increase their economic sovereignty against the pressure of US sanctions. The UK, France and Germany, for example, as signatories of the JCPOA, recently established the Instrument in Support of Trade Exchanges ('**INSTEX**'), a Special Purpose Vehicle ('**SPV**') designed to facilitate compliance trade between EU and Iranian companies through a mirror-transaction system. Though the practical and legal minutiae of the SPV are yet to be determined, and it is not clear whether any such vehicle would be capable of facilitating trade between Iran and third party countries, it is an important example of how countries are attempting to mitigate the stranglehold of US sanctions.

> **Though China is currently permitted to continue exporting oil from Iran under its temporary waiver granted by the US to eight of Iran's key oil exporters, China may need to re-evaluate its position when the waiver expires on 1st May 2019;**

In a further example, at the end of March 2019, the China International Payments System ('**CIPS**') reportedly attracted several Russian banks with a view to boosting bilateral relations between Russian and China, including the use of their respective national currencies (ruble and yuan respectively). Though this is a relatively nascent development, considering the challenges imposed by US sanctions not only on Iran but also on targeted Russian entities, it may prove useful as an alternative mode of payment in the future, moving away from reliance on the US dollar dominated financial system and towards greater multilateral economic sovereignty.

With an elevated risk of sanctions infractions, the high cost of compliance, and facing the deterrence of secondary sanctions, the US upending the JCPOA will radically undermine the appetite and ability of Chinese businesses, as well as companies based in the Middle East and beyond, to trade with Iran. Repercussions from the US' withdrawal will not be confined to entities that trade with Iran, as collective fear of punitive measures will osmose into the global financial system, spurring development of alternative means to facilitate trade without invoking trade sanctions.

Critically, unlike with the migration of business activity based on the commercial drivers of trade tariffs, any means that are perceived to be aimed at circumventing sanctions measures carry far greater legal risk and the full weight of punitive fines. Delineating between activity that is legitimately risk-avoidant rather than illicit is a fundamental requirement of modern compliance programmes.

Untangling Sanctions and Tariffs: The Saga of China's Telecom Giants

Although trade tariffs and sanctions are distinctly different mechanisms for influencing economic flows, there are instances where their application can become conflated, blurring the lines between legal and geopolitical restrictions. This is exemplified by recent high profile activity surround the US government and China's telecommunications giants.

Historically, the US has set precedence for applying punitive measures against Chinese telecoms' companies, including punitive fines for sanctions infractions, as well as strict export restrictions on US-origin componentry sold to a specific Chinese telecoms company. Most recently, the US has waged an extensive campaign against one of China's flagship telecoms' companies, taking extreme measures to curtail its global commercial activity. This incorporated a range of measures including arresting and extraditing the company Chief Financial Officer from Vancouver, Canada, banning all US government branches from purchasing and using goods produced by Chinese telecoms' companies, and conducting a concerted diplomatic campaign across Europe to persuade its allies to impose a ban against use of technology produced by the company in question in development of 5G networks on the basis of national security concerns. Press reporting on the matter has recently included speculation that impending measures may include US sanctions measures against the company, even though there has been no official confirmation of any such plans to date.

Whilst President Trump has insinuated a political basis for this activity, and pending the outcome of a comprehensive US-China trade agreement under discussion by both countries, Middle Eastern markets have already responded to the risk of impending increased difficulty in trading with Chinese telecoms' companies. In the event that sanctions measures are imposed against targeted companies, these would pose significant difficulties for Middle Eastern markets, which are largely reliant on Chinese supply of componentry for telecoms' networks.

As long as the prospect of sanctions measures in this matter remains speculative, companies are not subject to any further legal restrictions regarding trading with Chinese telecoms companies. Businesses and governments would be well-advised however, to monitor any developments for significant shifts in the risk climate.

> **Critically, unlike with migration of business activity based on the commercial drivers of trade tariffs, any means that are perceived to be aimed at circumventing sanctions measures carry far greater legal risk and the full weight of punitive fines.**

Keeping an Eye on the Dragon: Middle East-China Trade Ties in Future

For Middle Eastern businesses that are endeavouring to predict their place in the storm of trade tensions and restrictions, it is critical that business leaders are aware of how global dynamics influence regional trade flows. Against the backdrop of China's intensifying diplomatic and trade ties with the region, increasing inflows of investment and commerce from the East will likely raise concerns surrounding the strategic balance between US and Chinese interests with key strategic allies. Such considerations will become increasingly important as regional governments focus on securing sufficient inflows to their respective countries in pursuance of their development strategies, such as the Bahrain Economic Vision 2030, KSA Vision 2030 and Egypt Vision 2030. These visions are contingent upon sufficient funding, and efforts by regional countries to develop trade ties within international investors which will likely increase their exposure to shifts in global trade flows.

As high profile developments currently exhibit, the dynamics of trade wars and walls can create an intractable nexus of forces that shape cross-border trade, the impacts of which can dissipate to be felt at the micro-level. Ultimately, despite the seeming remoteness of such threats, it is imperative that all businesses, whether operating in the Middle East or elsewhere, stay apprised of developments on an international level which may impact business conditions and make an effort to ensure that they are aware of where the lines between commercial and legal risks merge.

Still A Good Guard Dog?

A review of the United Kingdom's financial crime structures post-Brexit

Adam Wolstenholme
Senior Associate
Regional Financial Crime
Dubai, UAE
a.wolstenholme@tamimi.com

Introduction to Brexit

The UAE, as a progressive financial hub, will always have an eye on its competitors. It is necessary to do so, if it wishes to continue with its ambitions to be one of the best countries in the world for the Golden Jubilee of the nation in 2021. One such competitor is London and the UK, a global city and country where the sun previously never set on its domain.

Times have changed. Exclusionary policies and decisions now mean that Britain will be exiting the European Union ('**EU**') either on 12 April or 22 May, dependent upon EU/UK negotiations. This means that Britain will sever ties with an economic union with which it has enjoyed economic growth since its membership in 1972 of the erstwhile European Economic Community.

The terms of Brexit are yet to be finalised with the UK struggling to assuage the wishes of the majority who voted for Brexit on 23 June 2016, the competing minority views of the 'Remainers' (those who wish to remain in the EU) and the EU itself. As the short, medium and long-term consequences of Brexit remains in a state of flux, this article briefly addresses the potential financial crime implications for the UK and the Middle East.

Should there be a strain on the British economy post-Brexit then there may be calls to liberate companies from legislation aimed at targeting financial crime that may be seen as a hindrance to trade. If these calls are vociferous enough, then legislators may lessen the approach currently taken that could, in turn, benefit the malevolent.

Introduction to Potential Legislative Framework Post-Brexit

The European Communities Act 1972 ('**ECA**') has, to date, provided for the primacy/supremacy of EU law in the United Kingdom. The effect of the ECA has been that where there is a conflict between UK law and EU law, EU law prevails. This means that ultimately, the EU was the chief arbitrator of UK legislation.

The UK has now introduced the European Union (**Withdrawal**) Act 2018 which is intended to remedy the short-term effects of Brexit from a legal perspective. This will be achieved through maintaining the status quo of existing EU legislation, with the option of UK legislators then deciding which laws they wish to retain.

The UK understands the importance of maintaining a strict anti-financial crime policy and enforcement mechanism. Accordingly, there has been a flutter of legislation over the last few years. Legislation such as The Criminal Finances Act 2017, Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017, and Serious Crime Act 2015 are the most relevant recent examples. The UK also enacted the Sanctions and Anti-Money Laundering Act 2018 on 22 November 2018, which was introduced partly in order to ensure that the UK's sanctions or restrictive measures policies are maintained and strengthened after Brexit.

Since 1990, the EU has issued directives aimed to tackle money laundering and terror financing.

These directives have been modernised constantly and adopt the Financial Action Task Force's recommendations to promote the highest standards to address the insidious effects of money laundering.

The current legal status of EU Directives in the UK is that they require implementation under domestic law to take effect. Accordingly, Britain passed the UK's Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017, which was intended to transpose the EU's Fourth Money Laundering Directive ('**4MLD**') into UK law.

The most recent directive, however, the 5th Anti-Money Laundering Directive ('**5MLD**'), entered into force on 19 June 2018, requiring EU Member States to transpose the Directive by 10 January 2020. The requirement to transpose 5MLD will be post-Brexit and accordingly the UK will no longer be mandated to transpose the requirements, although assurances have been made that the UK will abide by these commitments.

The effects of 5MLD are intended to limit the ability of criminals to exploit the EU and introduce comprehensive recordings of relevant transactions, such as making information publicly available as to the source of funds and/or wealth, as well as information of beneficial ownership with transactions from high-risk countries. This transparency will force criminals further into the shadows as they scour the globe for jurisdictions with exploitable regimes. 5MLD will provide an independent record that will be a valuable source for verifiable customer information, including electronic identification. It remains to be seen whether, post-Brexit, this will lead to a divergence in standards between the UK and the EU and what effect this will have.

A Look Ahead with UK's Anti-Corruption Plan 2017-2022

Subsequent to the decision to Brexit, in 2017, the UK outlined its five-year anti-corruption strategy that was to provide 'a framework to guide UK anti-corruption policies and actions… [underpinning the UK's] government's focus on economic crime'. Now in 2019, and with Brexit looming, the feasibility of this strategy will be under scrutiny. Three of the six priorities now appear to be precariously placed following Brexit, namely: 1) strengthen the UK as an international financial centre; 2) improve the business environment globally; and 3) work with other countries to combat corruption. These specific priorities are reliant upon the assistance of other jurisdictions and the ability to attract foreign wealth. An isolationist policy may be seen as running directly contrary to these priorities and undermines the acceptance that corruption is a global practice that requires an international uniform approach to stem the illicit flow of funds.

There are two readily immediate areas of concern in respect of financial crime and they relate to judicial cooperation between the UK and the EU post-Brexit. The first is in the realm of mutual legal assistance, the term used to describe the process of judicial co-operation between States that allows the collection and exchange of information. Currently, Britain and the EU benefit from European Investigation Orders that permits the judiciary of an EU Member State to request information be obtained from another EU Member State ('**MLA Requests**'). This is designed as an efficient procedure that mandates the receiving State to accept the request and enables an expeditious approach to investigations across Member States of the EU. Post-Brexit, it is unclear how the UK will be able to effect MLA Requests and may be forced to revert to the use of diplomatic channels as is currently the status for third countries seeking assistance with EU Member States. This is a bureaucratic process and one that may hinder the UK's ability to liaise with its neighbours as efficiently as would be required for cross-border issues.

The second area of immediate concern for financial crime is in respect to extradition. Britain benefits (or is burdened with – dependent upon personal views) from the European Arrest Warrant ('**EAW**'). The EAW was introduced to improve the ability of Member States to extradite requested individuals between one another, enabling States to enforce criminal judgments against criminals who sought to evade capture by fleeing a jurisdiction. Following Brexit, the UK's position will not be clear. Currently, non-EU States do not participate in the EAW system, with EU Member States relying on domestic provisions and multilateral treaties to effect extradition. Consequently, the UK would look to rely upon other treaties, such as the Council of Europe's 1957 Convention on Extradition, which is considerably more cumbersome and time-consuming than the EAW.

Accordingly, and as shown in the two examples above, whilst not debilitating the UK from a financial crime perspective, Brexit would appear to stymie the current efforts of the UK to lead the world in financial crime matters and be a nimble and effective jurisdiction that cooperates closely with its international counterparts. Irrespective of the status of the legislation post-Brexit, the UK enforcement authorities and legislature will undertake their best efforts to ensure that criminals cannot benefit from the new dawn in geo-political relations.

"Whether the UK fully adopts future European standards, Middle Eastern businesses should demand from their UK counterparts that they adhere to the highest possible standards of efficacy, irrespective of the quagmire of Brexit and legislative upheaval."

What Does this Mean for the Middle East?

Whatever the effects of Brexit, the UK will no doubt remain an attractive location for investors and entrepreneurs from the Middle East, and the large expatriate population residing in the Middle East will wish to maintain their interests back home. Accordingly. all eyes will still be on the UK for potential opportunities. Many will be salivating at the prospect of uncertainty, currency fluctuations, capital withdrawal and economic crashes. Some will be enticed by the potential to exploit this uncertainty and unsavoury, unscrupulous actors may seek to defraud unwitting investors both domestically and internationally. Fraud comes in a myriad of forms and once the UK further distances itself from the EU, Middle Eastern individuals must further confirm they only enter into relations and transactions where they have full confidence in their counterparty or agent.

The UAE's new anti-money laundering law, Federal Law No. 20 of 2018, and recent amendments to the Penal Code provide greater standards for businesses in respect of their domestic and international transactions. Combining the UAE's current approach with the standards set by 5MLD are a good marker for any Middle Eastern company wishing to ensure that its business thrives, but with security and stability, and fundamentally insulating themselves from risk. Whether the UK fully adopts the 5MLD and future European standards, Middle Eastern businesses should demand from their UK counterparts that they adhere to the highest possible standards of efficacy, irrespective of the quagmire of Brexit and legislative upheaval.

In order to obtain the requisite level of confidence, we would reiterate the need to undertake the necessary level of due diligence according to the risk that is proposed. This preparation will ensure that there is transparency in the business with which you are interacting, and that promises that are too good to be true are not made, or at least not believed. For those seeking to invest in the UK or with UK businesses post-Brexit, as always, consult a great lawyer first.

Going After the Lion's Share: The UAE's Changing Approach to Foreign Direct Investment in Technology and its Financial Crime Implications

Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

Andrew Fawcett
Senior Counsel
Technology, Media & Telecommunications
Abu Dhabi, UAE
a.fawcett@tamimi.com

The United Arab Emirates (**UAE**), in an effort to expand in critical markets including technology, has passed a new FDI law that will increase foreign investment interest in the country by creating a more open climate for foreign ownership. Conversely, amid escalating trade tensions with global technology behemoths and the American-protectionist slant on national security, the US is now subjecting FDI in technology business to greater scrutiny and imposing new restrictions on foreign ownership in US technology companies.

These two contemporaneous, yet differing, stances have positive implications for the UAE's economy, as foreign investors deterred by the increasingly arduous investment conditions in the US may now look to the Middle East for future tech investments.

Whilst there may be potentially negative implications for investors from the UAE or elsewhere in the Middle East operating in the US, foreign investors aspiring to capitalise on the UAE's market will also need to be aware of the measures Federal authorities impose to protect the country's national and economic security.

Accentuate the Positive: UAE Opening Up

Historically, UAE law has restricted foreign ownership in any onshore company established in the UAE. The long-awaited Federal Decree-Law No. 19 of 2018 on Foreign Direct Investment ('**FDI Law**'), however, which came into force on 30 October 2018, allows foreign investors to potentially have up to 100 percent ownership in a UAE onshore business entity in specific sectors.

The new FDI law has been met with widespread acclaim, as prospects are bolstered for development by renewed interest from international markets – according to a statement by UAE Minister of Economy His Excellency Sultan Al Mansouri shortly after the new Law's issuance, changes to the FDI regulations are expected to increase the volume of capital inflows to the country by as much as 20 percent by 2020.

With the increased flow of funds, the FDI Law will be instrumental in attracting and directing FDI in line with the developmental policies of the UAE, including expanding the production base, diversifying it, and transferring and attracting 'advanced technology', knowledge and training.

To ensure that funds are directed towards prioritised areas of development, the UAE Foreign Direct Investment Committee ('**FDIC**') established under the FDI Law, has been charged with issuing an impending 'Positive List' specifying the sectors and economic activities that will benefit from increased openness to international investment, including the Emirates in which such activities are allowed to be conducted as a foreign direct investment.

Considering the stated objectives around advanced technology and its strategic significance as a non-oil sector, it is expected that the technology sector

will feature on the 'Positive List'. UAE Minister of Economy Mr Al Mansouri has already indicated that the fields of innovation, technology, space and Artificial Intelligence (AI) are considered to be critical forces of change in the transition to an advanced digital economy, and modern technology within these sectors is likely to be a key target beneficiary of the access route to international investors.

> **The UAE continues to prioritise its national and economic security and has ensured that its defences have not been compromised by its recent years of economic development and increased trade.**

On FIRRMA Ground: US Clamping Down on National Security

Whereas the UAE is in its infancy in becoming a leading hub for high-tech innovation, the US represents a far more established, and even dominant market in this sector. According to Forbes, as of 2018 the US was home to seven of the top 10 technology companies in the world (Apple, Microsoft, Alphabet, Intel, IBM, Facebook, and Oracle), with the remaining three hailing from South Korea (Samsung, ranked 2nd largest in the world behind Apple) and China (Tencent Holdings and Hon Hai Precision Industry).

Foreign investment, however, including funds from the Middle East, is now subject to heightened US government scrutiny and FDI transactions potentially could, in certain circumstances, be blocked or unwound.

In October 2018, the US Treasury Department issued 'pilot programme' regulations that restrict Foreign Investment in US technology businesses. The regulations mean that foreign investors have to adhere to strict national security reviews or risk facing fines that could be as large as the value of their intended investment.

Foreign investment in the United States is controlled and reviewed by the Committee on Foreign Investment in the United States ('**CFIUS**') - a Treasury-led inter-agency committee. Previously, CFIUS primarily focused their efforts on investors who had intentions of owning a controlling stake in a US company. In practice, foreign investors were incentivised to voluntarily seek review and approval from the CFIUS anyway, due to the committee's power to adversely affect a business's investment opportunities, by blocking or unwinding the investment. Under the new regulations, however, the scope of the CFIUS' authority will be expanded in that review for foreign investors will now be a mandatory process for many acquisitions.

This will have profound implications for investors that are contemplating vesting their financial interests in the US, as their discretionary protection from inspection by the US government will be removed.

The regulations were created in response to a growing bipartisan consensus over a perceived threat to national security from foreign companies that are supported by foreign governments. Recent hostilities with companies such as Huawei and ZTE exemplify this trend, featuring a convergence of different types of trade controls, tariffs, blockades and economic sanctions, which expose the political and security underpinnings of technology trade.

The regulations are not myopically focused on a single collective of international investors, however, and their extensive scope will have far-reaching implications for overall foreign investment in a much broader scope, including any investment interests out of the Middle East.

Earlier in 2018, President Trump signed the Foreign Investment Risk Review Modernization Act ('**FIRRMA**'). This new law broadens and modifies the authority of the President and the CFIUS by expanding the scope of foreign investments in the US that are subject to national security review.

