

## inBrief



### Corporate Criminal Liability in the UAE and the Duty to Report Crime

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21 February 2023

#### Introduction

Recent years have seen the UAE making regular updates to its laws in order to guarantee a legal regime that is forward-looking, and consistent with international standards and principles. The leaders of the UAE have been particularly cognizant of the need to have a robust criminal law regime to encourage legitimacy in business, and dissuade any unscrupulous activities that could reflect negatively on the UAE as a determined and fast-developing economy. This is especially true of Dubai, whose ruler, HH Sheikh Mohammed bin Rashid Al Maktoum, recently unveiled plans to catapult Dubai into the top three cities by economic strength by 2033, and to place it within the top four global financial centres.

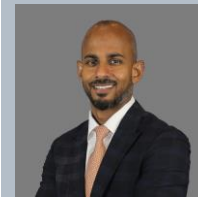
In such circumstances, it is particularly important for companies based in and operating out of the UAE to stay abreast of legislation which penalises criminal conduct of directors, employees and other representatives. Crimes that are more relevant for corporate entities would be fraud, bribery, forgery, and money laundering.

#### Brief overview of the criminal justice system

All laws in the UAE are codified, and there is no system of *stare decisis* or binding precedent, as understood in a common law jurisdiction, that is followed. Consequently, each case is decided on its own merits, though previous decisions may serve as useful guide and have some persuasive effect on the courts.

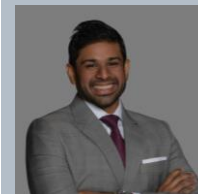
The principle that no one shall be punished for any act which did not constitute a criminal offence under the law at the time when it was committed is safeguarded in Article 27 of the Federal Constitution which states that '*[l]aw shall define crime and penalties. [n]o penalty shall be inflicted for any act performed or abandoned before the enactment of the law stipulating it.*'

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Chatura's practice focuses primarily on dispute resolution. He advises and represents clients in arbitration, and has represented clients in DIAC, ADCCAC, ICC and ad hoc arbitrations. He also works with local advocates on matters before the UAE Federal courts. Chatura regularly advises clients in high value construction, and maritime and shipping disputes. He is admitted as Attorney-at-Law of the Supreme Court of Sri Lanka. He is a recommended practitioner by Chambers and Partners and Legal 500.



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Mevan advises and represents clients in arbitration, DIFC Court litigation and on-shore litigation matters. In addition to advising client on regular commercial/contractual disputes,

Additionally, although the UAE law has not expressly recognised traditional common law standards of proof such as the balance of probabilities test in civil claims, or the beyond reasonable doubt standard for criminal matters, the courts in their decisions have consistently reiterated that allegations in criminal cases must be proven to a degree that leaves no reasonable doubt.

In terms of the Criminal Procedure Code, the public prosecution has exclusive jurisdiction to lodge and pursue criminal cases, excluding cases otherwise specified by law. Cases relating to any criminal offence will generally be filed and prosecuted by the public prosecution before the criminal courts of first instance (save for example, certain crimes involving national security which will be heard directly by the Union Supreme Court). In practice, when presented with complex crimes or crimes which heavily feature commercial aspects, the court will appoint an expert to conduct an inquiry and submit a report to the court with findings and recommendations. More often than not, the courts adopt the view of the expert, unless there are serious errors which are evident on the face of the record.

### **Can companies in the UAE be held liable for criminal conduct of employees?**

Juristic persons, including companies based in the UAE, can attract liability for offences committed by directors, employees and other agents. Federal Decree Law No. 32/2021 On Commercial Companies (the **Companies Law**) provides that companies shall be liable for damage caused due to unlawful acts committed by the company's chairman and board members while managing the company. The Companies Law also provides for personal liability of board members and executive management of companies to the company, shareholders, and third parties, for acts of fraud and abuse of power.

