



Saudi Arabia's New Anti-Concealment Law

Yesterday, 24 February 2021, the new Anti-Concealment Law, promulgated by Royal Decree No. M/4, dated 01/01/1442H (corresponding to 20 August 2020) (the "**Law**") came into effect and replaces the previous Anti-Concealment Law, promulgated by Royal Decree No. M/22, dated 04/05/1425H (corresponding to 22 June 2004). The draft Implementing Regulations to the new Law were circulated for public consultation but have not been issued yet. The two most notable changes in the new Law are the extended scope of its application and the increase in penalties, discussed in further detail below.

What is Concealment?

The Law continues a legal prohibition that dates back to 1989 on schemes or practices designed to evade the Saudi foreign investment laws. Although the essence of the offense of "concealment" has not changed substantially, the Law refines the definition of "concealment" as follows: "... an agreement or arrangement by which a person enables another, Non-Saudi person to carry out an economic activity in the Kingdom that the latter is not authorized to practice, by using a license or authorization issued to the concealer."

The Law lists three examples of conduct punishable under the Law (which are taken from the pre-existing implementing regulations and are not exhaustive). These are:

1. Establishments [a natural or juristic person] unlawfully granting non-Saudis authority giving them absolute power to make use of the establishment.
2. Non-Saudis unlawfully possessing or using authority that lead to them gaining absolute power to make use of the establishment.
3. In its economic activity, the establishment using a bank account that does not belong to it.

Even though Saudi Arabia had an anti-concealment law in effect since 1989, concealment, or fronting arrangements, have historically been common in the market and enforcement efforts were viewed as lax. The fact that certain activities, such as wholesale and retail trade and distribution of goods, were generally reserved for Saudi nationals and wholly Saudi owned businesses meant that "fronting" arrangements were the only available means for foreigners to engage in such activities

More recently, however, the risk profile has increased substantially and particularly since Saudi Arabia joined the World Trade Organization in 2005, legitimate structures for foreigners to engage in "trade" have become available. Enforcement efforts have increased markedly, led by the Ministry of Commerce ("**MoC**") and the General Authority for Zakat and Tax, in conjunction with a crackdown on immigration and other offenses involving foreigners as to which there was some laxity in the past.

Although Saudi courts and other adjudicatory authorities do not, in general, report their decisions, the MoC regularly announces violations of the Anti-Concealment Law on its website and Twitter account. The new law underlines the determination of the Saudi government to continue and expand the campaign against concealment. The Council of Ministers Decision that approved the Law provides that the Ministry of Finance shall allocate a budget to support efforts to combat concealment, and fines in the new Law have increased substantially.

Scope

Under the previous Anti-Concealment Law, only the non-Saudi persons (natural or juristic) engaging in economic activities for his/its own account in the Kingdom without being properly licensed, and the Saudi person (natural or juristic) acting as the "front" would be in violation of the law. The new Law expands the scope of the Law's application to include:

1. "accomplices" - persons who incited, helped or advised the parties commit the crime while being aware it was a crime. This would include a party's advisors, such as accounting or legal advisors; and
2. persons obstructing or preventing investigators from performing their duties, including failing to disclose information, or providing incorrect or misleading information.

Without prejudice to the rights of bona fide third parties, any contracts or actions whose purpose or aim is to conceal are deemed null and void. This is a significant change; in the past, courts often used to enforce agreements relating to concealment arrangements on contractual grounds, on the rationale that administrative violations and related penalties should be addressed by the competent administrative authorities but that courts should nevertheless enforce contracts as between the parties (based on the precept "the contract is the law of the contracting parties") unless they contain terms that contravene *Shariah* precepts. Courts would, however, sometimes (but not always) refer cases involving concealment to the MoC. Under this provision presumably they should no longer enforce the contract, at least as between the parties to the concealment arrangement.

Enforcement, Investigations and Prosecution

Although the MoC is responsible for monitoring, receiving reports and controlling crimes and violations under the Law, officials from other governmental bodies are also responsible for monitoring and investigating concealment violations, such as the Ministry of Municipal and Rural Affairs, the Ministry of Human Resources and Social Development, the Ministry of Environment, Water and Agriculture, and the General Authority for Zakat and Tax. Judicial officers from these governmental bodies have the power to:

- carry out inspection visits on a suspected establishment's premises (including any location where the economic activity is conducted) and search vehicles used by the suspect;
- examine and seize a suspect's records, data and documents (including electronic);
- view the suspect's surveillance cameras footage (which was not one of the powers under the old law);
- request disclosure and the provision of information related to the establishment's activity from any entity or person;
- seal sites and storerooms that cannot be opened until examined;
- summon suspects and anyone with information that may be useful in uncovering the crime or violation, hear and record their statements;
- seek the assistance of the police and competent authorities when needed.

The Public Prosecution Office is the competent body to investigate and prosecute concealment crimes which are tried in the Saudi Criminal Court. The MoC may request the Public Prosecution to bar the travel of anyone suspected of committing a crime under the Law (which was also in the old law), and may order the precautionary seizure of funds that may become subject to confiscation for a period of up to 60 days. The Public Prosecution may retain the seized funds or request the Criminal Court to transfer the funds to a competent authority to mitigate the likelihood of the funds being disposed.

Penalties

The penalties for violating the new Law are:

- Imprisonment for a period not exceeding five years or a fine not exceeding SAR 5,000,000 (equivalent to approximately US\$ 1,333,330), or both, taking into account the size of the economic activity, its revenues, the period of engaging in the activity and the consequences of the crime. Under the previous law, the fine would not exceed SAR 1,000,000 (equivalent to approximately US\$ 266,666) and the imprisonment term would not exceed two years. (Although the old law did not take into account the considerations listed above, the fine would be increased in case of multiple violators or locations subject to the concealment scheme.) In the event of a repeat violation, within three years from the date of conviction, sanctions are doubled. (The old law did not specify that the penalties would be increased for a repeat offense, by how much, nor did it include a limitation post-conviction.) Fines are deposited in the Ministry of Finance's current account after deducting the whistleblower's reward, if any - see below.
- Proceeds acquired from the concealments will be confiscated, even if a bona fide third party is in possession of such funds. If the funds are merged with funds from legitimate sources or their location cannot be ascertained, monies equivalent in value will be confiscated. Confiscated funds are transferred to the public treasury.
- Non-Saudi nationals (individuals) convicted of concealment will be deported from the Kingdom and banned from re-entering for a certain period of time.
- The Saudi and non-Saudi persons involved in the concealment must pay Zakat (local tithe), taxes and any other fees. (The position remains unchanged from the old law. Typically concealment involves tax evasion because only foreign owned business operations are subject to income tax, but tax returns would not be filed because this would entail disclosing the concealment arrangement.)
- The Saudi establishment involved in a concealment arrangement will be dissolved, its licenses and commercial registration will be cancelled (unless the Criminal Court decides otherwise), and it will be barred from engaging in any economic activity for a period of five years from the date the judgement becomes final. (The position remains unchanged from the old law.)

Whistleblowing

The new Law retains the financial reward that was found in the old law, whereby a whistleblower who reports a fronting arrangement that leads to a conviction will receive up to 30% of the total fines collected. (Whistleblowers exclude those who are tasked with enforcing the provisions of the Law, such as investigators, government bodies and judicial officials.)

Conclusion

The new Law is an indication that Saudi Arabia is determined to enforce its foreign investment licensing regime, which is becoming more and more liberal in terms of the activities in which foreign investment is permitted, but still requires proper licensing and registration of economic activities by foreign nationals and wholly or partially foreign owned companies in the Kingdom.

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