In particular, the CFIUS mandate has been expanded to non-controlling investments in US tech companies by a foreign person if the investments afford the foreign person:

- access to any material, non-public information in the possession of the US business (i.e. it is not available in the public domain, and is necessary to design, fabricate, develop, test, produce or manufacture critical technologies – but does not include financial transaction information regarding performance of the US business);
- membership or observer rights on the board of directors or equivalent governing body of a US business (or right to nominate an individual to a position on the board or equivalent governing body if the US business); or
- any involvement, other than through voting of shares, in substantive decision-making of the US business regarding the use, development, acquisition, or release of critical technology.

> **The divergence in the approach to the regulation of foreign direct investment by each of the UAE and US from their existing economic models could potentially boost investment in technology businesses in the UAE.**

The new US regulations apply to 'critical technology' which is defined very broadly. Nearly all significant or emerging areas of technology are affected including biotechnology, artificial intelligence (**AI**), computer vision, position, navigation, and timing (**PNT**) technology, microprocessor technology, advanced computing technology, quantum information and sensing technology, logistics, additive manufacturing (e.g., 3D printing), robotics, brain-computer interfaces, hypersonics, advanced materials, and advanced surveillance technologies.

At this stage, the new US regulations are temporary 'pilot' rules that took effect in November 2018 and may be subject to change once superseding permanent regulations are introduced around 18 months after FIRRMA's enactment.

Dual Use Goods

In addition to the recent tensions that have ratcheted up in the technology field, security concerns around technology are compounded due to the sensitivities related to Dual-Use Goods ('**DUG**'). Such items are subject to trade restrictions due to the potential co-optation of their componentry for nefarious use for which they were not intended, particularly in conflict and military-related contexts. Radios, chlorine and aircraft parts are all examples of goods with multiple legitimate uses, yet all are subject to strict export controls to limit their potential to be supplied to high-risk jurisdictions or entities.

Technology, due to its versatile nature, is a particularly common inclusion within dual-use lists, and the US has taken steps to deploy a fortified defence against supply of designated DUGs. On the very same day as the introduction of FIRRMA, the US passed sister legislation known as the Export Control Reform Act of 2018 ('**ECRA**'), primarily orientated at improving control of export and supply of sensitive goods. Part 1 of the ECRA, the Export Control Act, mandates that the US authorities must improve the level of oversight in its dual-use export control system and expend greater efforts to identify and control emerging and foundational technologies that should be subject to export control. These regulations may have a profound impact for investors and developers working in the realm of new technologies.

All In the Balance: UAE Unifying National and Economic Security

Despite the seeming opposite trajectories of the US and UAE FDI trends, the UAE's opening-up to international investors in the technology sector should not be taken as a sign of diminished national security. On the contrary, the UAE continues to prioritise its national and economic security and has ensured that its defences have not been compromised by its recent years of economic development and increased trade. In regard to DUGs, the UAE implements all restrictions imposed under the United Nations ('**UN**') sanctions framework, either implemented under the umbrella of the World Trade Organisation General Agreements on Tariffs and Trade, or otherwise targeted as part of an embargo or trade restriction for peace and security purposes issued by the UN Security Council.

Moreover, it has drafted its new FDI Law in such a way as to balance its national security requirements with its objectives for global connectivity.

By way of example, whilst the promised 'Positive List' is still pending at this stage, the UAE FDI Law has already introduced a 'Negative List', identifying sectors which will not permit more than 49 percent foreign ownership, ensuring that such sectors remain weighted towards local control. FDI shall not apply in the UAE's financial or non-financial free zones, such as the Dubai International Financial Centre ('**DIFC**'). The 'Negative List' includes the following sectors:

- exploration and production of petroleum materials;
- investigations, security, military sectors, manufacturing of arms, explosives and military equipment, devices and clothing;
- banking and financing activities, payment systems and dealing with cash;
- insurance services;
- water and electricity services;
- postal services, telecommunications services and audio and video services; and
- land and air transport services.

This may pose as a challenge to emerging forms of applied technology such as Fintech and Insurtech, which span both technology and finance and insurance industries, and may not receive the same incentives as FDI in renewable energy.

This should not be taken as a deterrent, however, as FDI not included on the 'Positive List' can still be applied for by a foreign investor and subsequently approved by the Council of Ministers at the request of the local government, the recommendation of the FDIC and upon presentation by the Minister of Economy.

When reviewing FDI applications, the FDIC will consider a range of criteria revolving around the perceived benefit to the UAE economy. Although the sectors and activities to be included in the 'Positive List' are still to be announced at the time of writing of this article, the FDI Law is widely expected to boost activity and attract investment in technology business in the UAE.

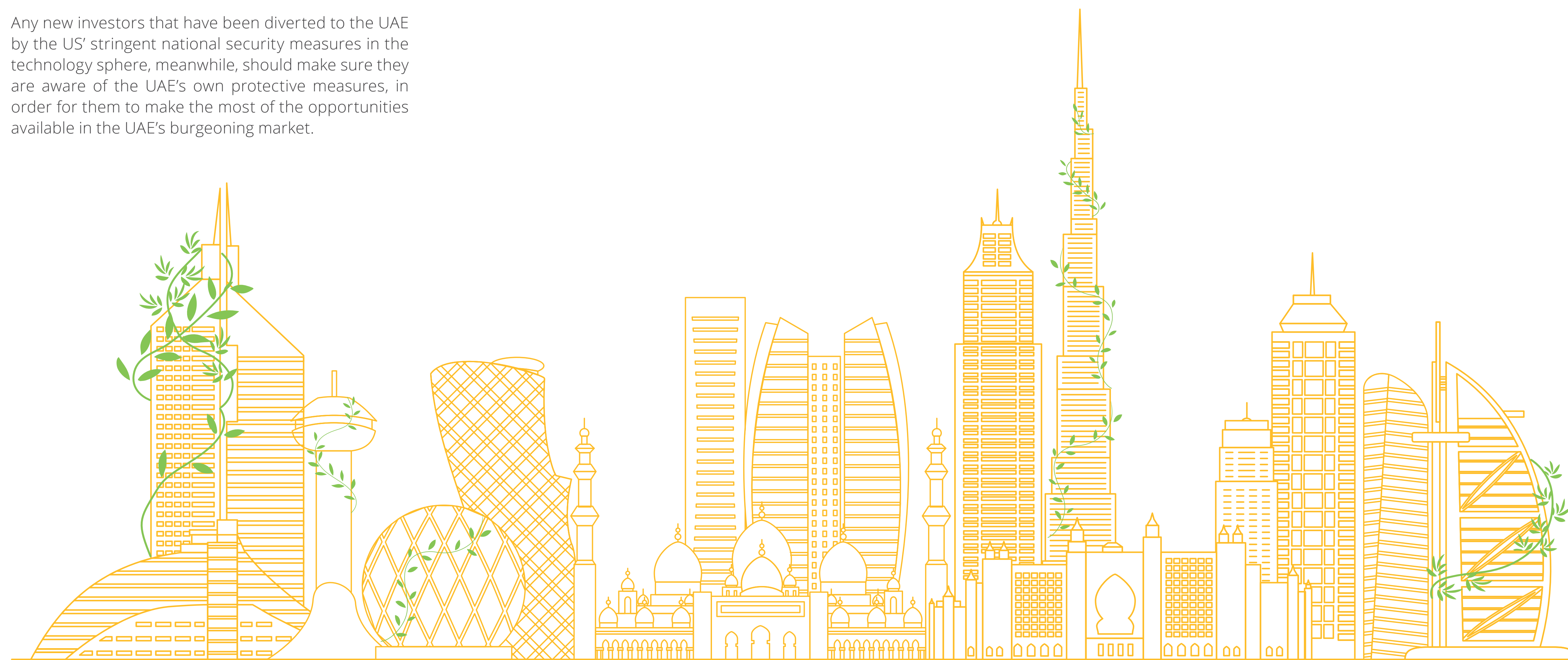
A Future for Foreign Investors in Tech?

With changing approaches to FDI in both the US and the UAE, foreign investors will have to take into account the new laws in both jurisdictions.

Middle Eastern residents looking to make investments in US technology, or Middle Eastern companies holding US subsidiaries will have to adjust to the restrictions and higher levels of scrutiny that the new US regulations impose, largely as a result of its increased focus on national security concerns surrounding trade flows.

Any new investors that have been diverted to the UAE by the US' stringent national security measures in the technology sphere, meanwhile, should make sure they are aware of the UAE's own protective measures, in order for them to make the most of the opportunities available in the UAE's burgeoning market.

> **"Foreign investors aspiring to capitalise on the UAE's market will also need to be aware of the measures Federal authorities impose to protect the country's national and economic security."**



Float Like a Butterfly, Sting Like a Bee: Kuwait's National Anti-Corruption Strategy to Take the Fight to Graft

Khalid Al Hamrani
Partner,
Head of Regional Financial Crime
Dubai, UAE
k.hamrani@tamimi.com

Adam Wolstenholme
Senior Associate
Regional Financial Crime
Dubai, UAE
a.wolstenholme@tamimi.com

In January 2019, the Emir of Kuwait, Sheikh Sabah Al Ahmad Al Saba, unveiled the country's five year anti-corruption strategy, the National Strategy to Promote Integrity and Combat Corruption ('**Strategy**'),at Kuwait's anti-graft conference, poising the country to spring into action against corrupt practice within government.

The Strategy was fully outlined by the head of Nazaha, Kuwait's Anti-Corruption Authority established pursuant to Law No. 2 of 2016, and takes an expansive approach to tackling graft practices across different sectors of society. The plan includes fostering improvements to the rule of law, as well as nurturing citizens' values of integrity, transparency and accountability to create a culture that is resilient to illicit practices.

Following the introduction of Law No. 2 of 2016, Nazaha was mandated with the objective of establishing a comprehensive Kuwaiti strategy for integrity and anti-corruption, as well as the necessary underlying programmes for its implementation. Since its inception, Nazaha's goal has been to lead by example and act as the figurehead for Kuwaiti government institutions to strive to reach the highest standards of integrity.

The Game Plan

The Strategy, which was developed with the technical assistance of the United Nations, has been introduced to further Kuwait's efforts to align itself with international best practices of governance standards, and to meet its obligations under the United Nations Convention Against Corruption ('**UNCAC**'). The Strategy is divided into four focused areas: 1) the Public Sector; 2) the Private Sector; 3) the Community; and 4) Specialised Institutions.

Targets for the Public Sector are centred on the role of State institutions and public officials. Conduct in these areas is perhaps the fundamental pillar of combating corruption issues, and is addressed under the Strategy through measures for increased oversight and transparency of corruption offences. In practice, this will be effected by ensuring that information is collated and analysed in respect of corruption and public industry. This data will then be compiled into reports which can be used to inform an efficiency assessment of Nazaha and the Kuwaiti law enforcement agencies. By creating a mechanism of ongoing evaluation, the Strategy creates opportunities to identify and redress any issues related to the functioning of core Government anti-corruption agencies, which should give rise to a process of continuous reform and improvement.

The political ambit of the Public Sector will also come under increased scrutiny, as the Strategy provides scope for Kuwait's campaign financing regulations to be modified. Public procurement legislation will also be bolstered, clamping down on those trading in favours and unjustly benefitting from State funds. There is also an intention to introduce legislation to criminalise illicit

enrichment of public funds. By introducing punitive measures with an added sting, Kuwait authorities will simultaneously be signalling their intent to eradicate corrupt practices whilst also disincentivising acts that harm Kuwait's national market.

The Private Sector, or the private economy and businesses, will be targeted with a sustainable approach aimed to increase training practices. These training proposals will relate to increasing ethical awareness and the introduction of corporate governance principles. There is to be an approach to increase the awareness and introduction of a culture of reporting criminality, including whistleblowing. Nazaha has already established accessible guidance for whistleblowers on its website, and has attempted to reassure prospective reporters that all reports will be handled with confidentiality and caution. It also emphasises that there is a positive reporting duty for corruption offences under Kuwaiti law and failure to report can result in punitive action. Whilst personal protection is already offered by Nazaha to whistleblowers, Nazaha has been tasked under the new Strategy to ensure that there are practical and effective measures in place to protect whistleblowers from possible acts of retribution.

The third pillar of the Strategy, namely Society, is also targeted by several proposed initiatives. Importantly, the initiatives are not intended to be introduced in isolation or narrowly applied to individuals directly at risk of engaging in corrupt practices, but are explicitly directed at raising awareness of corruption issues amongst the wider population. Accordingly, suggested promotional activities included in the Strategy are aimed at both the Kuwaiti and international residents in Kuwait, and take a grassroots approach to raising awareness by promoting the Strategy in places of worship, media outlets and in schools. This emphasises the underlying recognition by the Kuwaiti authorities that involving youth in anti-corruption efforts is paramount to ensuring the long-term sustainability of its efforts, as it will instil a vigilant culture of anti-corruption within the future business and governance leaders of Kuwait.

The fourth and final area relates to Specialised Institutions. In conjunction with the efforts of Nazaha to oversee extended efforts in the public sector, on a more industrialised scale, Specialised Institutions and specifically regulatory bodies, will be given training in anti-bribery practices and will be encouraged to incentivise whistleblowing.

Preparing for the Fight

As outlined above, the plan addresses the role of civil society in conjunction with both the private and public sectors. The Kuwaiti authorities have adopted a sustainable development approach to anti-corruption efforts, importantly including civil society as a means of making long-term improvements, aiming at the country's 2035 vision.

If a culture of anti-corruption and transparency is adopted, then individuals and businesses will more likely report instances of abuse, and authorities will have greater access to a body of information as to the authenticity of business conducted within the jurisdiction, and legitimacy of business arriving in Kuwait from abroad.

The Strategy's publication provides an opportunity for optimism for Kuwait. In cooperation with the United Nations, Kuwaiti authorities are using the bricks and mortar of strong legislation together with fortified enforcement agencies to build the necessary infrastructure for an effective anti-corruption programme. Throughout the implementation of the Strategy's various initiatives, Kuwait should also capitalise on the expertise of international organisations involved in developing global anti-corruption programmes and the experience of their neighbours in the GCC to augment their efforts over the coming years.

The Early Rounds

Throughout the process of formulating the Strategy, Nazaha has been liaising closely with financial and economic institutions in Kuwait, the Kuwait Higher Council for Planning and Development and the United Nations Development Program ('**UNDP**') to ensure that its strategic approach and ultimate objectives are in line with international best practice.

Moreover, and in respect of the UNDP, throughout 2018 the UNDP assisted in a joint co-operative effort with the General Secretariat of the Supreme Council for Planning and Development and Nazaha. This effort was conducted with international and regional bodies assisting in cooperation, namely the United Nations Office on Drugs and Crime as well as the UNDP regional office on Anti-Corruption. The 2018 project, which involved the review and analysis Nazaha's internal strategy, was aimed at bolstering the institutional capacities of Nazaha to further enable its jurisdictional reach and strengthen its practical effectiveness. In a show of commitment, the Government of Kuwait reiterated its dedication to the UNDP's 2018 project by providing the funding.

> **Kuwait authorities have ensured that their system benefits from the full extent of protections enjoyed by other countries, and will not unduly attract criminal actors that seek to benefit at the expense of Kuwait's national market.**

As an ancillary concern, the 2018 review by Kuwait's international partners highlighted the importance of redressing Kuwait's diminished economic development, highlighted by the World Economic Forum to the ultimate success of its anti-corruption efforts. Financial stability, security and transparency are fundamental requirements to attract international investment and stimulate economic growth, whilst simultaneously creating conditions that deter rather than cultivate illicit practices. The business case for implementing fair and ethical practices has vocal proponents in both public and private sectors, and Kuwaiti authorities have taken substantive steps towards protecting their economic security by fostering this approach within their market.

The International Fight

Recently, the UNDP emphasised political policy and a normative agenda on transparency and accountability, reiterating that there are intrinsic links between anti-corruption and human development, and that governmental integrity is a core requirement for all forms of developmental progress. These are some of the dominant principles of anti-corruption that underpin many of the domestic legislative approaches taken by other countries. The same principles are enshrined in the United National Convention Against Corruption, which has 140 global signatories to date and represents one of the leading international tools for aligning global anti-corruption policy. Corruption is an insipid issue that prevails on a global scale, and responses must be applied in an equally transnational manner to have any hope of making headway.

By developing the Strategy for Kuwait in accordance with these commitments, Kuwait authorities have ensured that their system benefits from the full extent of protections enjoyed by other countries, and will not unduly attract criminal actors that seek to benefit at the expense of Kuwait's national market.

Next on the Agenda

Kuwait was recently ranked eighth in the Arab world on Transparency International's (**TI**) Corruption Perceptions Index 2018 (78th in the world) with a score of 41, representing an improvement of two points on its score of 39 in last year's index. However incremental, even marginal improvements are a positive indicator for countries that are attempting to tackle graft, and should be viewed as achievements during a time where progress on TI's corruption barometer has become universally stagnant on a global scale. Nevertheless, Kuwait will likely seek to better its standing in the rankings next year when the Strategy is at a more advanced stage of implementation.

In the long term, Kuwait may offer an attractive destination for potential investors, and the introduction of its five year strategy can only assist its efforts to promote its financial appeal to the international market. Businesses in Kuwait and international investors with interests in the country should ensure that they are aware of Nazaha's efforts to fortify Kuwait's defences against corrupt activity over the coming months and years, particularly where there may be potential ramifications or changes to business practices. It may be early days in the 2019-2024 term, but Kuwait will be hoping its strategy pays off in a knock-out win against corruption before too long.

Can a Leopard Change its Spots? Lessons from the Transparency International Corruption Perceptions Index 2018

Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

In the spring season of each year, international attention is drawn to the publication of Transparency International's ('**TI**') flagship offering; the annual Corruption Perceptions Index ('**CPI**'). True to form, following the release of the CPI 2018 on 30 January this year, the global anti-corruption discourse has been infused by the most recent findings of TI, a Berlin-based NGO, which ranks 180 countries and territories across the globe on perceived corruption levels within their systems.

Results this year present a somewhat despondent overview of anti-corruption progress on a global scale, as scores have stagnated and key proponents such as the United States ('**US**') have stalled or slid backwards on the table. The Middle East as a region continues to face critical scores in conflict-torn and unstable nations, though in the context of incremental gains, moves in the region have generally been in the right direction.

