Fighting corruption in Saudi Arabia

The Saudi Oversight and Anti-Corruption Authority (“Nazaha”) was established by the Royal Decree 65/A of 18/03/2011. In 2015, his Royal Highness the King of the Kingdom of Saudi Arabia (“KSA”) declared his commitment to eradicating corruption. As such the Supreme Anti-Corruption Committee (“SACC”) was established on November 4, 2017 by virtue of the Royal Decree 38/A. Headed by his Royal Highness the Crown Prince of KSA, the SACC ran a campaign against corruption leading to the interrogation of around 381 individuals and the recovery of around SAR400 billion (USD106,632,060,000). After the SACC concluded its role, the Royal Decree A/277 was issued on 12/12/2019, to merge the former Oversight and Investigation Authority and the Administrative Investigations into Nazaha, making Nazaha the exclusive body authorised to investigate and prosecute all corruption crimes in KSA. Using its vast powers, Nazaha has since been very active in its campaign against corruption.

NAZHA AND ITS POWERS

Nazaha is an independent body enjoying independent administrative and financial juridical personality. It reports directly to his Royal Highness the King of KSA bypassing the Council of Ministers, which gives it autonomy and independence to monitor and investigate. KSA Council of Ministers issued decision 165 on 2/5/2011 which defines Nazaha’s jurisdiction and powers along with the Royal Decree A/277. Protecting integrity, enhancing transparency and combatting all forms of financial and administrative corruption are Nazaha’s main objectives. Nazaha’s jurisdiction covers all KSA governmental officials, governmental entities and all
private companies where the government of KSA owns not less than 25 per cent of the shares. Nazaha’s most significant powers are:

- The power to receive corruption related allegations/reports involving whoever is covered by Nazaha’s jurisdiction and to investigate such allegations/reports.
- The power to demand the relevant entities to take precautionary or preventive measures against suspected individuals.
- The power to refer corruption cases to the competent criminal court.

NAZHAH, PUBLIC PROSECUTION AND JUDICIARY

The Royal Decree A/277 established a special criminal investigation and prosecution unit in Nazaha (the “Unit”). It is mainly composed of public prosecutors who are seconded to work with Nazaha. Relying on the Unit, Nazaha benefits from exclusive jurisdiction to investigate and prosecute corruption related crimes throughout KSA’s provinces at which Nazaha has local offices with no involvement from the Public Prosecution. Currently Nazaha has 26 branches in KSA.

The Unit possesses the same powers as the public prosecution in respect of issuing summons and interviewing and retaining suspects, until the relevant file is referred to the competent court.

The Royal Decree A/277, states that all corruption cases shall be referred to a designated court located in Riyadh (“Competent Court”). The Competent Court has exclusive jurisdiction to consider corruption cases throughout KSA.

NAZHAHA ACTIVITIES

From February 2020, Nazaha started to publish news announcements regarding the number of corruption cases being investigated by Nazaha, including a brief summary of sample cases (“Announcements”). From February 12, 2020 to February 11, 2021, Nazaha issued around 20 Announcements.

The Announcements provide some insight into the criteria adopted by Nazaha in its campaign against corruption. According to the Announcements, Nazaha investigated more than 1,900 cases during this period. The investigated cases included allegations of embezzlement, abuse of power, money laundering and bribery. They also included high ranking public officials working in a variety of notable positions. The most investigated crime is bribery.

The Announcements revealed that the cases investigated ranged from low value bribery in the form of smart phones to high value corruption cases. One case involved bribes of SAR1,229,400,000 (USD327 million) and 19 individuals working in the Ministry of Defense.

The Announcements also revealed that more than nine court judgments were issued against individuals referred to the Competent Court. We expect more transparency to follow in the future with more information being provided about the facts of the cases and the penalties imposed including closed cases. This will in turn provide Nazaha with an opportunity to provide even more clarity on how the different aspects of anti-corruption laws are being applied in KSA.

KSA ANTI-BRIBERY LAW

As bribery is one of Nazaha’s most investigated crimes, we now turn to consider how some of the key provisions of KSA’s Anti-Bribery Law issued by the Royal Decree M/36 of 30/06/1992 (“SABL”)
compares to the US Foreign Corrupt Practices Act 1977 ("FCPA") and the UK Bribery Act 2010 ("UKBA").