Federal Decree Law No. 31/2021 on the Issuance of the Crimes and Penalties Law (the **Penal Code**) goes beyond the provisions of the Companies Law which appears to be limited to acts of the company chairman, board, and executive management. Article 66 of the Penal Code provides that juristic persons shall be criminally liable for crimes committed by their representatives, directors, or agents acting on their behalf or in their names. Although the law does not expressly mention "employees", it is likely that a court in the UAE would interpret "representative" or "agent" to include an employee acting on behalf of the company. The provision clarified that juristic entities may only be sentenced to a fine, confiscation and other penalties prescribed by law. Where the law provides for a principal penalty other than a fine, the penalty for juristic persons would be restricted to a fine not exceeding AED 5 million, unless otherwise provided by law.

Mevan regularly acts for clients in high-value construction disputes and also advises on bankruptcy and restructure, maritime and shipping, insurance, employment, banking disputes and investment disputes. Mevan also assists clients in structuring joint ventures, franchises, distributorship and registered agencies. He is a Legal500 recognised practitioner.



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Ramesh has considerable experience in litigation and dispute resolution, with extensive abilities in contract negotiations and large-scale disputes. Ramesh advises on and drafts legal opinions and agreements for large Multi-National Corporations and other non-Governmental entities and investors when retained to advise on potential legal issues, regulatory steps, and changes to applicable legislation.

Corporate criminal liability is also recognised under Federal Decree Law No. 20/2018 on Combating Money Laundering Crimes, the Financing of Terrorism and Financing of Unlawful Organisations (the **Anti-Money Laundering Law**), which states that the legal person can be criminally responsible for the crime if it is committed in its name or for its account intentionally.

While the position in some other jurisdictions is that only the criminal acts of a senior person representing the company's *controlling mind and will* can incur liability on the company, the law of the UAE does not make such distinction. All that is required for a company to attract liability is for the individual concerned to have committed the criminal act in the company's name or when acting on behalf of the company. As noted above, the courts are likely to interpret the provisions widely to include employees exercising some level of managerial powers and acting on behalf of the company. However, where an employee commits a criminal offence in the pursuance of some personal interest or agenda, the company will not be criminally liable.

### **Do companies have a duty to report crimes or suspicious transactions?**

It is important to note that the Penal Code imposes a general duty on all persons who have knowledge of a crime to report it to the competent authorities, and failure to do so is a punishable offence. Where there is concern of potential money laundering, the Anti-Money Laundering Law imposes a specific duty on financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) who suspect, or have reasonable grounds to suspect, that a transaction or funds constitute proceeds of crime, to report to the Financial Intelligence Unit (FIU) of the Central Bank "without delay" and provide it with a detailed report including all data and information on such transaction and the connected parties. The Anti-Money Laundering Regulations define DNFBPs to include independent legal professionals and independent accountants. Article 251 of the Companies Law imposes a separate obligation on auditors of Public Joint Stock Companies to notify the Securities and Commodities Authority within 10 days of detecting any crime. Article 104 (1) of the Companies Law provides that the provisions on Joint Stock Companies apply to Limited Liability Companies (LLCs) to the extent they are consistent with their nature. Therefore, auditors of LLCs may also be bound by the obligation to report crimes under Article 251.

### **Is it still money laundering if the proceeds were obtained overseas?**

The provisions of the Anti-Money Laundering Law apply where any person willfully does any of the acts mentioned under Article 2 (1) with proceeds or funds having knowledge that the proceeds or funds are the proceeds of a Predicate Offence. The law defines Predicate Offence as any act which constitutes a felony or misdemeanor under the UAE law, whether it is committed within the UAE or elsewhere, provided it is punishable in the State where it was committed as well as in the UAE.

### **When should a crime be reported?**

The Penal Code is silent on the time-frame within which a crime must be reported. The Anti-Money Laundering Law only states that financial institutions and DNFBPs (which includes independent auditors) must report suspicious transactions to the FIU "without delay", and does not specify any further. On the other hand, the Companies Law requires company auditors to report any crime within 10 days of detecting the crime. Read with the Companies Law, it is likely that the duty imposed on independent auditors to report "without delay" under the Anti-Money Laundering Law means that the report must be made within 10 days or less.

It is also important to note that while the Penal Code and the Companies Law require crimes or violations of the law to be reported, the duty to report under the Anti-Money Laundering Law is much wider and requires the relevant persons to report upon suspicion. This is in keeping with the intention of the drafters of the Anti-Money Laundering Law, that is the strict deterrence of any money laundering activities in the UAE. ■

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