Despite its status as the leading international indicator of corruption perceptions, the CPI's seeming reliability is quickly eroded by fundamental shortcomings in its methodology. Whilst an attempt to provide a benchmark for global corruption levels is commendable, distilling a concept as nuanced and complex as corruption into a single-figure score has been widely criticised as a counterproductive exercise.

In this light, the question remains what lessons can be learned from the CPI 2018 for businesses in the Middle East and the wider world, and how it can assist in removing the marks of corruption from across the globe.

Picking Out Patterns – Global Trends from CPI 2018

In a concerning trend for global anti-corruption campaigners, the results of the CPI reinforce the sentiment that little progress is being made in the fight against corruption. Out of 180 nations included in the CPI 2018, only eight have experienced significant changes to their corruption perception scores since last year's results, six of which were positive changes (namely Italy, Belarus, Argentina, Guyana, Angola and North Korea), with the remainder featuring little to no progress, or even a decline. Even from a more long-term outlook, only 30 countries have experienced significant change since 2012, with 14 of these experiencing a significant decline rather than any improvement.

After an extended period of intense scrutiny that has surrounded the various investigations in the United States, the US recorded one of the most noteworthy scores in the CPI 2018, dropping four points from 75 to 71 and failing to rank within the top 20 nations for the first time in eight years. Though four points is not a statistically significant move, the symbolic importance of one of the world's leading advocates of transparency exhibiting diminished confidence in public integrity is tangible.

In the context of shifting dynamics on the international leadership front, China's immobility on the CPI is also worthy of note. With a CPI 2018 score of 39 that has fluctuated only minimally since it received the same score in 2012, the anti-corruption drive of the Chinese

Communist Party under the leadership of Xi Jinping has seemingly had little to no impact on professionals' perceptions of corruption within the global superpower's system. As China faces increasing pressure to sustain its economic growth (amid the ongoing trade tensions with the US and the threat of sanctions on its telecom giants), improving corruption perception may prove to be a key facet for attracting foreign investment.

View from the Middle East

In the context of incremental gains, moves in the Middle East have generally been in the right direction. Outliers in the overall trends are Egypt and Oman, which have both demonstrated tangible improvements in corruption perceptions. Each country has risen 12 and 15 places in the ranking respectively (Egypt from 117th and Oman from 68th), despite scoring only a few points higher. Seemingly disproportionate moves in the rankings should not diminish their achievements, however, as corruption is an insipid practice any progress during a time of relative stagnation merits commendation.

Whilst commonly utilised as a measure of corruption, the Corruption Perceptions Index is in fact a composite index; essentially a poll of polls drawing data from a range of other sources to aggregate a single-figure measure of how corruption is perceived, rather than perpetrated.

The range across Middle Eastern countries spans territories that are currently some of the most troubled in the world, including the lowest ranked Syria, Somalia and Yemen, which often detracts from the Region's more favourable success stories. The UAE, for example, leads the Middle East with a score of 70 and a rank of 22 – just one point and one place behind the US, and favourable even compared to some developed Western democracies such as Italy and Spain.

Saudi Arabia, meanwhile, has faced challenges in translating its high profile and bold anti-corruption reform effort into more positive perceptions of governance standards, despite a continued co-ordinated campaign against improper governance practices. In keeping with the global trend, other regional nations, including Kuwait, Lebanon, Bahrain, Jordan and Iraq, have also displayed negligible momentum in redressing corruption perceptions, though this should not be used to equivocate a corresponding failure to redress actual corruption levels.

Evidently, there is room for Middle Eastern States to forge a path ahead in anti-corruption efforts. Many of the articles in this Financial Crime Special Focus Edition pivot around the surge in anti-corruption reform in regional States, including the new national anti-corruption strategy in Kuwait, an extensive reform programme in Saudi Arabia, and various implementations in the UAE which are suggestive of a more sustainable, holistic approach.

Considering the widespread regional drive for diversified economies and international investment, Middle Eastern countries are poised for momentous change and can use their legislative manoeuvrability to make greater strides in the corruption sphere.

Methodological Issues

Despite the prominence of the CPIon an international stage, it is subject to vocal criticism from many anti-corruption experts for its lack of accuracy as a measure of actual levels of corruption. Whilst commonly utilised as a measure of corruption the CPI is. in fact. a composite index; essentially a poll of polls drawing data from a range of other sources to aggregate a single-figure measure of how corruption is perceived, rather than perpetrated. According to TI's methodology note, data is drawn from 13 underlying sources, namely:

1. African Development Bank Country Policy and Institutional Assessment 2016;
2. Bertelsmann Stiftung Sustainable Governance Indicators 2018;
3. Bertelsmann Stiftung Transformation Index 2017-2018;
4. Economist Intelligence Unit Country Risk Service 2018;
5. Freedom House Nations in Transit 2018;
6. Global Insight Business Conditions and Risk Indicators 2017;
7. IMD World Competitiveness Center World Competitiveness Yearbook Executive Opinion Survey 2018;
8. Political and Economic Risk Consultancy Asian Intelligence 2018;
9. The PRS Group International Country Risk Guide 2018;
10. World Bank Country Policy and Institutional Assessment 2017;
11. World Economic Forum Executive Opinion Survey 2018;
12. World Justice Project Rule of Law Index Expert Survey 2017-2018; and
13. Varieties of Democracy (**V-Dem**) 2018.

Each of these sources analyses different aspects of corruption, and converts the results to scores on their respective numerical scales. TI then standardises the data from each source to its 0-100 scale, averages the scores available for each country (there must be data from at least three sources available for each country) and finally calculates the margin of error and confidence interval for each score. These numbers are used to indicate each country's overall level of perceived corruption and are compared directly against one another to create the rankings.

Statistical Sticking Points

The CPI attracts significant methodological criticism for a number of reasons.

Aside from scepticism regarding the independence of data and other statistical techniques, for Middle Eastern countries the methodology poses a particular problem with regard to available data. Regional countries are typically scored on the basis of less data, due to their exclusion from several of the underlying source studies. This is due to a number of reasons, including a narrower geographic focus (as with sources such as the PERC Asia Risk Guide) and lack of available data for global studies. The World Justice Project Rule of Law Index, for example, omits almost all Gulf Cooperation Council ('**GCC**') States from its data, with the exception of the UAE. As a result, the scores for these countries do not include evaluation of important corruption facets included in the Rule of Law Index, such as the behaviour of government officials in various branches of the State's security, executive and judicial apparatus in relation to opportunities for private gain. Many of the GCC States have expended considerable effort to impose proper and effective controls on public officials, and inclusion of such data may have resulted in more favourable scores on the CPI.

As a result, scores for countries that are informed by a smaller data set are not as nuanced or as comprehensive as those that have been amalgamated from a greater number of sources, which may lead to an imbalanced evaluation of their overall corruption perceptions. Bahrain, for example, is particularly affected by this feature, as its CPI score is based on underlying data from just four of the source studies, barely reaching the required minimum of three. Bahrain has experienced disappointing scores on the CPI, tumbling down from 51 to 36 between 2015 and 2017. Though its scores have stabilised and its 2018 result of 36 shows no movement from last year, it is possible that its record would have differed had a more comprehensive range of factors been considered.

A Complex Concept

One of the more obvious criticisms of the CPI is the practical issue of reducing a concept as complex as corruption to a simple single-figure form. Corruption is a multi-faceted and nuanced notion that encompasses a spectrum of behaviours, values, norms and practices, and even proposing a universal definition is problematic. Common understanding of the ways in

which corruption manifests differs by jurisdiction, and are steeped in cultural cues and contextual factors. One common issue for Middle Eastern countries, for example, is the Western-centric vision of democratic and liberal structures as a causal requirement for the absence of corruption. Blanket application of this assertion is not particularly constructive to a region that exhibits alternative governance structures. If applied without critique, emphasis on such elements could generate negative scores that could obscure some of the invaluable anti-corruption achievements that have taken place across the Middle East.

As a result, corruption perceptions are equally varied, and condensing such a broad spectrum of opinions into a single-figure is inevitably too blunt an instrument to demonstrate the intricacies of the issues at hand. It is also important to note that the CPI is a measure of corruption perceptions, which not only contain inherent biases but are also distinctly removed from instances of actual corruption and are not an accurate proxy for measuring such practices (or the enforcement efforts of various authorities to stamp out corrupt practices).

The inability of the CPI to accurately portray levels of corruption is exacerbated by gaping holes in its data set. All source studies incorporated by the CPI are focused on public sector corruption, leading to an equivalent myopic focus in the CPI. As a result, fundamental aspects of corruption that exist outside of governmental practice bear no reflection in the data, including private sector bribery and embezzlement, money laundering and illicit financial flows, tax fraud, informal economies and citizen experience of corruption.

Excluding these corruption facets from the evaluation effectively disguises criminal activity in States that are presented as being particularly clean. Denmark for example, was awarded the highest ranking in the CPI 2018, yet has recently experienced two separate high-profile scandals when its biggest lender bank became embroiled in an Estonian money laundering scheme, and public funds were embezzled through an administrative department of the Danish Ministry for Children and Social Affairs, Socialstyrelsen. Similarly, Canada was ranked ninth on the CPI 2018, but has recently been rocked by a political interference controversy involving a Quebec-based engineering and construction company which has raised the issue of ethical standards in government and has encompassed every level of government. Such cases expose how the CPI can misconstrue the risk of criminal activity in highly ranked countries, and fails to account for significant elements of corruption risk.

Not All Negative

In keeping with its eponymous quality, TI has been very transparent about its methodological limitations, and is careful to acknowledge that there is margin of error in its results. With this in mind, the CPI is an ambitious exercise to provide a benchmark figure for perception of corruption in nations across the world. Moreover, its broad stroke approach to amalgamating data does allow it to incorporate a multitude of corruption manifestations and controls within the public sector.

Full Pelt Ahead – Lessons from CPI 2018

For many, the intrinsic value of the CPI is its effectiveness in drawing anti-corruption issues to the forefront of the international agenda. By invoking a comparative reference for perceived corruption levels, TI's work though flawed is instrumental in raising awareness of systemic governance issues and provoking reformative efforts. Given the continued deference to the CPI by businesses and NGOs, favourable rankings go a long way to enhancing the reputation of a given State, and governments will be keen to be seen as improving on the universal scale. In Kuwait, for example, following the publication of the CPI 2017, the Kuwait Cabinet mandated its national Anti-Corruption Authority (Nazaha) with analysing the findings of TI so that it could enhance and expedite any measures, including international cooperation, which might improve Kuwait's rating (Kuwait's 2018 score of 41 represented an increase of two points on its 2017 score).

“The intrinsic value of the Corruption Perceptions Index is its effectiveness in drawing anti-corruption issues to the forefront of the international agenda.”

“High-profile cases of corruption scandals involving private companies are emblematic of how even countries perceived to be the cleanest in the world are not indemnified against corrupt practices.”

Despite this added value, it is important not to equivocate the CPI with an absolute measure of corruption. The faults in its methodology are widely acknowledged, and whilst they should not undermine the latent value of the index altogether, they do warrant that the scores and rankings are taken with a heavy pinch of salt. Countries that have scored highly on the CPI should not be lured into a false sense of security, as a misplaced degree of cultural trust will not be sufficient to sustain vigilance against corrupt practices. High-profile cases of corruption scandals involving private companies are emblematic of how even States perceived to be the cleanest in the world are not indemnified against corrupt practices. On the other end of the scale, low scoring nations should not be unequivocally vilified for anti-corruption failures, as the rankings may have failed to capture important anti-corruption progress still in its nascent stages.

From a regional perspective, businesses operating in the Middle East should take a degree of optimism from improved scores in countries such as Egypt and Oman, which represent the most significant upward mobility in the region and at the very least are a testament to improved regard of anti-corruption defences. Other countries such as the UAE and Saudi Arabia, which have seen their anti-corruption efforts (and other measures to boost investor appeal and confidence, including new Foreign Direct Investment laws) greeted by marginal demotions in the rankings should not be deterred by the apparent lack of progress, which may not be reflective of significant improvement in practice. Rather, these States, and others beyond the Middle East in similar circumstances, should focus their efforts on continuing to create cultures that are resilient to corruption in public office. In this respect, the matter is less about the leopard changing its spots, and more about discerning where it actually has them.

Sniffing Out Dirty Money: Combining the Ancient and the New in Egypt's Anti-Money Laundering Policy

Osama Daneshyar
Senior Associate
Regional Financial Crime
Dubai, UAE
o.daneshyar@tamimi.com

Salma Kebeich
Associate
Dispute Resolution
Cairo, Egypt
s.kebeich@tamimi.com

By the late 1980s, international efforts in combating money laundering and terrorist financing had been significantly increased. The United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('**UN Convention**') came into force in 1988. It set out to combat the economic power of criminal organisations and individuals by depriving them of their illegitimate wealth, whilst simultaneously rooting out illegal enterprises and countering the adverse effects of the illegal economy on the wider one.

The UN Convention defines Money Laundering as:

> *'The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offense or offenses or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his action.'*

The scope of the underlying criminal activity that gives rise to proceeds that are subject of money laundering was expanded by subsequent international legal instruments to include other additional serious offences.

The UN Convention led to the establishment in 1989 of the Financial Action Task Force ('**FATF**'), an inter-governmental organisation that acts as a global watchdog for money laundering defences, and that conceives of and promotes policies and standards to combat financial crimes. The mandate of the FATF was subsequently expanded to cover the fight against terrorist financing by issuing Counter Terrorist Financing ('**CTF**') policy recommendations.

Notwithstanding the distinction between money laundering and terrorist financing with regard to the source of the funds involved, the techniques of laundering the proceeds for both are similar.

Sniffing Out Dirty Money Launderers: Egyptian Anti-Money Laundering Laws and Regulations

In response to the international drive for combative measures, the Egyptian Government enacted Law No. 80 of 2002 on Combating Money Laundering ('**CML Law**'). A number of subsequent executive regulations designed to disrupt money laundering and terrorist financing activities were subsequently passed to fortify the provisions of the CML Law.

According to paragraph 1 of Article 2 of the CML Law, a person is guilty of a money laundering offence if he or she knows that the funds involved are the proceeds of a predicate offence as defined in the first paragraph of the same Article, and intentionally does any of the following acts:

1. converts or transfers the proceeds, for the purposes of concealing the funds, disguising their true nature, source, location, ownership, any interest therein, altering their reality, or preventing the discovery thereof or impeding the identification of the perpetrator of the predicate offence; or

2. acquiring, holding, disposing of, managing, keeping, exchanging, depositing, guaranteeing, investing the proceeds, or tampering with their value, or concealing or disguising the true nature of these proceeds, their source, location, disposal, movement or ownership or rights associated therewith.

In practice, this requires the accused to have knowledge that the funds in question were the proceeds of a specific criminal offence included within Article 2 of the CML law. This highlights a common challenge with money laundering legislation, where the strength of defensive measures can provoke tension with a country's commitment to the presumption of innocence and rule of law.

By requiring knowledge that the funds are the proceeds of a predicate offence and are therefore illegitimate, under such a reading of the law, money laundering offences in Egypt can only be sustained by proving the predicate offence, either by adducing a certificate of conviction or evidence to satisfy the judge of the existence of the predicate offence, such as a confession. There are two main reasons for such a requirement:

1. proceeds under the law are defined as those *'Accruing directly or indirectly from the perpetration of an offence set out under Article 2 of this law'*. Therefore, the Proceeds will only be illegitimate if they have come from a specific predicate offence. Identifying the origin of the funds would therefore necessitate proving that such an offence had been committed; and

2. the accused's knowledge of criminal activity is an element of the offence of money laundering. Therefore, it would be impossible for a Prosecutor to show that the accused knew the origin of the funds without being able to fully assert that the predicate offence had been committed.

Whilst money laundering as an offence is independent of the predicate crime, in this context independence relates to its prosecution and not elements of the offence. The Prosecution's duty to prove that the funds in question are illegitimate, must be proven by evidence and not presumed. Therefore, whilst the offence can be investigated and charged, no conviction can be sustained without first establishing the predicate offence.

The principle was clearly emphasised by the Cassation Court in case no. 12808 for the Judicial Year 82, (corresponding to 2012). The Prosecution argued that being an independent offence, only required them to adduce evidence supporting the allegation that the funds were derived from an offence within the definition of a predicate offence set out in Article 2, therefore the Court of First Instance was entitled to convict without proof of guilt of an underlying offence.

The Cassation Court upheld the challenge of the appellant on the basis that the Egyptian CML Law clearly established the predicate crime as a prerequisite of a money laundering offence, and consequently one which must be established prior to convicting an individual of a money laundering offence. Merely speculating or suggesting that a predicate offence (the primary issue) has been committed is not sufficient evidence for the Court to deal with the secondary issue of money laundering. In this instance, the Court's judgment also definitively declared that any other approach to prosecuting money laundering crimes would be:

> *'A rogue standard that runs contrary to the principles of criminal jurisprudence, and leads to unacceptable and inconsistent judgments'.*

Although there is an apparent variance in the manner in which the Egyptian judiciary has applied approaches on whether a conviction for the predicate offence is required, a closer look at the cases shows that the variance is not as apparent. Court of Cassation decision no. 8948 of 79, for example, found that the money laundering offence is committed whenever its elements are satisfied, regardless of the underlying predicate offence, which is apparently in stark contrast to the reasoning outlined above in case no. 12808 of 82. A more thorough analysis of the judgment however, indicates that the Court of Cassation was not addressing the same issues in both cases. The Cassation Court in decision no. 8948 of 79 quashed the conviction and ordered a re-trial based on the failure of the first instance Court to give sufficient reasoning on how it established the intent of the accused, and briefly cited a general principle that a money laundering offence is established whenever the elements are made out, irrelevant of the underlying predicate offence. Unlike Cassation Court case no. 12808 of 82, however, the Court was not asked to address whether, in the absence of proof of the predicate offence, a conviction for money laundering can be sustained. As a result, it did not offer the detailed and emphatic answer given in Cassation Court case no. 12808 of 82, which acknowledged the need to establish the predicate offence for money laundering offences and, by extension, gave effect to the express wording of the statute.

> **Modern amendments that have been grafted to Egypt's legislative apparatus since the CML's implementation in 2002 have been broadly orientated towards enhancing its integration to the international AML/CTF network, and aligning with multilateral initiatives to standardise AML/CTF defences.**

A Legislative Cat's Cradle - Updating Defences

In accordance with these principles, Egyptian authorities have taken active steps to bolster the CML Law and its Executive Regulations with a comprehensive Anti-Money Laundering and Counter-Terrorist Financing ('**AML/CTF**') framework. The Money Laundering Combat Unit ('MLCU') was established in 2002 as an independent unit functioning within the Central Bank of Egypt ('**CBE**') to principally receive, analyse and distribute STRs received from financial institutions and non-financial business and professions. The MLCU is also responsible for directing international co-operation efforts with international organisations related to AML/CTF activities and to this end has signed memoranda of understanding with its counterparts in over twenty countries.

