

Bahrain: Penalties for carrying out Unlicensed Financial activities now include jail time

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HM King Hamad Bin Isa Al-Khalifa has recently ratified Law No. 48/2014 (the “New Law”) amending certain provisions of the Penal Code of Bahrain (Legislative Decree No. 15/1976) (the “Penal Code”).

The New Law added a new Article 391 (which is referred to as ‘Article 391 (repeated) because it exists alongside the original Article 391 that remains in force). Saad Al Doseri, Associate in the Bahrain office of Al Tamimi & Company, examines the changes and their potential impact.

Introduction

The well established financial services regulatory environment in the Kingdom of Bahrain includes a framework of rules that stimulates business activity and investor confidence in Bahrain’s financial services sector. The laws in Bahrain attempt to provide an efficient and protective regulatory framework for the financial services sector which is closely supervised by the Central Bank of Bahrain (“CBB”). All of this has enhanced the reputation of Bahrain’s financial services sector and has instilled confidence in its regulatory environment.

Article 40 of the Central Bank of Bahrain and Financial Institutions Law No. 64/2006 (“CBB Law”) prohibits any person from carrying out a regulated service in Bahrain unless licensed and approved by the CBB. Article 43 of the CBB Law states that any contracts concluded providing unlicensed financial services are void. In our experience, Bahrain courts have witnessed a number of cases filed by some of those affected and has made awards to claimants allowing them to recover their money on the basis of Article 43.

The New Law prohibits receiving third party funds and using such funds for investment or management or some other purpose without being properly licensed and further prohibits such unlicensed investments as well as marketing the said activities. The New Law has therefore made it a specific crime for the commission of such acts and strengthens the legal protection of the financial services sector.

The New Law also makes it a criminal offence to carry out certain activities, which were previously not specified and imposes severe criminal penalties for such offences. This is in addition to the existing criminal liability for carrying out unlicensed financial services under Article 161 of the CBB Law.

What are the changes?

The New Law criminalizes the following acts and imposes certain penalties:

Punishment	Crimes under the New Law
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<p>Both or either of imprisonment and a fine not less than one hundred thousand Bahraini Dinars and not exceeding twice the amount of monies collected or received or owed from said monies.</p> <p>The offender shall be ordered to refund the monies to the owner and the proceeds of crime shall be confiscated.</p>	<p>Collecting monies from third parties for the purpose of investing, managing, or using said monies without obtaining a license from the Central Bank of Bahrain or other competent administrative authorities specialized in activities of collecting and receiving said monies.</p>
<p>Both or either of imprisonment and a fine not exceeding fifty thousand Bahraini Dinars.</p>	<p>Collecting or receiving monies, in the capacity of an agent or broker, or delegate, or any other capacity, from third parties for the benefit of a party that is not licensed to practice activities such as collecting and receiving monies with the said party's knowledge.</p>
<p>Both or either of imprisonment and a fine not exceeding one hundred thousand Bahraini Dinars.</p>	<p>Sending invitations to the public, by any means of announcement, to collect or receive monies for the purpose of investing or managing or using such monies, without obtaining a license from the CBB or relevant authorities.</p>

Leeway to offenders

The New Law provides a route for offenders to escape the heavy penalties described above by encouraging early settlements. It allows the offender to receive lesser or, in some cases, no punishment for committing the criminal offences under the New Law provided that the offender returns the funds collected or received or owed.

The New Law sets out the basis upon which an offender can take advantage of such relief. Where the offender performs the required acts for relief under the New Law at the *investigation stage*, the criminal proceedings will be suspended. However, if the offender performs the required action for relief *during prosecution and before court hearing*, while the court will exempt the offender from any punishment, the crime will remain part of the offender's criminal record. If the offender returns the funds *after the sentence* has been issued, the execution judge may, upon the offender's request, order the suspension of execution of the sentence. The crime will remain part of the offender's criminal record in such a case.

It should be noted that before the New Law was issued, Article 161 of the CBB Law also criminalized the said acts indirectly and imposed a fine not exceeding one million Bahraini Dinars without imprisonment. Article 161 provides that any person who contravenes the provisions of Articles 40 and 41 of the CBB Law in relation to providing unlicensed financial services and activities shall be liable to the said fine.

Accordingly, offenders of the New Law automatically violate Article 161 at the same time. This raises the question of which law will be applied by the court. According to Article 65 of the Penal Code, if an act triggers more than one criminal offence, the court is under an obligation to apply the strictest punishment. In our case, the New Law provides for a stricter punishment as it includes a punishment which deprives the offender from his personal liberty in addition to fines.

Practical Implications

The most obvious implication of the newly introduced criminal offences is that punishment now includes the possibility of imprisonment for offenders but offers offenders the opportunity to avoid such punishment. This is expected to operate as a deterrent which is aimed to achieve effective law enforcement in the financial services market.

The New Law also provides more comfort to investors and boosts confidence in Bahrain's financial services sector. The New Law is focused on achieving restitution for aggrieved investors, whereby it ensures that – even in the event that the offender is relieved of criminal conviction or sentence – the investors are placed in the same position they were in before the offence was committed.

More importantly, when the possibility of criminal liability is attached to dealings within the financial services market, it is essential that such liability does not form an obstacle for directors of corporate entities when performing their duties.

Conclusion

As a response to the need for transparency, the New Law provides a platform for closer financial stability in the market. The New Law witnesses the introduction of a criminal liability alongside the previous civil liability whereby any agreements to provide unlicensed financial services are deemed void. At first glance, the New Law appears to be coming down on offenders with an iron fist imposing heavy criminal liability; however, upon examination a leniency for offenders to escape liability is apparent. Returning the funds collected, received or owed after the sentence will enable an execution judge, upon the offender's request, to suspend the execution of the sentence.