SCOPE
The SABL has an extremely wide scope of application, particularly when compared to the FCPA. It not only covers those who work for government bodies, but also:
› any arbitrator or expert assigned by the government or any authority with judicial jurisdiction.
› any person assigned by the government to perform a specific task.
› any person who works for companies or sole proprietorships that manage, operate or maintain public facilities or provide public services, as well as any person who works for joint stock companies, companies partially owned by the government, and companies and sole proprietorships engaged in banking services.
› employees and members of private associations of public benefit, and the chairmen and members of their boards of directors.
› employees of international institutions and organisations related to the conduct of international business.
› anyone who works in national or cooperative associations, private companies and institutions or professional authorities.

PIERCING THE CORPORATE VEIL
According to KSA Companies Law issued by the Royal Decree M/3 of 10/11/2015, the corporate veil may be lifted in certain circumstances where shareholders and directors are held personally liable.
These circumstances differ between joint stock companies and limited liability companies. However, board members and directors for all corporate entities are personally liable towards the company, shareholders or third parties for damage caused by breach of the law or the company’s articles, or their management’s mistakes.

CORPORATE LIABILITY
Unlike the UKBA, the SABL does not specifically identify the failure to prevent bribery as an offence. However, the SABL incorporates an enhanced version of the US vicarious liability principle as it presumes corporate liability when the manager of the corporate entity or any of its employees are convicted of a bribery offence, when the relevant act was committed in favor of the corporate entity. The prescribed penalty imposed on the corporate entity is a fine of up to 10 times the value of the bribe. The corporate entity may additionally or alternatively be debarred from entering into contracts with governmental entities.

KSA Government Tendering & Procurement Law also obliges governmental entities to terminate the contract if it is proven that the contractor has procured it by way of bribery.
Notwithstanding the above, an analysis of some of the published precedents (issued before 2019) shows that the criminal courts have on occasions adopted different approaches to the issue of corporate liability under SABL. Some precedents showed that corporate liability was established automatically whilst in others, it was not, which appeared to be due to the individualisation of sanctions principle.
DEFENCES AND EXEMPTIONS

> Facilitation Payments: Unlike the FCPA, both the SABL and the UKBA prohibit any form of facilitation payments. Neither the SABL nor the UKBA allow such payments and there is no minimum prescribed value which would otherwise permit a payment to be made.

> Gifts, hospitality and travel expenses: Similar to the UKBA and contrary to the FCPA, SABL does not offer a specific exemption for gifts, hospitality and travel expenses (sometimes referred to as ‘promotional expenses’). However, whether or not promotional expenses will be considered a bribe under the SABL, is still likely to depend on the specific circumstances of each particular case (as is the case under the UKBA).

WHISTLE-BLOWERS

Under the provisions of the SABL (and as is the case under the FCPA), whistle-blowers are incentivised to report bribery crimes. The incentive is a monetary one that shall not be less than SAR5,000 (USD1,333), and not more than half the value of the confiscated amount. The incentive is to be awarded by the Competent Court. SABL prescribes two conditions for receiving the incentive; the first is that the tip-off needs to lead to the crime being proven; the second is that the whistle-blower must not have committed bribery or be an accomplice or intermediary in the bribery. There are no incentive payments payable to whistle-blowers under the UKBA.

It is worth noting that a circular was issued from KSA Royal Court which was addressed to the entities that fall under Nazaha’s jurisdiction, instructing them not to pursue disciplinary measures against whistle-blowers working in these entities. This was considered by many to be an important step forward in providing whistle-blowers with the confidence and protection they need to speak up without fear of retaliation.

SELF-REPORTING

Like the FCPA and the UKBA, the SABL also offers potential benefits to those who self-report. However, it is a straightforward process, by which the briber or intermediary are to be exempt from both the original and ancillary sanctions, if the report was filed before the discovery of the offence. The plea agreements offered under the FCPA and the UKBA are not available under the SABL.

LIMITATION PERIOD

Unlike the FCPA, the SABL and the UKBA do not have any limitation periods.

WHAT TO DO?

KSA’s commitment to stamping out corruption is clearly here to stay. Companies working within KSA should therefore ensure that their policies and procedures are compliant with the requirements of the SABL, including but not limited to their approach to facilitation payments and promotional expenses. Those entities dealing with reports of wrongdoing, (whether past or present) should also carefully consider the steps required to comply with their global obligations, including whether to self-report. In all cases, companies that suspect any of its employees of being involved in an act of bribery, should seek legal advice immediately in order to ensure they do not fall foul of their legal, regulatory obligations.

1. The FCPA provides that it shall not constitute a violation of the statute if the person charged can prove that the payment in question constituted a reasonable and bona fide expenditure, such as travel and lodging expenses,” and that it was “directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof 15 U.S.C. §§78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

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