Since the implementation of the CML Law in 2002, an expansive approach has been adopted in amending the scope of its provisions. For instance, the definition of 'funds' under the law has been most recently amended by Presidential Decree-Law no. 36 of 2014 ('**Presidential Decree**'), to include national or foreign currency, securities, commercial instruments, valuable items whether real estate or tangible or intangible property, or any rights relating thereto, and legal documents and deeds that prove ownership of these funds or interest therein in any form including digital and electronic forms. The definition of the underlying predicate offence has likewise been amended to include any act that is considered a felony or misdemeanour under Egyptian law. Further, as previously mentioned, terrorist financing was added to the scope of the CML Law by the Presidential Decree in 2014 and accordingly the MLCU has been renamed as the Money Laundering and Terrorist Financing Combating Unit to reflect its increased mandate.

The CML Law stipulates that financial institutions must report to the MLCU any transactions suspected of involving the proceeds of crime or amounting to money laundering or terrorist financing, and must expend all measures necessary to prevent such transactions regardless of their value. Regulated institutions are also obligated to establish adequate compliance systems, including but not limited to customer due diligence processes, and any other preventative procedure set by the MCLU.

In an attempt to broaden AML/CTF measures across the private sector, regulatory requirements were extended to Designated Non-Financial Businesses

Egypt has fastidiously defended the presumption of innocence and drafted its money laundering defences to imply that predicate offences must be proven prior to prosecuting an individual for a money laundering charge.

and Professions ('**DNFBPs**') in Presidential Decree Law no. 36/2014, including accountants and lawyers, whether practising as sole practitioners or partners within law firms. Accountants and lawyers must report any suspicion of money laundering or terrorist financing when it arises in the course of preparing or carrying out transactions on behalf of clients involving:

1. the purchase and sale of real estate;
2. management of client funds, securities or other assets;
3. management of bank, savings or securities accounts;
4. organisation of shares for the purpose of the establishment, operation or management of companies; and
5. establishment, operation or management of juristic persons as well as the sale and purchase of business entities.

In an effort to ensure maximum adherence to these regulations, strict punitive measures are attached to the requirements. Failure to comply with the procedures exposes the non-financial professional or business, and the person responsible for its actual management, to either imprisonment, or a fine of EGP 100,000 - 500,000, or both, in addition to the suspension of their practising certificate.

Creating an Enhanced Framework

Since 2002, Egypt has shown increased efforts to control money laundering and terrorist financing activities by placing several safeguards in supporting legislation to prevent such activity. By way of example, Presidential Decree no. 89 of 2017 establishing the National Council for Payments, was issued to limit the use of cash, promote the use of electronic payment mechanisms, and incentivise individuals and small businesses to enter into the banking system. Whilst not explicitly targeted at AML/CTF defences, the measures contained in this decree were introduced with the intention of limiting the flow of funds that exist outside of the traditional banking system and beyond the purview of protective regulations. Cash funds are notoriously hard to trace, so by attempting to make the banking sector more inclusive, Egyptian authorities have increased the number of transactions that are within supervisory reach.

Furthermore, Egypt has demonstrated a commitment to international co-operation on money laundering and terrorist financing issues. As previously mentioned, in accordance with the provisions of the CML Law, Egypt has entered into several bilateral and multilateral treaties to implement an effective AML/CTF framework. In 2003 and 2004, respectively, Egypt approved the United Nations Convention Against Transnational Organized Crime and the United Nations Convention against Corruption, which both include limiting the illicit flow of funds as a critical element of curtailing criminal activity. From a Regional perspective, Egypt also ratified the Arab Convention for Combating Money Laundering and Terrorist Financing in 2014.

To ensure the due observance of multilateral and bilateral agreements to which Egypt is a party, the National Committee for Coordination in Combating Corruption ('**National Committee**') was established by virtue of Prime Minister Decree no. 2890 of 2010. Its main function is to monitor the enforcement of the United Nations Convention against Corruption and the related multilateral and bilateral agreements, and the co-ordination with the different national agencies in this regard. The National Committee is also responsible for conducting a regular review of the relevant anti-corruption national legislation, regulations and decrees to ensure their compliance with international conventions ratified by Egypt, and strengthening international judicial co-operation concerning anti-corruption and recovery of criminal proceeds.

In this vein, Egypt has entered into more than thirty bilateral judicial co-operation treaties which provide for mutual judicial assistance and extradition. The CML itself also provides for judicial assistance on the basis of the principle of reciprocity and international courtesy. By forging numerous international links, Egyptian authorities have extended their capacity to pursue criminal actors and proceeds in an extraterritorial fashion, and have likewise committed to strengthening the capacity of other countries to do the same.

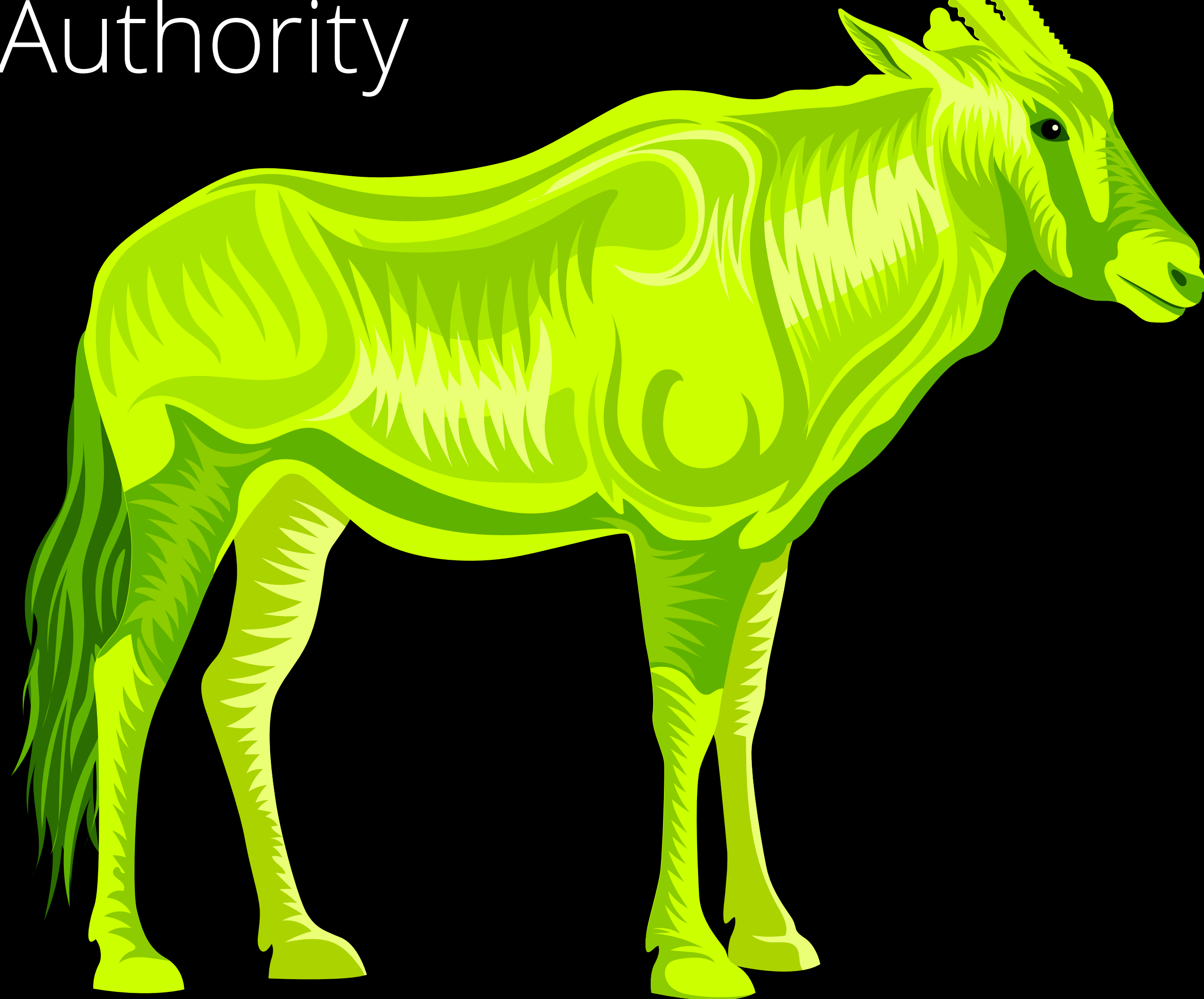
A Modern Approach Fused with Traditional Principles

Egypt's AML/CTF framework has undergone extensive change since the introduction of its primary legislation – the CML Law. Modern amendments that have been grafted to its legislative apparatus since the CML's implementation in 2002 have been broadly orientated towards enhancing Egypt's integration into the international AML/CTF network, and aligning itself with multilateral initiatives to standardise AML/CTF defences.

These improvements, however, have been implemented in a way so as to preserve foundational legal principles that have been reinforced by centuries of practice. Considering the strengths of the consequences brought by a conviction (including imprisonment, a fine and confiscation of twice the amount which was laundered), Egypt has fastidiously defended the presumption of innocence and drafted its money laundering defences to imply that predicate offences must be proven prior to prosecuting an individual for a money laundering charge. In so doing, it has maintained the presumption of innocence and sanctity of personal property at the core of its reasoning.

By forging numerous international links, Egyptian authorities have extended their capacity to pursue criminal actors and proceeds in an extraterritorial fashion, and have likewise committed to strengthening the capacity of other countries to do the same.

Showing the Sharp End to Public Corruption: Dubai's New Financial Audit Authority



Khalid Al Hamrani
Partner,
Head of Regional Financial Crime
Dubai, UAE
k.hamrani@tamimi.com

Buthaina Al Sayegh
Trainee Lawyer
Regional Financial Crime
Dubai, UAE
b.alsayegh@tamimi.com

The United Arab Emirates' ('**UAE**') recent efforts to eradicate financial crime has been enshrined in the issuance of new legislation and policy that are aimed at protecting the country's public funds from criminal abuse. As part of this effort, on the 14 April 2018, His Highness Sheikh Mohammed Bin Rashid Al Maktoum (Ruler of Dubai, Vice President and Prime Minister of the UAE) issued Dubai Law No. 4 of 2018 establishing the Financial Audit Authority ('**FAA**').

The primary remit of the FAA is to maximise performance, compliance, and the financial and control systems for auditing public funds, whilst also ensuring the efficiency of the distribution of the funds as a step towards better financial security and stability. The newly recognised FAA substitutes the previously known Financial Audit Department ('**FAD**'), established in 2007.

Keeping a Sharp Eye on Public Funds

At a high-level the FAA's role is to detect any illegal activities related to public funds and investigate all violations including but not limited to:

- embezzlement;
- corruption;
- illegal use of official documents such as but not limited to forgery; and
- evasion of tax and customs' duties.

From a more practical perspective, the FAA aims to control and supervise public funds, promote transparency, control and risk management, and combat all methods of financial and administrative violations and corruption. These multifarious objectives are contained within the 47 Articles that make up the bulk of the Dubai Law No. 4 of 2018 ('**FAA Law**'), outlining all the controlled entities and authority's obligations, liabilities and restrictions.

Under the provisions of the FAA Law, the FAA's functions include the following:

- auditing the controlled entities and the government's financial statements;
- investigating any internal or external violations;
- reviewing all complaints;
- monitoring the controlled entities and the government's compliance with all the regulations and policies;
- consulting the controlled entities and the government in their financial performance to achieve international standards;
- recovering lost funds resulting from violations; and
- drafting laws.

The legislation has been drafted with the intent to provide greater recognition of the FAA, both in terms of granting it higher authority whilst simultaneously

assuring the quality of its work with more advanced and precise duties, structure, functions of its key people, the entities controlled by the FAA and auditing works.

In line with the evolution of financial crime threats, it is necessary for the UAE to continuously extend its defences and efforts in combating financial crimes in the country by continuously updating and improving its laws and the authorities that supervise the financial flow in the country, notwithstanding the existence of analogous laws prior to the FAA Law.

Dubai Law No. 1 of 1995 establishing the FAD was the first law to introduce an authority with auditory powers, followed by Dubai Law No. 3 of 2007 and Dubai Law No. 4 of 2018 regarding the FAA. This evolution demonstrates that Dubai has recognised the need to update, improve and expand the powers of its supervisory authority by amending its underlying laws and provisions.

The primary remit of the FAA is to maximise performance, compliance, and the financial and control systems for auditing public funds, whilst also ensuring the efficiency of the distribution of the funds as a step towards better financial security and stability.

Whereas the formerly known FAD was a supervisory authority that reviewed the use of public funds, the new FAA acts as an investigative and supervisory authority that broadly governs the flow of public funds in Dubai and inspects any violations that may impact the efficacy of public resourcing.

The new law defines and adds functions to the newly named FAA whilst improving the regulations and functions of the authority, the controlled entities and key people such as the Chairman and the Director General.

The FAA has also been granted wider powers than its predecessors, such as international co-operation and the authority to enter into international agreements with a view to enhancing Dubai's role in cross-border collaborative efforts to combat global flows of illicit funds. This process of evolution reflects the resilient approach the Dubai authorities have taken to ensure that the country is equipped to detect and defend against financial crime.

On the End of New Measures

Despite its strict remit concerning the integrity of funds related to the public sector, the new FAA targets both private and publicly owned companies that are involved in managing and regulating the flow of these funds in Dubai. All the controlled entities are duty bound to inform the FAA of any violations regarding the applicable rules, provisions of the general budget and the rules regulating contracts and agreements. Additionally, the controlled entities are required to submit their annual financial statements and supporting documents in order for the FAA to proceed with their auditing works.

As per the FAA Law, the controlled entities based in Dubai are listed as:

- government and public authorities;
- free ones;
- Companies with at least a 25 percent share-owned by the government;
- companies that have been admitted to the Government Minimum Revenue Guarantee;
- allntities that have been admitted as a Government financial subsidy;
- any entity that entrusts its auditing works to the FAA; and
- any entity related or connected to the financial or administrative violations committed in any of the abovementioned companies.

This represents an extension of the powers of the previous FAD in that it has widened the scope of companies that fall under its oversight. Since the issuance of the FAA Law, entities that have been granted a government financial subsidy and all entities entrusting the authority to conduct their auditing have been included under the umbrella of the FAA.

Keen to Improve – New Measures in the FAA Law

Pursuant to the FAA Law, His Highness Sheikh Maktoum bin Mohammed bin Rashid Al Maktoum (Deputy Ruler of Dubai) has been appointed as Chairman of the FAA. In so doing, the new Decree adds a higher authority to the FAA, considering the previous FAD's highest authority had been the Director General His Excellency Abdullah Mohammed Ghobash.

- additionally, the FAA Law provides for the formation of a Grievances Committee as an additional avenue for dispute resolution. This committee grants the offending employee (which may be an employee of any of the controlled entities) the opportunity to justify his/her actions or prove his/her innocence without the need to refer the conflict to the Public Prosecution or the Courts. Any offending employee in the controlled entities that faces disciplinary punishment is allowed to file a written grievance with the Grievances Committee objecting to the decision made against him/her within 15 days of being notified, while agreeing to waive his/her rights from resorting to the Courts. The Grievances Committee consists of three to five members from the FAA as delegated by the Chairman of the FAA, the Supreme Legislation Committee in the UAE and a member of the controlled entity to which the employee belongs. The Grievances Committee's decisions cannot be appealed and are considered final.

Ultimately, the new and improved FAA is another string in the bow of Dubai and UAE authorities to detect, prevent and eventually eradicate illicit practices from public office.

The FAA Law also contains provisions that clearly outline the various procedures of the FAA, to create consistency and order in its activities, including but not limited to the following:

- previously, in case of any conflict or dispute between the FAD and any of the controlled entities, the conflict was referred to the Director of the Ruler's Court to take the necessary actions, but with the recent update of the department, the FAA should refer any dispute arising between it or any of the controlled entities, to the Chairman to take appropriate action. By internalising the dispute resolution process, it is expected that conflicts can be resolved more quickly and efficiently;
- investigations conducted by the FAA are initiated by the Director General or his delegate through suspension of the offending employee of the controlled entities until further notice, seizure of relevant documents, notification to the Public Prosecution of the investigation and imposition of disciplinary punishment on the offending employee if necessary.
- the FAA Law states the procedures the Chairman, the Director General, Executive Managers, Experts, Technicians and all Auditors to take an oath on appointment. This procedure has been introduced in a further attempt to ensure that the work of the FAA is protected, and of a sufficient standard so as to be a reliable

"In line with the motif of collaborative training initiatives, the FAA has also taken steps to expand the expertise of its employees by signing training agreements with various top auditing firms in the region to hone their skills in supervising and identifying any damages to the public funds."

form of evidence against any of the controlled entities or their employees where necessary. The oath is a means to validate the legitimacy of their work.

- the FAA Law also empowers the authority to audit the internal control systems of any controlled entity in co=operation with any concerned authority in any of the other six Emirates to verify the efficiency of the systems by evaluating their costs, assets, data and investments. This co-operation between all seven Emirates is an instrumental aspect of the national strategy to prevent illegal activity at the Federal level.

Be Aware of the Sharp End of the FAA

In its holistic approach to legislative reform, the weight of the FAA is also impacted by revisions to legal provisions contained within separate laws. The UAE recently introduced the Federal Decree Law No. 24 of 2018, amending certain penalty provisions issued under the Federal Law No. 3 of 1987 Promulgating the Penal Code, increasing punishments for many crimes including bribery and corruption. The Penal Code imposes the penalties for crimes that the FAA uncovers and investigates.

The impact of increased penalties was demonstrated in 2017, when the Court of Cassation sentenced the CEO of a government-owned real estate company to ten years imprisonment, deportation and a fine worth AED 35 million for causing wilful loss to public funds with intent to unjustly enrich himself and others by AED 20 million in exchange for awarding contracts in favour of two other companies, leading to a conflict. The CEO, alongside nine other defendants, conspired to profit from the company's real estate account by exchanging bribes for influence in facilitating projects with other associated companies.

The company's audit report showed that millions were suspiciously transferred to the CEO's account which led to the intervention of the prevailing audit authority at the time, namely the FAD. The FAD's investigation linked the source of transfers and all payment methods used to bribe the CEO.

The ruling in this case was contingent on the FAD's detection and report on public fund damages and its ability to identify the perpetrators.

Though this case involved the intervention of the FAD, it is a clear example of how the new authority, the FAA, with its expanded capacity, is anticipated to play an even greater role in detecting any type of violation relating to public funds and to intervene where necessary.

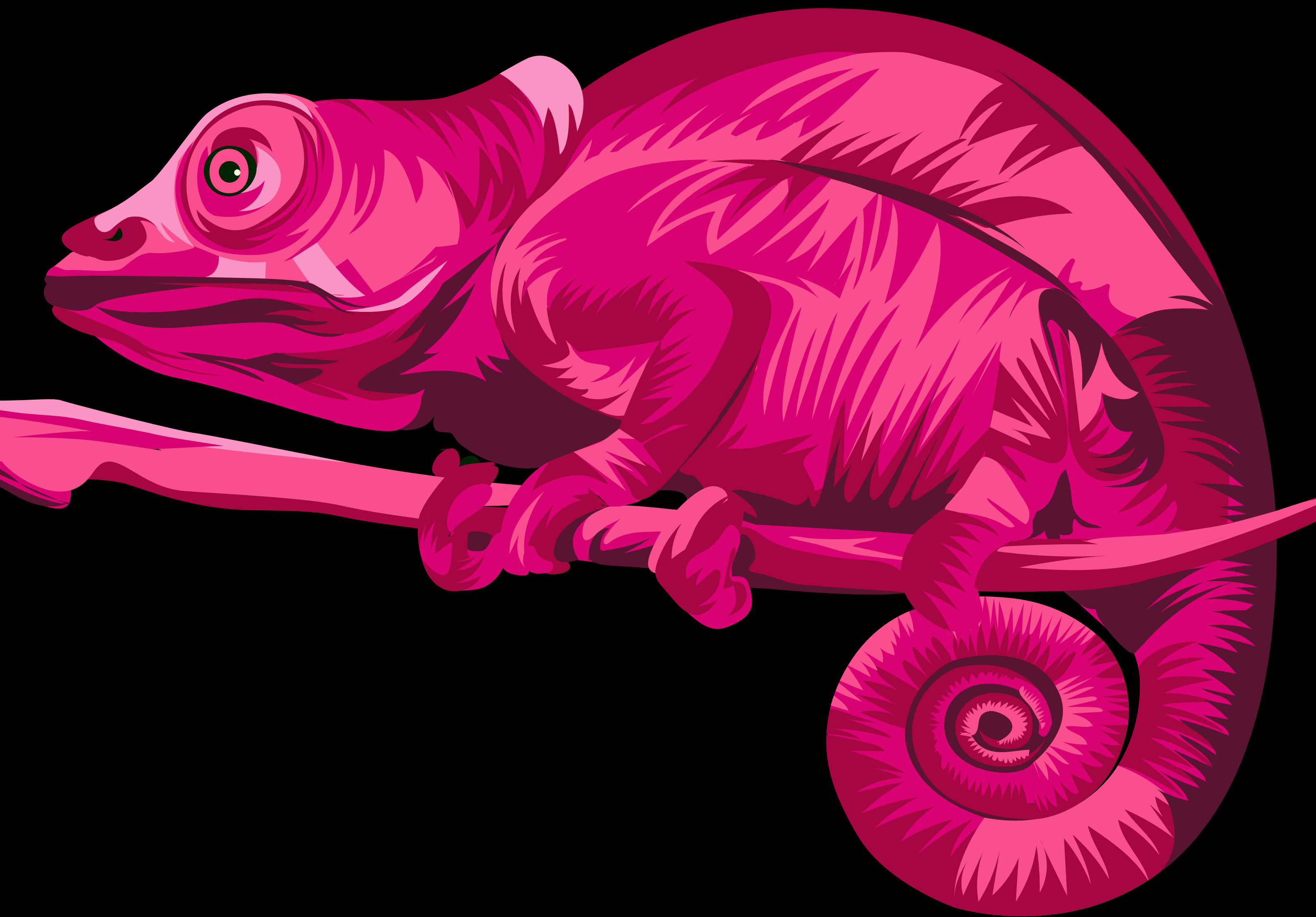
It has been less than one year since the establishment of the FAA and, as such. it is still in the nascent stages of determining its role within the UAE's wider anti-corruption drive in co-operation with other relevant authorities. Implementation of the FAA Law has been enhanced by dedicated training initiatives, such as one held in July 2018 by the Public Prosecution for the Financial Audit Authority's team of auditors. This session was aimed at briefing FAA employees on the prosecutorial perspective of relevant crimes and instructing them on the mechanisms for investigating crimes relating to public funds and demonstrating the necessary findings of the investigation.

In line with the motif of 'collaborative training initiatives', the FAA has also taken steps to expand the expertise of its employees by signing training agreements with various top auditing firms in the region in order to hone their skills in supervising and identifying any damages to the public funds.

A Beginning, Not An End

Ultimately, the new and improved FAA is another string in the bow of Dubai and UAE authorities to detect, prevent and eventually eradicate illicit practices from public office. By empowering the FAA to effectively address these issues, the government hopes to insulate public funds against the risk of abuse by criminal actors and ensure that resources are effectively expended towards the public good and national economic development, rather than unjust enrichment. In essence, the FAA is a crucial part of Dubai's first line of defence against illegal activity in government and showing the sharp end to any guilty perpetrators.

Learning to Adapt: The UAE's New Anti-Money Laundering Law and Matching FATF Standards



Ibtissem Lassoued
Partner, Head of Advisory
Regional Financial Crime
Dubai, UAE
i.lassoued@tamimi.com

Global flows of illicit financing are a universal affliction and continue to vex authorities and law enforcement agencies across the world as insidious threats present persistent risks to the world's financial system. These threats do not distinguish by geography, and it is imperative that all countries are committed to implementing the strongest possible defences against illicit financial flows. The Middle East and North Africa (**MENA**) Region is no exception to this rule, and countries across the Region exhibit the hallmarks of systems that are increasingly determined to protect themselves against the harmful effects of nefarious activity. In this light, efforts that happen at the supra-national level are just as likely to prove instrumental to preventing money laundering and terrorist financing activity as the defences that are applied at a national level.

Tackling Illicit Financial Flows: The FATF's Footprint

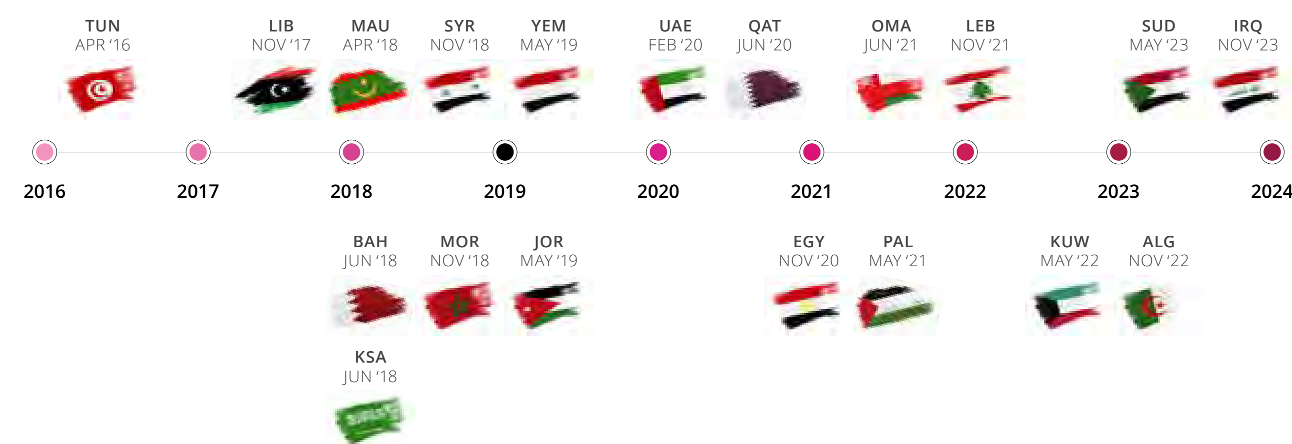
One of the driving forces of the above mentioned coordinated effort is the role of the Financial Action Task Force (**FATF**); the global best practice setter and watchdog for Anti-Money Laundering and Counter Terrorist Financing (**AML/CTF**) standards. Currently, the FATF is midway through conducting its Second Round Mutual Evaluations for member countries across the MENA Region, the results of which will have profound implications for international perceptions of each country's economic security and business viability. In recognition of the importance of the assessments, the footprints of the MENAFATF's influence are growing more pronounced within regional reform efforts.

Saudi Arabia

One of the most recent 2nd MERs published was Saudi Arabia's evaluation, which was released in September 2018 and evidenced both where the country has improved its AML and CTF regulations, as well as clear areas that would benefit from further attention. Saudi Arabia underwent its on-site evaluations in November 2017, in the immediate aftermath of issuing two new pieces of legislation to improve its AML framework: Law No. M20 05/02/1439, the Anti-Money Laundering Law (**AML Law**), and Law No. M21 12/02/1439, the Countering Terrorist Financing Law (**CTF Law**). Saudi Arabia's new AML Law in particular introduced extensive revision to the country's AML machinations, including the establishment of two new Government authorities to play key roles in Saudi Arabia' ongoing AML efforts, and imposing higher levels of regulatory control on Financial Institutions (**FIs**) and Designated Non-Financial Businesses and Professions (**DNFBPs**). In appraisal of these widespread reforms, Saudi Arabia received favourable assessment for its technical compliance with the FATF's 40 Recommendations for best practice, though the report stated that practical implementation was a fundamental area of improvement for the country to address.

Bahrain

Likewise, Bahrain's 2nd MER, published simultaneously with Saudi Arabia's in September 2018, is suggestive of national authorities' assent to international calls to tighten AML/CTF regulations. During the process of the report's compilation, the Central Bank of Bahrain began introducing targeted reforms to address some of the elevated risks and weakness identified by the FATF, for example by increasing the stringency of Enhanced Due Diligence requirements for Islamic banks to apply to cross border cash transactions by courier, removing the threshold at which the enhanced procedures need be applied. This was in direct response to the FATF report's identification of cash courier / cross-border violations for terrorist financing as a key risk for the Bahraini jurisdiction.



Middle East and North Africa Financial Action Task Force Second Round Mutual Evaluation Reports: Timeline for Plenary Discussion of Onsite Evaluation

The UAE in Focus

The UAE, meanwhile, is scheduled to undergo its evaluation in the second half of 2019 and has notably already taken pre-emptive steps to shore up its AML/CTF defences and align itself with international best practice in advance of its evaluation.

Federal Law No. 20 of 2018 on Anti-Money Laundering, Combating the Financing of Terrorism and Financing of Illegal Organisations was issued on 30 October 2018 and has brought about a number of changes that show anticipation and a readiness to address criticisms that have appeared in the UAE's previous evaluations, and those of other regional countries.

Enhancements to the UAE's AML Law have been built around a number of core objectives, including but not limited to the following:

- Greater investigative powers and channels to collect and use financial intelligence. This includes provision of grounds for 'controlled delivery', whereby the authorities are permitted to allow criminal transactions to proceed in order to trace their flow and identify other actors within the criminal network. The transition from merely collecting financial data to being able to utilise the intelligence to take more pro-active action is a vital advancement for law enforcement;
- Strengthening of punitive measures through increased fines. Prevention methods are the counterpoint to detection capabilities, and strong deterrents are fundamental to an effective prevention regime. Under the new AML law, corporate liability for money laundering offences has been extended to fines of up to fifty million dirhams (AED 50,000,000), and compulsory liquidation where the offence is related to terrorist financing;
- Streamlining procedure for the authorities to freeze suspected funds. By creating a direct mechanism involving the Governor of the Central Bank, the authorities are enabled to take expedited action against suspected criminal actors and minimise the risk of the suspected funds being dissipated. It was recently confirmed in December 2018 that the current UAE Central Bank Governor His Excellency Mubarak Rashed Khamis Al Mansoori has been renewed to remain in post for the next four years;
- Greater powers for the Public Prosecution to conduct their investigation. Specifically, this involves, though is not limited to, authorisation for the Public Prosecution to obtain and investigate third party data and records through mandatory cooperation with a broad array of other agencies, institutions and businesses;
- Criminalisation of acts violating United Nations (**UN**) Security Council Resolutions under Chapter VII of the UN Charter on economic sanctions and terrorism. This is an unprecedented explicit inclusion within the AML law and improves the transparency of the process by which authorities prevent and punish the attempted financing of designated entities/individuals.

The new and improved measures aligned to these procedural pillars have a dual-pronged effect of both strengthening deterrents against using the UAE's financial system to facilitate the illicit financial flows, as well as giving teeth to Federal authorities to pro-actively combat criminal activity.

Following the recent publication of the AML Law's implementing regulations (Cabinet Resolution No. 10 of 2019), it is evident that the UAE has tried to match these top-down investigative powers with corresponding pro-active, bottom-up mechanisms for the collection and sharing of financial intelligence. Information sharing as a concept is accruing significant attention amongst compliance professionals for its potential to drastically increase efficiency in combative efforts against financial crime. In line with this developing notion, the UAE's regulatory requirements such as recording beneficial ownership information and maintaining accurate and current records for provision to authorities on request lay solid foundations for opening channels of information between the public and private sectors.

The AML Law, though drastically improved in itself, has been further bolstered by the simultaneous introduction of a raft of other legislation in the UAE. Within the last 3 months alone since October 2018, this includes at the Federal level a new Central Bank Law (Federal Law No. 14 of 2018) and a new Foreign Direct Investment (**FDI**) law (Federal Law No. 19 of 2018), as well as sector specific protections such as the new regulations for the banking sector to cover risk management and internal controls and compliance.

Cumulatively, these legislative advancements can only assist in providing greater protection for the UAE's market, as well as offering assurance to international investors that their financial interests are safe within the UAE jurisdiction. The UAE still has a number of months to prepare for its on-site assessment phase, and will likely utilise this time to ensure that the legislative amendments are properly implemented. This is a critical step to ensuring that the country avoids a key criticism prevalent in other FATF evaluations, that practical measures lag behind technical compliance with the 40 Recommendations and updated defences are largely symbolic. Companies with a presence in the UAE should be aware of both training and awareness initiatives as well as additional legal revisions that may be introduced in the build up to the UAE's evaluation, to further enhance the efficiency and effectiveness of AML/CTF defences.

> **Currently, the FATF is midway through conducting its Second Round Mutual Evaluations for member countries across the MENA Region, the results of which will have profound implications for international perceptions of each country's economic security and business viability.**

Other FATF 2nd MERs may also provide invaluable guidance in situations where AML/CTF frameworks have been awarded favourable scores for technical and practical compliance with the FATF 40 Recommendations. For example, the United Kingdom's report was published on 1 December 2018, so this and other such assessments scheduled to be published soon may be used to inform other countries hoping to model their own systems on those that have successfully passed FATF evaluation.

A Passionate Defence: Measures for Detection and Prevention

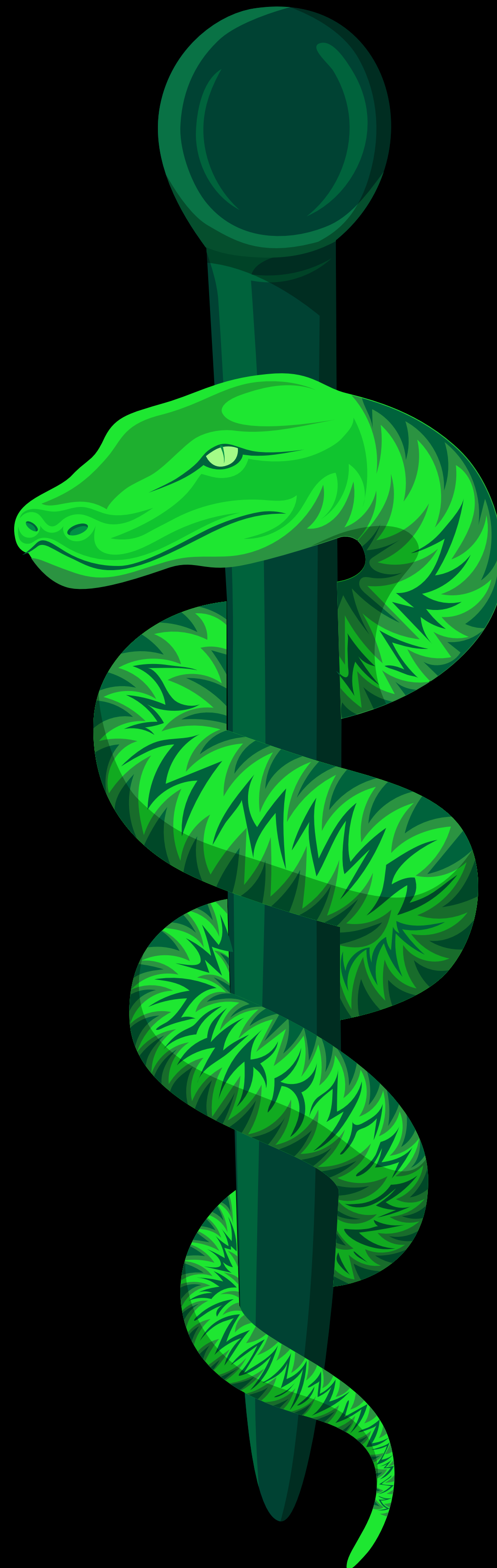
Progression is promising, but the flow of illicit funding is a metamorphic threat not easily defeated, and tides of elicits funds sweeping through the global system are still able to exact extensive damage on the market.

In tandem with the legislative reinforcement discussed above, there is growing concentration on the development of innovative technological tools that will enhance the ability of law enforcement agencies to not only collect financial intelligence, but also to use it to decipher patterns in criminal activity and prevent further abuse of the financial system. The World Bank, for example, has already pledged in the last few years to assist its partners in the development of a new tool capable of measuring specific flows of funds.

At a lower level, companies will also have to ensure that they are cognisant of the risks and implement effective compliance systems to avoid incurring damaging fines. Frequent and well-publicised fines issued to businesses and corporations for compliance violations can reach astronomical figures in the range of billions of US Dollars, and can be a keen incentive to intensify protection at the company level. However, rising compliance standards are increasingly challenging businesses to accept greater risk burdens for regulatory breaches, and new technological solutions are accruing attention for their promising potential to reduce the financial and temporal cost of compliance for businesses. As the methodology of criminal financing is becoming more creative, law enforcement agencies and international organisations are tasked with matching the pace of change and putting equally innovative systems in place as means of detecting and preventing such activity. Ultimately, avenues for international cooperation that involve advancing combative tools, raising awareness of the risks and improving legislative defences should be a priority for all players in the global system that are tasked with defending the integrity of the international market.

Please note that an earlier version of this article was previously published as a client alert entitled 'A Fat Footprint in the Sand: The UAE's New AML Law and the Financial Action Task Force's Regional Impact'.

Cumulatively, these legislative advancements can only assist in providing greater protection for the UAE's market, as well as offering assurance to international investors that their financial interests are safe within the UAE jurisdiction.



Serpents in the Sand: Kickbacks in the Healthcare Industry

Adam Wolstenholme
Senior Associate
Regional Financial Crime
Dubai, UAE
a.wolstenholme@tamimi.com

James McMillan
Senior Associate
Healthcare
Dubai, UAE
j.mcmillan@tamimi.com

According to the Dubai Health Authority ('**DHA**'), medical tourism is now estimated to generate revenue of over AED1.4billion for the Emirate of Dubai annually. The healthcare sector already accounts for 3.6 percent of the GDP of the Emirate of Dubai. The UAE healthcare sector is forecast to grow at an impressive rate. The UAE's Vision 2021, the highest-level U.A.E. government strategic plan, aims to provide 'world-class healthcare' as one of its priority goals. This will be achieved by, among other measures, assessing all public and private hospitals according to clear national and international standards. It should not be forgotten however, that the healthcare sector is no different from any other sector in that it faces exposure to criminal actors.

As with many lucrative, high-value services, routine check-ups of the medical industry have uncovered an insidious virus under the skin, with toxic actors attempting to leach from the system. This article briefly reviews the attempts of the UAE authorities to limit healthcare fraud in order to give the UAE a clean bill of health.

The Diagnosis

Healthcare fraud is a financial crime and regulatory issue that may be committed by healthcare providers, consumers, businesses providing medical supplies or services, and/or healthcare organisations. The common types of fraud committed by physicians include billing for services that were never rendered, providing unnecessary treatments or tests, falsifying or exaggerating the severity of a medical illness, accepting kickbacks for referrals, and billing for a more expensive diagnosis or procedure that is not required. Due to the high illicit yield that this may provide, there is now a global trend toward increased participation by organised crime groups ('**OCGs**') in complex healthcare fraud schemes.

In addition to the UAE's crackdown on all forms of financial fraud, there has been renewed interest by UAE healthcare regulators and government officials such as the DHA and The Department of Health in Abu Dhabi ('**DOH**'), in promoting transparency and accountability within the healthcare sector. Investigation of healthcare fraud is becoming one of the regulator's major priorities.

The Treatment

The criminal authorities and the regulatory authorities, such as the DOH and the DHA have taken a number of steps to curb or extinguish the practice of doctors and/or healthcare providers paying or being paid kickbacks for referrals. These legislative and regulatory changes include:

- DOH Standard Provider Contract;
- DOH Policy on Health Insurance Fraud and Abuse HSF/FA/1.0 ('**Fraud Policy**');

- DOH Circular DG 16/14 ('**Kickbacks Circular**');
- DAMAN Insurance letter of undertaking; and
- DHA Outpatient Care Facility Regulations 2012.

A definition of health insurance fraud is illustrated in the DOH Fraud Policy, as an intentional act of deception by any person, which has as its purpose the objective of:

i. *'obtaining a (financial or other) benefit or advantage related to the operation of the Health Insurance Scheme; or*

ii. *causing or exposing another person to a (financial or other) loss or disadvantage related to the operation of the Health Insurance Scheme, whether or not that act in fact achieves its intended purpose.'*

In addition, the DOH Kickbacks Circular prohibits the following activities:

'paying/receiving any commissions/financial incentives or making illegal profits against referring patients to medical laboratories for tests.'

Provisions of benefits and incentives may, in limited instances such as the provision of promotional items of nominal value, be provided only if they do not offend the UAE's Penal Code, the principles of insurance fraud, the DOH policies, or, the DHA policies. The DHA issued the Outpatient Care Facility Regulations 2012, which prohibits referring physicians from taking any commission for referring a patient to a specific clinical laboratory service provider.

As above, where there is criminal intent, the offer or acceptance of payment of a referral fee to a healthcare provider may be viewed as a bribe. Following amendments and expansions to its anti-bribery provisions in 2016, the UAE has again updated its bribery provisions in the Penal Code, through Federal Law No. 24 of 2018 amended by Federal Law No. 3 of 1987.

It is a criminal offence in the UAE to offer or accept a bribe in both the public and private sectors. Accordingly, a bribe offered or received by a healthcare provider may face sanction by the UAE authorities.

The Federal Penal Code, under Articles 47 and 236 of Federal Law No. 3 of 1987 (as amended), provides that it is an offence if:

'Any member of a board of directors of any company, private establishment, cooperative society or public utility, or any manager or employee in any of them, requests for himself or for another, or accepts a promise or donation or do or abstain from doing any of the tasks of his job or to breach his duties. The offender shall be considered a bribe-taker even if he does not intend to do such task or breach such duties.''

Further, Article 65 of the Federal Penal Code provides for corporate criminal liability and ensures that a company, such as a healthcare provider, can be held criminally liable for acts of bribery committed by its employees, representatives or agents, where the company has acted in bad faith and 'acted' in the commission of the offence.

Innovation, and specifically technological innovation, has recently become one of the most popular growing trends for social and economic development within the UAE and globally. Innovation was defined in the UAE National Innovation Strategy 2014 as, 'the aspiration of individuals, private institutions and governments to achieve development by generating creative ideas and introducing new products, services and operations that improve the overall quality of life', with the aim of making the UAE the most innovative nation in the world within seven years. The UAE has chosen the healthcare industry as one of the primary sectors to stimulate innovation.

"As with many lucrative, high-value services, routine check-ups of the medical industry have uncovered an insidious virus under the skin, with toxic actors attempting to leach from the system."

The Prognosis

Healthcare fraud is not to be considered a victimless crime. Fraud increases the costs of providing medical services. This may result in a reduced benefit in healthcare coverage or higher policy excess payments for individuals. Physicians may perform procedures to increase reimbursement, compromising patient safety. If medical providers do bill for services never rendered, they create an inaccurate medical history for patients. This may cause patients difficulty at a later stage in obtaining insurance policies. An inaccurate medical history may also affect treatment decisions and allow some insurance companies to deny coverage to an individual based on a previous medical condition.

Fraudsters are continually adapting their schemes to avoid detection. The best internal controls cannot provide 100 percent protection from fraud. However, there are some obvious steps, which can be taken to prevent fraud in the healthcare sector. For example:

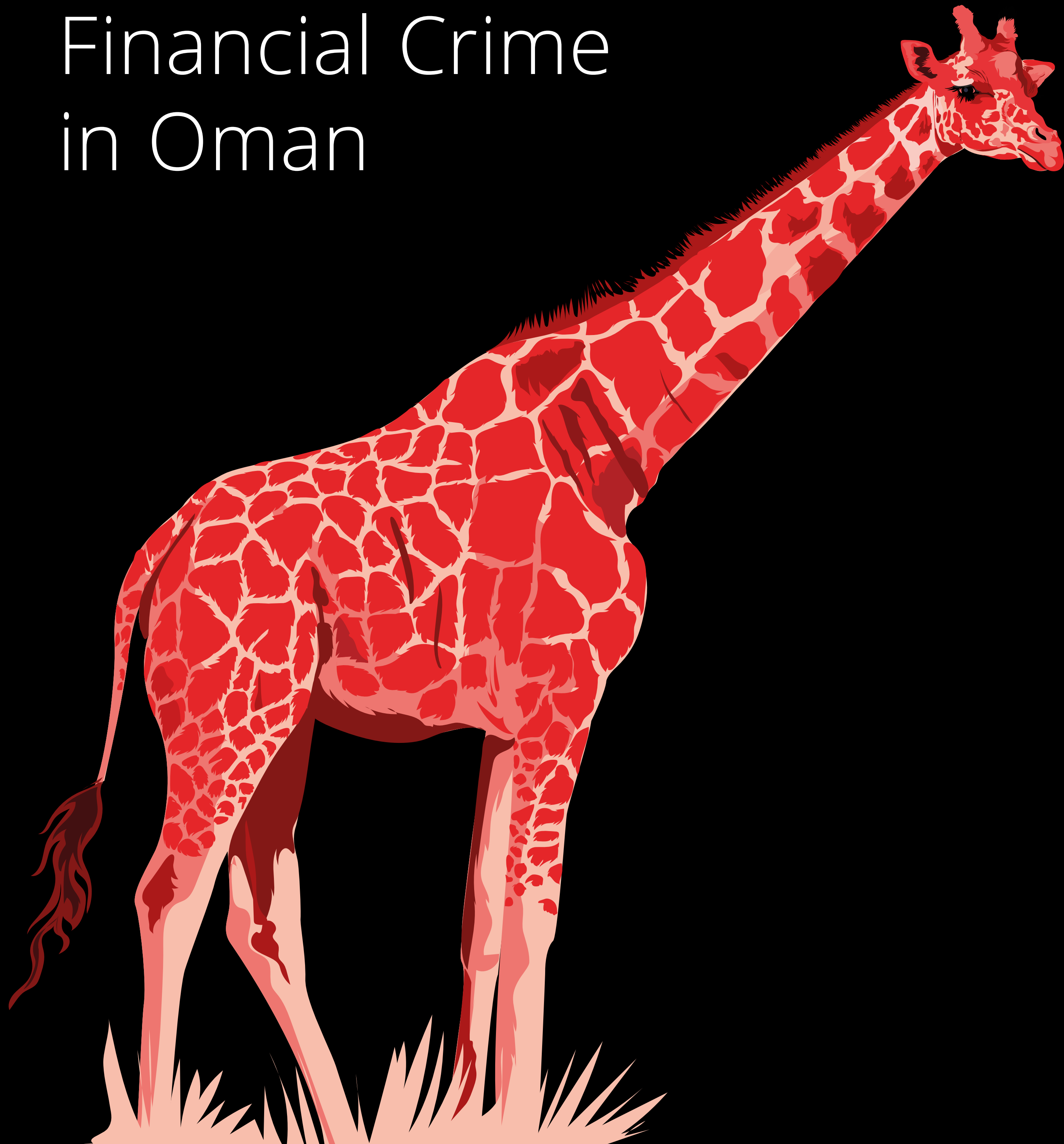
- patients should refuse to sign empty or incomplete claim forms;
- patients should not sign on more than one claim form per doctor visit;
- patients should inform insurers of any services that were not undertaken or completed after the insurer's approval;
- corporates and individuals should report any lost or stolen cards immediately;
- alert your insurer if a healthcare provider offers to waive your co-payment or deductible; and
- alert your insurer if a healthcare provider offers to bill the insurer for an uncovered service.

The vast majority of healthcare practitioners in the UAE act with honesty and integrity. However, certain individuals will attempt to cheat the system for financial gain.

Healthcare fraud destroys the reputation of the medical profession and raises questions in relation to governance of physicians' conduct.

"Healthcare fraud destroys the reputation of the medical profession and raises questions in relation to the governance of physicians' conduct."

Reaching New Heights: Fighting Financial Crime in Oman



Marja Boman
Senior Associate
Regional Financial Crime
Dubai, UAE
m.boman@tamimi.com

Wassim Mahmoud
Paralegal
Litigation
Muscat, Oman
w.mahmoud@tamimi.com

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.

"Preserving compliance requires that the effect of compliance policies is extended beyond employees to cover external representatives and sub-contractors as well."

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.

An Overview of Telecoms Licensing in Saudi Arabia

Nick O'Connell
Partner
Riyadh, Saudi Arabia
n.oconnell@tamimi.com

Amy Land-Pejoska
Associate
Riyadh, Saudi Arabia
a.pejoska@tamimi.com

The Saudi telecoms market is the largest in the GCC, and its licensing structure provides opportunities for a variety of market participants. In this article, we provide a general outline of the various licence categories, and the violations associated with non-compliance.

Pursuant to the Telecoms Law (Royal Decree No. (M/12) of 12/03/1422H (3 June 2001); Council of Ministers Resolution No. (74) of 05/03/1422H (27 May 2001), the Communications and Information Technology Commission ('**CITC**') is responsible for identifying the telecommunications-related licences available in the Kingdom, and the conditions an applicant must meet in order for the relevant licence to be issued.

The Telecoms Law contemplates four broad categories of licences, which are further detailed in the Telecoms Regulations (Telecom Act Bylaws (Ministerial Resolution No. (11) of 17/05/1423H (27 July 2002)):

- Telecommunications licences;
- Radio frequency licences;
- Numbering licences; and
- Equipment licences.

Licensees are required to comply with conditions specified in their licence. The repeated failure to comply with basic licensing conditions provides a basis upon which the CITC can amend, suspend, revoke or decline to renew a licence. Other reasons that would permit the CITC to amend, suspend, revoke or decline to renew a licence include: failure to commence operations within 12 months from licence issuance; failure to pay applicable fees; repeated failure to comply with decisions of the CITC; carrying out activities contrary to the public interest; and the purported assignment of the licence to a third party without the CITC's prior consent. Of course, the licensee's bankruptcy, dissolution or liquidation would also provide a legitimate basis for the licence to be revoked.

Practices violating the provisions of the Telecoms Law are prohibited and the CITC has considerable power to investigate and prosecute offences, including by establishing a Committee to consider and rule on violations. Penalties can include fines of up to SAR25M (about USD6.5M), as well as an account of profits and publication of details of the violation and the violator. In appropriate circumstances, criminal prosecution may also occur, and affected parties may also make a claim for damages.

Violations of specific relevance to licensing issues include:

- providing telecommunications services or operating (or connecting to) a public telecommunications network without obtaining a licence from the CITC;
- using any telecoms equipment not licensed by the CITC, or importing, marketing or using non-compliant telecoms equipment;

- using any radio frequency without a licence from the CITC; and
- any other practice violating the provisions of the Telecoms Law.

Telecommunications Licences

The Telecoms Regulations contemplate two types of telecommunications licences: 'Individual' Licences and 'Class' Licences. Class Licences are further split into 'Type A' Class Licences and 'Type B' Class Licences.

Individual Licences

The following are the types of activities covered by Individual Licences:

- fixed voice telephone services;
- public mobile cellular telecommunications services;
- operation of a public telecommunications network; and
- national and international fixed and mobile data communications services.

The CITC has discretion to specify other types of service that shall require an Individual Licence.

The types of requirements that the CITC can impose for an Individual Licence include requirements relating to scope and quality of services; terms and conditions of exclusivity; service rollout requirements; limitations on ownership of other service providers; tariff conditions; and requirements relating to providing the CITC with information.

The CITC can publish information on the procedures and requirements for applications for different types of Individual Licences, and in appropriate circumstances it may call for public consultation before calling for applications. The type of information published needs to provide enough detail on the criteria of the licence to enable applicants to file complete applications, and applicants need to be provided with enough time to provide a complete response. Licences for the same type of services should have the same requirements unless there is an objectively justifiable reason to take a different approach.

At a minimum, an applicant for an Individual Licence needs to provide the following information to the CITC as part of its application:

- name and location details;
- a description of the specific type of service that the applicant proposes to provide, and the geographic area the service would cover;
- a description of the specific network and telecommunications transmission system that the applicant proposes to establish and operate, and the schedule for implementation and roll-out of the network and system;
- clear evidence that the applicant has the financial capability to provide the proposed services and to implement the proposed network; and
- clear evidence that the applicant has the technical capability and experience (or has access to the same) to provide the proposed services and to implement the proposed network.

Upon request, the CITC is required to provide unsuccessful applicants with an explanation as to why the application was unsuccessful.

The Regulations contemplate the manner in which CITC can manage the issuance of Individual Licences in certain circumstances, such as where frequencies are scarce or where the CITC is seeking to swiftly transition towards a more competitive model for the subject service. This may involve the use of a comparative evaluation process, an auction process, or such other process as the CITC may consider appropriate. When limiting the number of licences being awarded, the CITC is required to adopt a process that is objective, transparent, and non-discriminatory.

Class Licences

Class Licences allow more than one service provider to provide the subject services, and impose identical conditions on all licensees in the relevant class.

The key differences between Type A Class Licences and Type B Class Licences are as follows:

- Type A: the CITC is permitted to limit the number of licensees, and adopt a competitive approach to the qualification process; and
- Type B: the CITC is not permitted to limit the number of licensees, and it may not adopt a competitive approach to the qualification process. (Applicants need only submit a basic registration form, providing the applicant's name, address, and information on the subject service.)

The following are examples of the types of services/networks the subject of Type A Class Licences:

- national and international voice call resale services;
- Very Small Aperture Terminal ('**VSAT**') satellite services;
- public pay telephone services;
- radio paging services;
- temporary network services; and
- Internet of Things-Mobile Virtual Network Operator ('**IoT-MVNO**') services.

The following are examples of the types of services/networks which fall under Type B Class Licences:

- Internet Service Provider ('**ISP**') services;
- Value-Added Network ('**VAN**') services;
- Global Mobile Personal Communication by Satellite ('**GMPCS**') services;
- Public Call Office ('**PCO**') services;
- Audio Text Service;
- Automated Vehicle Location Service ('**AVL**');
- Broadband Satellite Services;
- Call Center Services;
- Electronic Wallet Services;
- Leasing Utilities Communications Facilities;
- Network Operation Center;
- Providing Internet Services on Aircraft;
- Providing Mobile Communication Services onboard Aircraft;
- Bulk Short Messages Service ('**SMS**'); and
- Wholesale Infrastructure Services.

Upon request, the CITC is required to provide unsuccessful applicants with an explanation as to why the application was unsuccessful.

Radio Licences

Under the Regulations, it is not permitted to install, operate, or possess radio equipment or use a radio frequency except pursuant to, and in accordance with, a radio licence.

The Regulations allow the CITC to prepare and publish procedures related to the management of the radio frequency spectrum, including procedures dealing with classes and conditions of radio frequency licences and radio equipment licences, and associated application procedures, information requirements, application forms and fees.

The CITC has prepared a National Frequency Spectrum Plan (originally in effect from 2/5/1429H (13 February 2008)), consistent with international and regional regulations, agreements and standards, in order to allocate frequency spectrum among different types of use, and to prescribe associated technical standards.

Numbering Licences

The CITC has prepared a National Numbering Plan (most recently revised in 1432H (2011), consistent with international and regional conventions, regulations and recommendations. The National Numbering Plan is intended to manage the resource, efficiently allocate numbers, and plan for growth in demand so that numbers can be readily assigned and ported between carriers, etc.

The Regulations require telecommunications service providers to use numbers assigned to them by the CITC in accordance with the National Numbering Plan, and to ensure that such numbers are used in accordance with the National Numbering Plan. These requirements impose obligations on service providers in respect of subscribers with regard to the issuance and variation of the numbers issued to them. The Regulations also provide for Mobile Number Portability, and further CITC guidance has been issued on this.

Failure to comply with the numbering provisions would be likely to constitute a breach of the 'catch all' prohibition on 'any other practices in violation of this law' found in the Telecoms Law.

Equipment Licences

The CITC is required to prescribe the procedures and requirements applicable to type approval / telecoms equipment licences, as well as details of telecoms equipment approved for use in Saudi Arabia (as well as local labelling requirements showing that equipment is approved). This relates to radio-apparatus, radio-sensitive equipment, interference-causing equipment and any other device, apparatus, product, tool, machinery, equipment or thing connected to a telecommunications network or that may interfere with telecommunications services.

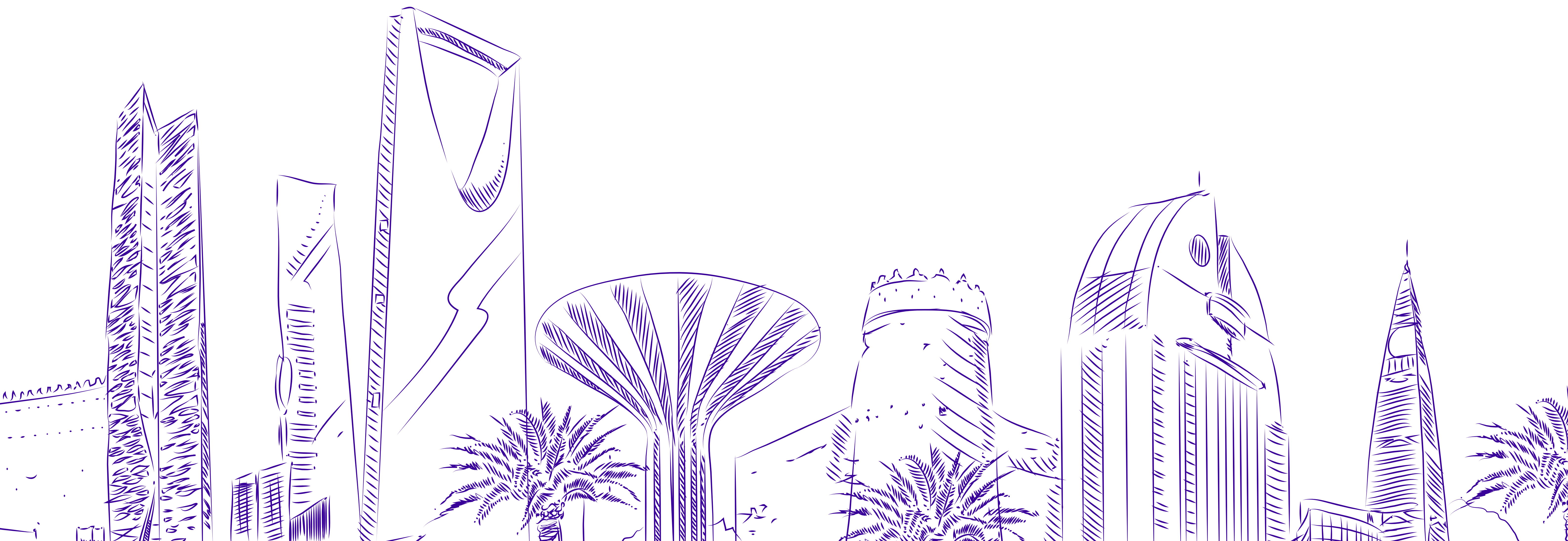
It is permitted to use telecommunications equipment that has been type approved, or otherwise complies with technical standards that have been approved, by the CITC. The Regulations specifically prohibit the use of telecommunications equipment other than pursuant to a licence issued by the CITC. They also prohibit the manufacture, importation, distribution, leasing, offering for sale or sale of such equipment.

What Next?

The CITC is proactive in continually reviewing the licence regime, particularly in terms of introducing new Class Licences where technological developments require it. Examples include the recent introduction of an IOT MVNO regime. Prospective participants in the Saudi telecoms market, and those hoping to offer peripheral services that could require a local licence, are well advised to familiarise themselves with the licensing categories and ensure they obtain the appropriate licences.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises on issues relating to licensing in the telecoms sector. For further information, please contact Nick O'Connell (n.oconnell@tamimi.com) or Amy Land-Pejoska (a.pejoska@tamimi.com).

"Prospective participants in the Saudi telecoms market, and those hoping to offer peripheral services that could require a local licence, are well advised to familiarise themselves with the licensing categories and ensure they obtain the appropriate licences."



Corporate Governance Regulations for Non-Listed Joint Stock Companies in Saudi Arabia

Mohamad Chehab
Senior Associate
Riyadh, Saudi Arabia
m.chehab@tamimi.com

On 14-08-1439H (30 April 2018), the Saudi Arabian Ministry of Commerce and Investment ('**MoCI**') issued Corporate Governance Regulations ('**CGRs**') for Non-Listed or Closed Joint Stock Companies (referred to below as 'CJSCs' or the 'Company' as appropriate) operating in the Kingdom of Saudi Arabia ('**KSA**').

This article summarises the key provisions of the CGRs.

Important Qualifications

The new CGRs provide CJSCs operating within KSA with a framework for enhanced accountability, fairness, transparency and efficiency. They are not however binding on CGRs. That is, there is no legal requirement for CGRs to adopt them.

CGRs are meant to be complementary to the Saudi Arabian Companies Law (Royal Decree no. M/3 dated 28-01-1437H corresponding to 11 November 2015) (the '**Companies Law**') and provide a set of guiding principles for CJSCs to implement in conjunction with their existing regulatory obligations. The requirements of the Companies Law take precedence over the provisions of the CGRs where there is any conflict.

What are the Objectives of the CGRs?

The CGRs aim to:

- provide an effective legal framework for corporate governance;
- set out the scope of responsibilities for the board of directors, its committees and executive management;
- promote transparency, integrity and fairness in the Company's business endeavours;
- provide an effective and well-defined mechanism for dealing with potential conflicts of interest; and
- increase the awareness of professional behaviour within the Company.

Shareholders' Rights

The CGRs provide protections of shareholders' rights. They include the following:

a. fair treatment;

b. receipt of allocated share of the Company's net profits;

c. attend and vote in general assembly meetings;

d. access to the Company's documents and information; and

e. nominate, elect and remove members of the board of directors.

Shareholders' Assemblies

The CGRs specify the scope of authorities that may be exercised through Shareholders' Assemblies.

Board of Directors

The CGRs contain a number provisions relevant to boards of directors of CGRs:

a. the CGRs prescribe a list of functions to be carried out by the board of directors. The board of directors is responsible for forming and allocating the functions of the executive management of the Company. The board of directors is also responsible for supervising the executive management and ensuring the implementation of its functions;

b. the board of directors may, within the limits of its authority, delegate some of its authority to committees;

c. the board of directors is required to meet at least four times each year with a meeting being held every three months. At least half of the members of the board of directors would need to be present in order for a meeting to be valid;

d. the number of board of director members should be set out in the Company's articles of association. However, the number of members should not be less than three and not more than eleven;

e. one third of the board members should be independent members and the board should conduct an annual review of its members to ensure that their independence is not compromised;

f. the independence of a board member can be compromised where:

- the member owns five percent or more of the shares of the Company;
- the member receives financial remuneration from the Company other than the remuneration received as a member of the board of directors (or any of its committees);
- the member has a direct or indirect interest in the Company's business; or
- the member engages in a business that would compete with the Company.

g. members of the board of directors should have the necessary professional and leadership capabilities to enable them to perform their responsibilities effectively;

h. all members of the board of directors are required to adhere to principles of honesty and devotion by avoiding conflicts of interest and performing their responsibilities in accordance with the Companies Law, and the Company's articles of association and policies and procedures; and

i. the board of directors should appoint a chairman and deputy chairman. They have the discretion to appoint a managing director as well. The chairman of the board of directors is prohibited from holding an executive position in the Company unless it is stipulated in the articles of association.

Training and Evaluation

The Company should develop training programmes for members of the board of directors and executive management to familiarise themselves with the following:

a. the Company's strategy;

b. the financial and operational aspects of the Company's activities;

c. the rights and responsibilities of members of the board of directors and executive management; and

d. the functions and authorities of the Company's committees.

Additional training programmes and courses should be provided to members of the board of directors and executive management on an ongoing basis and as may be necessary.

With the recommendation of the nominations committee, the board of directors should establish procedures for evaluating the performance of the board of directors (including its members), committees and executive management on an annual basis. Key performance indicators may be instituted to achieve this.

Arrangements should be made for a third party to evaluate the performance of the board of directors every three years.

The chairman's performance should be evaluated by independent members of the board of directors on a periodic basis.

Conflicts of Interest

The board of directors should establish a written policy for addressing any conflicts of interest that may occur. This would be applicable to all members of the board of directors, committees, executive management and employees of the Company.

a. The conflicts of interest policy should include the following:

- the obligation to disclose any conflicts of interest;
- illustrative examples of conflicts of interest cases;
- clear procedures for disclosing conflicts of interest;
- the obligation to abstain from voting or participating in any decisions when there is a conflict of interest;
- clear procedures when conducting business with a related party; and
- measures to be taken by the board of directors in the event the policy is breached.

b. Directors must adhere to the following requirements:

- perform their responsibilities honestly and impartially;
- prioritise the Company's interests over their personal interests;
- avoid exploiting their position for personal gain;
- avoid conflicts of interest and notify the board of directors of any issues that may affect their neutrality when voting in meetings (the relevant member(s) would not be permitted to vote on matters that may affect their neutrality); and
- maintain the confidentiality of the Company's documents and information.

If a director intends to participate in a business that would compete with the Company, the following procedures should be taken:

- the member should inform the board of directors about the competing business, which should be recorded in the minutes of the meeting;
- the member would need to abstain from voting or participating in any decisions made by the board of directors with regard to the competing business;
- the chairman of the board of directors should notify the ordinary general assembly about the competing business; and
- the member should obtain prior authorisation from the ordinary general assembly to engage in the competing business.

Committees

The committees specifically prescribed by the CGRs are the audit, remuneration, nominations and risk management committees. The following are key requirements:

a. the committees are required to report to the board of directors;

b. the number of members in each committee should not be less than three and not more than five;

c. each committee is required to appoint an adequate number of non-executive and independent members;

d. heads of committees are required to attend the general assembly meetings in order to address any questions the shareholders may have;

e. committees are required to consider the topics referred to them by the board of directors and are required to submit their recommendations to the board of directors for agreement;

f. each committee is authorised to seek the assistance of third party experts and specialists in order to enable it to carry out its obligations effectively;

g. committee meetings cannot be attended by any members of the board of directors or executive management unless they are members of the relevant committee;

h. the Company may merge the remuneration and nominations committees into one committee.

Audit Committee

The audit committee's functions include the following:

a. evaluating the Company's financial statements and providing the results of such evaluation to the board of directors;

b. identifying any critical or unusual issues contained in the Company's financial statements;

c. recommending to the board of directors the nomination and removal of auditors, determining their fees and evaluating their performance;

d. ensuring compliance with applicable laws, regulations, policies and procedures; and

e. providing the board of directors with a list of issues that need to be resolved while making recommendations for resolving those issues.

The chairman of the Board of Directors cannot be a member of the audit committee.

Remuneration Committee

The remuneration committee's functions include the following:

a. formulating a policy for the remuneration of the members of the board of directors, its committees and executive management;

b. periodically reviewing and updating the remuneration policy in order to ensure alignment with its objectives; and

c. providing recommendations to the board of directors on the remuneration of its members, its committees and executive management in accordance with the remuneration policy.

Nominations' Committee

The nominations' committee's functions include the following:

a. formulating policies and criteria for membership on the board of directors and in executive management;

b. providing recommendations to the board of directors on the nomination and re-nomination of its members'

c. annual review of the skills and experience requirements for board membership and executive management functions;

d. reviewing the structure of the board of directors and executive management and providing recommendations for any changes that may be deemed necessary; and

e. annual verification of the independence of independent committee members.

Risk Management Committee

The risk management committee's functions include the following:

a. developing a comprehensive risk management strategy for the Company;

b. supervising the Company's risk management system and conducting evaluations on the effectiveness of the systems and procedures that are in place for identifying, measuring and monitoring risks that the Company may encounter;

c. preparing and submitting to the board of directors detailed risk exposure reports and outlining steps required to manage identified risks;

d. providing the board of directors with recommendations on risk management issues; and

e. ensuring the availability of adequate resources and systems for risk management.

Auditors

The Company is required to assign its annual audit function to an independent, experienced and qualified auditor. The auditor will be responsible for preparing an objective and independent report to the board of directors and shareholders on the financial position of the Company.

Miscellaneous Requirements

a. The board of directors is required to prepare an annual report on the activities of the Company and all factors affecting the Company's business. The CGRs prescribe a detailed list of items that should be included in the annual report in order to ensure that the Company operates in a transparent manner.

b. The board of directors should develop policies and procedures in order to enable staff of the Company to report any illegal practices that may be taking place. This will include assigning an individual to receive and address complaints and setting up a telephone line and/or email address for receiving complaints.

c. The Company should institute programmes aimed at increasing the participation and performance of its employees. In this regard, specialised workshops should be held in order to solicit feedback from employees about the Company and address any concerns they may have.

d. The board of directors should establish a policy of professional conduct in order to ensure that each member of the board of directors, executive management and employees of the Company take the best interests of the Company (rather than their personal interests) into account when performing their duties.

e. The board of directors should develop programmes to increase awareness on the importance of engaging in social work for the benefit of the local community.

Concluding Observations

Even though the CGRs are non-binding, CJSC's can reasonably expect that these are standards by which their performance in relation to compliance issues will be judged by regulators and others. This may also have an effect on the overall reputation of a CJSC with the regulators. Non-compliance with the provisions of the CGRs may therefore carry with it legal and other risks.

The auditors of CJSC's may take into consideration the extent of compliance with the CGRs as part of the auditing process.

Since CJSCs may be separately regulated by another authority (i.e. the Capital Markets Authority), it cannot be assumed that the CGRs satisfy all relevant compliance requirements in all cases since the relevant regulator may have more stringent compliance requirements in place.

Al Tamimi & Company's Corporate Commercial team regularly advises on issues relating to Non-Listed Joint Stock Companies in Saudi Arabia. For further information, please contact Mohamad Chehab (m.chehab@tamimi.com).

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 646
25 Jumada ul-Awwal 1440H
31 January 2019

FEDERAL DECREES

191 of 2018	Ratifying the Agreement on the Encouragement and Protection of Investments between the UAE and Japan.
192 of 2018	Ratifying the Protocol Amending the Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital between the UAE and Turkmenistan.
193 of 2018	Ratifying the Agreement for the Avoidance of Double Taxation and Prevention of Tax Evasion with respect to Taxes on Income and Capital between the UAE and KSA.
194 of 2018	Ratifying the Agreement on the Encouragement and Reciprocal Protection of Investments between the UAE and Rwanda.
195 of 2018	Ratifying the Agreement on the Encouragement and Reciprocal Protection of Investments between the UAE and Uganda.
196 of 2018	Ratifying the Bilateral Agreement on the Encouragement and Protection of Investments between the UAE and Colombia.
197 of 2018	Ratifying the Agreement for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income between the UAE and Rwanda.
198 of 2018	Ratifying the Agreement for the Elimination of Double Taxation and Prevention of Tax Evasion with respect to Taxes on Income between the UAE and Colombia.
199 of 2018	Ratifying the Agreement on Cultural Cooperation between the UAE and Turkmenistan.
200 of 2018	Ratifying the Agreement on Economic and Technical Cooperation between the UAE and Moldova.
201 of 2018	Ratifying the Agreement on Mutual Assistance and Cooperation in Customs Matters between the UAE and Sri Lanka.
202 of 2018	Ratifying the Agreement between the UAE and Russia on Mutual Exemption from Pre-Entry Visas.
203 of 2018	Ratifying the Agreement between the UAE and the Internal Bureau of Expositions on the Privileges and Benefits Accorded to Official Participants in Expo2020 Dubai.
204 of 2018	Ratifying the Agreement between the UAE and Gabon for Air Services Between and Beyond their Respective Territories.

United Arab Emirates
Ministry of Justice

49th Year
Issue No. 647
9 Jumada al-Akhira 1440H
14 February 2019

FEDERAL LAWS

2 of 2019	On the use of information and communication technology (ICT) in healthcare.

FEDERAL DECREES

206 of 2018	Ratifying the Agreement between the UAE and Saint Kitts and Nevis for Air Services Between and Beyond their Respective Territories.
207 of 2018	Ratifying the Acts and Resolutions Passed by the Universal Postal Union at the 26th Universal Postal Convention.
208 of 2018	Ratifying the Agreement on the Encouragement and Reciprocal Protection of Investments between the UAE and Costa Rica.
209 of 2018	Ratifying the Agreement on the Encouragement and Reciprocal Protection of Investments between the UAE and Kazakhstan.
210 of 2018	Ratifying the Agreement on Cooperation in Combatting Illicit Traffic in Narcotic Drugs, Psychotropic Substances and Precursors between the UAE and Afghanistan.
211 of 2018	Ratifying the Agreement between the UAE and Belize for Air Services Between and Beyond their Respective Territories.
212 of 2018	Ratifying the Agreement between the UAE and Namibia for Air Services Between and Beyond their Respective Territories.
213 of 2018	Ratifying the Agreement between the UAE and Ghana for Air Services Between and Beyond their Respective Territories.
215 of 2018	Ratifying the Agreement on Mutual Administrative Cooperation in Customs Matters between the UAE and Belarus.

REGULATORY DECISIONS OF THE CABINET

9 of 2019	Promulgating the executive regulations of Federal Law No. (5) of 2016 on diplomatic medals.
10 of 2019	Promulgating the executive regulations of Federal Decree-Law No. (20) of 2018 on combatting money laundering and the financing of terrorism and illegal organizations.
11 of 2019	Amending Cabinet Decision No. (16) of 2014 promulgating the executive regulations of Federal Law No. (6) of 2010 concerning credit information.
12 of 2019	On a UAE mandatory specification.
13 of 2019	Repealing Cabinet Decision No. (30) of 2008 on the formation of the Judicial Coordination Council.
14 of 2019	Regulating the grant of temporary licenses for testing and vetting innovations that use future technologies.
15 of 2019	Promulgating the executive regulations of Federal Law No. (22) of 2016 regulating the keeping of dangerous animals.
16 of 2019	Regulating pesticide advertising.
17 of 2019	Amending Cabinet Decision No. (45) of 2009 on customs service fees for UAE.

ADMINISTRATIVE DECISIONS

- From the UAE Central Bank

01/COMMEMORATIVE COIN/2019	Approving the issue of a commemorative silver coin and one Dirham coin to mark the UAE's Hosting of the Asia Cup 2019.
-	Regulation governing the reporting of currency, bearer negotiable instruments, precious metals and stones in the possession of arriving and departing passengers.

Arabian Business's list of GCC 100 Inspiring Leaders for 2019

Congratulations to our Founder & Senior Partner Essam Al Tamimi for being listed in the 2019 Arabian Business GCC 100 Inspiring Leaders.

The 100 list identifies the most pioneering leaders in the business community and the achievements they have made.

We applaud Essam and all of the inspirational leaders acknowledged.

Arbitration Department's Khushboo Shahdadpuri, gets selected to serve in the Young Singapore International Arbitration Centre Committee

Khushboo Shahdadpuri, Associate in the Arbitration Department, has been selected to serve in the Young Singapore International Arbitration Centre (YSIAC) Committee. The YSIAC Committee consists of selected young arbitration practitioners (aged 40 and under) from leading local, regional and international law firms and chambers based in Singapore and around the world. The Committee is tasked with encouraging and promoting the initiatives of the SIAC in the committee members' respective jurisdiction, amongst others.

> *"We are delighted to welcome a set of dynamic, energetic and motivated young lawyers from diverse legal systems and cultures to the YSIAC Committee. YSIAC seeks to nurture and provide opportunities to young arbitration practitioners all over the world as counsel, arbitrators, tribunal secretaries and speakers at SIAC events, and is an excellent networking platform. Under the stewardship of the previous Committee, the YSIAC community has seen its numbers grow steadily to over 3,000 members from 99 jurisdictions. We would like to express our sincere thanks and appreciation to the outgoing co-chairs, Mr Ankit Goyal and Ms Koh Swee Yen, and the former Committee, for their hard work and dedication, and look forward to working closely with the new Committee to take YSIAC to the next level."*

Ms Lim Seok Hui, CEO of SIAC

5th & 6th February
GDPR: Insights & Risk Analysis for UAE Businesses
Al Tamimi & Company DIFC office

Speakers:
Martin Hayward
Head of Technology, Media & Telecommunications

Amna Qureshi
Associate, Technology, Media & Telecommunications

Caro Robson
Senior Counsel, Privacy & Data Protection Mastercard Middle East & Africa

Jeremy Scott
Partner, Real Estate

Richard Catling
Partner, Corporate Commercial

Noff Al Khafaji
Senior Associate, Corporate Structuring

7th February
CBRE/ATCO Breakfast Event
Capital Club, DIFC

11th February
Sign of the times: What to know about digital signatures
Al Tamimi & Company DIFC office

Speakers:
Martin Hayward
Head of Technology, Media & Telecommunications

Andrew Fawcett
Senior Counsel, Technology, Media & Telecommunications

Amna Qureshi
Associate, Technology, Media & Telecommunications

Charlie Weijer
Area Vice President, Commercial Sales, DocuSign

Iain Jones
Principle Solution Consultant, DocuSign

12th February
DIFC Legislative Changes: A New Chapter for DIFC Businesses
DIFC Conference Centre

Speakers:
Izabella Szadkowska
Partner, Corporate Structuring

Gary Watts
Partner, Head of Corporate Commercial

Gordon Barr
Partner, Employment & Incentives

12th February
Qatar Office participate in National Sports Day at the AHK Football Tournament
German Industry and Commerce Office Qatar (AHK)
German Business Council Qatar (GBCQ)
Al Tamimi & Company
Al Sadd Football Club, Doha

Participants:
Ahmed Jaafir
Partner, Head of Corporate Structuring - Qatar

Hani Al Naddaf
Partner, Head of Litigation - Qatar

Ayman Raad
Associate, Corporate Structuring

Tamer Al Sayed
Paralegal, Corporate Structuring

17th February
Kingdom of Saudi Arabia: Legal developments in the Banking sector and Banking related enforcement issues
Al Tamimi & Company DIFC office

Speakers:
Rafiq Jaffer
Partner, Banking & Finance – KSA

Mohammed Negm
Senior Associate, Litigation – KSA

20th February
Chief Legal Officer Executive Series in association with Al Tamimi & Company
Etihad Towers, Jumeirah

27th February
New DIFC Employment Law: Breakfast Briefing

Speakers:
Gordon Barr
Partner, Employment & Incentives

Anna Marshall
Senior Associate, Employment & Incentives

About Us

Al Tamimi & Company is the largest law firm in the Middle East with 17 offices across 9 countries. The firm has unrivalled experience, having operated in the region for over 25 years. Our lawyers combine international experience and qualifications with expert regional knowledge and understanding.

We are a full-service firm, specialising in advising and supporting major international corporations, banks and financial institutions, government organisations and local, regional and international companies. Our main areas of expertise include arbitration & litigation, banking & finance, corporate & commercial, intellectual property, real estate, construction & infrastructure, and technology, media & telecommunications. Our lawyers provide quality legal advice and support to clients across all of our practice areas.

Our business and regional footprint continues to grow, and we seek to expand further in line with our commitment to meet the needs of clients doing business across the Middle East.

17	9	68	350	50
Offices	Countries	Partners	Lawyers	Nationalities

Client Services

Practices

Arbitration | Banking & Finance | Capital Markets | Commercial | Competition | Construction & Infrastructure | Corporate/M&A | Corporate Services | Corporate Structuring | Employment & Incentives | Family Business & Private Wealth | Financial Crime | Insurance | Intellectual Property | Legislative Drafting | Litigation | Mediation | Private Client | Private Equity | Private Notary | Real Estate | Regulatory | Tax | Technology, Media & Telecommunications |

Sectors

Automotive | Aviation | Education | Expo 2020 | FMCG | Healthcare | Hotels & Leisure | Innovation, Technology & Entrepreneurship | Projects | Rail | Shipping | Sports & Events Management | Transport & Logistics |

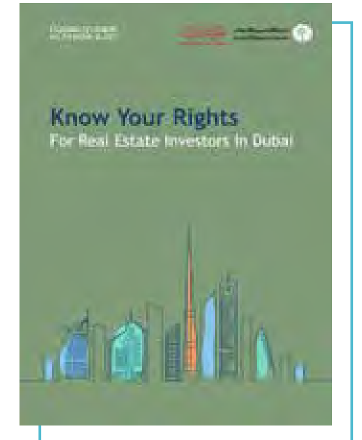
Country Groups

China | India | Korea |

> **Al Tamimi's key strength is providing quality service - maintaining international standards whilst providing the advantage of being a cost-effective external provider.**
>
> *Chambers Global*

Publications

Al Tamimi & Company is at the forefront of sharing knowledge and insights from the Middle East with publications such as Law Update, our monthly magazine that provides the latest legal news and developments, and our "Doing Business" and "Setting Up" books, which have proven to be valuable resources for companies looking to do business in the region. You can find these resources at www.tamimi.com.



Regional Footprint

UAE
Abu Dhabi
Dubai, DIC
Dubai, DIFC
Dubai, Maze Tower
Ras Al Khaimah
Sharjah

BAHRAIN
Manama

EGYPT
Cairo

IRAQ
Baghdad
Erbil

JORDAN
Amman

KUWAIT
Kuwait City

OMAN
Muscat

QATAR
Doha

SAUDI ARABIA
Al Khobar
Jeddah
Riyadh

Key Contacts

SENIOR PARTNER
Essam Al Tamimi
e.tamimi@tamimi.com

MANAGING PARTNER
Husam Hourani
h.hourani@tamimi.com

DEPUTY MANAGING PARTNER
Hassan Arab
h.arab@tamimi.com

Offices

UAE
ABU DHABI
Alex Ghazi
alex.ghazi@tamimi.com

DUBAI, DIC
Samer Qudah
s.qudah@tamimi.com

DUBAI, DIFC
Husam Hourani
h.hourani@tamimi.com

DUBAI, THE MAZE TOWER
Bassem El Dine
b.dine@tamimi.com

RAS AL KHAIMAH
Ammar Haykal
a.haykal@tamimi.com

SHARJAH
Zafer Oghli
z.oghli@tamimi.com

BAHRAIN
MANAMA
Foutoun Hajjar
f.hajjar@tamimi.com

EGYPT
CAIRO
Ayman Nour
a.nour@tamimi.com

IRAQ
BAGHDAD
Mohammed Norri
m.norri@tamimi.com

ERBIL
Khaled Saqqaf
k.saqqaf@tamimi.com

JORDAN
AMMAN
Khaled Saqqaf
k.saqqaf@tamimi.com

KUWAIT
KUWAIT CITY
Alex Saleh
alex.saleh@tamimi.com

Philip Kotsis
p.kotsis@tamimi.com

OMAN
MUSCAT
Ahmed Al Barwani
a.albarwani@tamimi.com

QATAR
DOHA
Matthew Heaton
m.heaton@tamimi.com

SAUDI ARABIA
HEAD OF KSA
Babul Parikh
b.parikh@tamimi.com

AL KHOBAR
Jonathan Reardon
j.reardon@tamimi.com

JEDDAH
Rakesh Bassi
r.bassi@tamimi.com

RIYADH
Grahame Nelson
g.nelson@tamimi.com

Practices

ARBITRATION
Thomas Snider
t.snider@tamimi.com

BANKING & FINANCE
Jody Waugh
j.waugh@tamimi.com

CAPITAL MARKETS
Mohamed Khodeir
m.khodeir@tamimi.com

Andrew Tarbuck
a.tarbuck@tamimi.com

COMMERCIAL
Willem Steenkamp
w.steenkamp@tamimi.com

COMPETITION
Omar Obeidat
o.obeidat@tamimi.com

CONSTRUCTION & INFRASTRUCTURE
Lyndon Richards
l.richards@tamimi.com

CORPORATE/M&A
Gary Watts
g.watts@tamimi.com

Abdullah Mutawi
a.mutawi@tamimi.com

CORPORATE SERVICES
Izabella Szadkowska
i.szadkowska@tamimi.com

CORPORATE STRUCTURING
Samer Qudah
s.qudah@tamimi.com

EMPLOYMENT & INCENTIVES
Samir Kantaria
s.kantaria@tamimi.com

FAMILY BUSINESS & PRIVATE WEALTH
Gary Watts
g.watts@tamimi.com

FINANCIAL CRIME
Khalid Al Hamrani
k.hamrani@tamimi.com

INSURANCE
Yazan Al Saoudi
y.saoudi@tamimi.com

INTELLECTUAL PROPERTY
Omar Obeidat
o.obeidat@tamimi.com

LEGISLATIVE DRAFTING
Mohamed Al Marzouqi
m.almarzouqi@tamimi.com

LITIGATION
Hussain Eisa Al Shiri
h.shiri@tamimi.com

PRIVATE CLIENT
Essam Al Tamimi
e.tamimi@tamimi.com

PRIVATE EQUITY
Alex Saleh
alex.saleh@tamimi.com

PRIVATE NOTARY
Taiba Al Safar
t.alsafar@tamimi.com

REAL ESTATE
Tara Marlow
t.marlow@tamimi.com

REGULATORY
Andrea Tithecott
a.tithecott@tamimi.com

TAX
Shiraz Khan
s.khan@tamimi.com

TECHNOLOGY, MEDIA & TELECOMMUNICATIONS
Martin Hayward
m.hayward@tamimi.com

Sectors

AUTOMOTIVE
Samir Kantaria
s.kantaria@tamimi.com

AVIATION
Yazan Al Saoudi
y.saoudi@tamimi.com

EDUCATION
Ivor McGettigan
i.mcGettigan@tamimi.com

EXPO 2020
Steve Bainbridge
s.bainbridge@tamimi.com

FMCG
Samer Qudah
s.qudah@tamimi.com

HEALTHCARE
Andrea Tithecott
a.tithecott@tamimi.com

HOTELS & LEISURE
Tara Marlow
t.marlow@tamimi.com

INNOVATION, TECHNOLOGY & ENTREPRENEURSHIP
Ahmad Saleh
ah.saleh@tamimi.com

PROJECTS
Mark Brown
m.brown@tamimi.com

RAIL
Foutoun Hajjar
f.hajjar@tamimi.com

SHIPPING
Omar Omar
o.omar@tamimi.com

SPORTS & EVENTS MANAGEMENT
Steve Bainbridge
s.bainbridge@tamimi.com

TRANSPORT & LOGISTICS
Yazan Al Saoudi
y.saoudi@tamimi.com

Country Groups

CHINA GROUP
Jody Waugh
j.waugh@tamimi.com

INDIA GROUP
Samir Kantaria
s.kantaria@tamimi.com

KOREA GROUP
Omar Omar
o.omar@tamimi.com

"We appreciate the diversity of the lawyers' backgrounds - there's always someone qualified to answer any query."

Chambers Global

Contact Us

UNITED ARAB EMIRATES

Abu Dhabi Al Sila Tower, 26th Floor, Abu Dhabi Global Market Square, Al Maryah Island, PO Box 44046, Abu Dhabi, UAE

T: +971 2 813 0444 / F: +971 2 813 0445
infoabudhabi@tamimi.com

Dubai Internet City DIC Building No. 5, G 08, PO Box 500188, Dubai, UAE

T: +971 4 391 2444 / F: +971 4 391 6864
infodic@tamimi.com

Dubai International Financial Centre 6th Floor, Building 4 East, Dubai International Financial Centre, Sheikh Zayed Road, PO Box 9275, Dubai, UAE

T: +971 4 364 1641 / F: +971 4 3641 777
info@tamimi.com

Dubai Maze Tower Level 15, Sheikh Zayed Road, PO Box 9275, Dubai, UAE

T: +971 4 331 7161 / F: +971 4 331 3089
info@tamimi.com

Ras Al Khaimah Julphar Office Tower, 39th Floor, Al Jissar Street, PO Box 34053, Ras Al Khaimah, UAE

T: +971 7 233 3841 / F: +971 7 233 3845
inforak@tamimi.com

Sharjah Al Khan Corniche Street Near Al Qasba Canal 30th Floor, Al Hind Tower PO Box 5099, Sharjah, UAE

T: +971 6 572 7255 / F: +971 6 572 7258
infosharjah@tamimi.com

BAHRAIN

Manama Bahrain Financial Harbour, West Tower, 13th floor, Suite 1304, Office 13B, Building 1459, Block 346, Manama, Bahrain

T: +973 17 108 919 / F: +973 17 104 776
infobahrain@tamimi.com

EGYPT

Cairo Building No. 5&7 (Star Capital Building), 10th Floor, Geziret El Arab Street, Mohandseen, Giza, Cairo, Egypt

T: +20 2 3368 1000 / F: +20 2 3368 1002
infoegypt@tamimi.com

Al Tamimi & Company is associated with Nour & Partners providing legal services in Egypt.

IRAQ

Baghdad Al Harithiya, Kindi St., Dist. 213 Building 106, First Floor, Baghdad, Iraq

T: +964 780 029 2929 / F: +964 1 542 0598
infoiraq@tamimi.com

Erbil English Village, Gulan Street, Villa no. 130, Erbil, Iraq

T: +964 780 588 7848 / F: +964 750 445 2154
infoiraq@tamimi.com

Basra infoiraq@tamimi.com

JORDAN

Amman 6th Circle, Emmar Towers, 11th Floor, Tower B, PO Box 18055, Zip 11195, Amman, Jordan

T: +962 6 577 7415 / F: +962 6 577 7425
infojordan@tamimi.com

KUWAIT

Kuwait City Khaled Bin Al Waleed Street, Sharq, Al Dhow Tower, 16th Floor, PO Box 29551, Safat 13156, Kuwait City, Kuwait

T: +965 2 246 2253 / F: +965 2 296 6424
infokuwait@tamimi.com

Al Tamimi & Company International Ltd. provides services in Kuwait through a joint venture with Yaqoub Al-Munayae. Yaqoub Al-Munayae is a registered and licensed lawyer under the laws and regulations of Kuwait.

OMAN

Muscat Al Assalah Towers, Building 223, Block 237, Office 409, Street 3701, Ghubrah South, Muscat, Oman

T: +968 2421 8554 / F: +968 2421 8553
infooman@tamimi.com

Al Tamimi, Al Barwani & Co is trading under the registered trade mark of "Al Tamimi & Co".

QATAR

Doha Tornado Tower, 19th Floor Majlis Al Taawon Street, PO Box 23443, West Bay, Doha, Qatar

T: +974 4457 2777 / F: +974 4360 921
infoqatar@tamimi.com

Adv. Mohammed Al-Marri in association with Al Tamimi & Company

SAUDI ARABIA

Al Khobar 9th Floor, Zamil House Prince Turkey Street, Corniche District, PO Box 32348, Al Khobar, Saudi Arabia 31952

T: +966 13 821 9960 / F: +966 13 821 9966
infoalkhobar@tamimi.com

Jeddah King's Road Tower, 11th Floor, King Abdulaziz Road, Al Shate'a District, PO Box 9337, Jeddah, Saudi Arabia 21333

T: +966 12 263 8900 / F: +966 12 263 8901
infojeddah@tamimi.com

Riyadh Sky Tower (North Tower), 9th Floor, King Fahad Road, Al Olaya District, PO Box 300400, Riyadh, Saudi Arabia 11372

T: +966 11 416 9666 / F: +966 11 416 9555
inforiyadh@tamimi.com

www.tamimi.com