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Oliver Borgers

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GETTING THE DEAL THROUGH

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United Arab Emirates

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The United Arab Emirates has not implemented a specific and separate legal regime regulating the activities and oversight of foreign direct investment (FDI) in the country. Nevertheless, the federal government assumes an active role in shaping the framework of policymaking in this regard. This is further complimented by, and coordinated with, strategies pursued within the particular emirates.

The UAE encourages the increased participation of foreign investors in the economy through various initiatives. One significant initiative to promote FDI is the creation of approximately 40 specially designated free trade zones (free zones). These free zones, which may establish separate regulatory environments within their designated jurisdiction, are attractive to international investors due to clear and market-oriented regulations, the ability to incorporate wholly foreign owned entities and guaranteed tax holidays on all corporate taxes. The UAE does not impose foreign exchange control regulations either in or outside the free zones. Foreign investors from the member states of the Gulf Cooperation Council (GCC) enjoy a special status in the UAE and are largely exempt from foreign ownership restrictions.

Notwithstanding various initiatives to encourage foreign investment, the UAE maintains stringent foreign investment restrictions in relation to strategically important sectors, including the defence, and oil and gas sectors. Further, certain economic activity remains the exclusive domain of UAE nationals and companies wholly owned by UAE nationals. The country is not a party to the WTO Plurilateral Agreement on Government Procurement. Accordingly, government procurement is generally awarded to local companies and suppliers where possible. Further, outside of the free zones, all companies incorporated in the UAE must have majority UAE ownership (unless 100 per cent owned by GCC persons or entities).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

Given the absence of a centralised investment law in the UAE, FDI is regulated by a number of distinct legislative texts including but not limited to:

- Federal Law No. 2 of 2015, as amended (the Commercial Companies Law);
- Federal Law No. 18 of 1981, as amended (the Commercial Agency Law);
- Federal Law No. 4 of 2012, as amended (the Competition Law);
- Financial Order No. 16 of 1975 (the Government Tender Law);
- Dubai Law No. 7 of 2006 Concerning Land Registration in the Emirate of Dubai an similar laws enacted in other Emirates (the Property Law);
- Laws and regulations applicable in the various free zones.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Commercial Companies Law stipulates that companies in the UAE must be 51 per cent owned by UAE nationals or companies wholly owned by UAE nationals, thus limiting foreign ownership to 49 per cent (the foreign ownership restriction). Branch offices of foreign companies are permitted without the participation of a UAE shareholding, but require the appointment of a UAE agent to conduct limited commercial activity in the country. There are, however, significant exceptions to the foreign ownership restriction, such as:

- GCC nationals and companies owned by GCC nationals are granted national treatment in respect of most commercial activities and are therefore exempt from the foreign ownership restriction;
- the foreign ownership restriction does not apply in respect of economic activity in free zones, enabling foreign investors to wholly own relevant entities established in free zones; and
- foreign companies may establish branch or representative offices to conduct limited amounts of economic activity in the UAE (however, these do not have a separate legal personality) (together, the foreign ownership exceptions).

The Property Law prevents foreign ownership of real property with the exception of areas designated by the respective governments of a particular emirate.

The Commercial Agency Law effectively excludes foreign investors from undertaking distribution and agency businesses in the UAE as it requires that distribution of a foreign principal's products must be conducted through an exclusive UAE agent, which in turn must be a wholly-owned UAE entity or a UAE citizen. Exclusive agents may be appointed for the UAE or a particular emirate. Underlying agreements establishing commercial agencies may be registered by the agent (provided it is a UAE national or wholly owned by UAE nationals) with the UAE Ministry of Economy, and following such registration, can only be terminated by mutual agreement, notwithstanding the expiry or breach of such contract.

Under the Competition Law, the conduct of any form of economic activity or holding of intellectual property rights by a natural or legal person in the UAE that affects competition inside the UAE, or occurs outside the country but has the ability to affect competition in the country, requires the approval of the Ministry of Economy. This includes any transaction, including mergers and acquisitions that result in a dominant market position. Similar approvals must be sought in respect of transactions relating to particular industry segments, such as the banking sector, which is further subject to a 20 per cent profit tax. The Competition Law has only recently been enacted and its exact scope is still unclear.

Lastly, free zones enable 100 per cent foreign ownership. However, companies established in a particular free zone are limited to conducting their business within the designated geographic area of the free zone and thus prevented from engaging in commercial activity in the UAE outside the relevant free zone.

4 How is a foreign investor or foreign investment defined in the applicable law?

Given the absence of a centralised investment law, there is no uniform definition of the terms foreign investor and foreign investment. However, a definition may be implied from the relevant legislation as including (an investment by) any non-UAE citizen or any corporate entity not wholly owned by UAE citizens. Except in specific areas of economic activity, GCC nationals are granted national treatment and therefore not considered to be foreign investors in the UAE.

Update and trends

The UAE is currently in the process of drafting a new investment law aimed at expanding foreign economic participation and strengthening foreign investment and know-how transfer into the country. It has been suggested that this new law is likely to address key concerns such as:

- eliminating or significantly reducing the limitations imposed by the Foreign Ownership Restriction by lifting the foreign ownership ceiling from 49 per cent; and
- introducing a comprehensive investment law regime, including relevant review processes and transparent criteria relating to the approval of FDI transactions.

The introduction of the new investment law has been extensively discussed at government level, and the need for an investment law reform has been supported in public statements by government authorities such as the Dubai Economic Council. However, the delay in implementing the new investment law can be attributed to the government's difficulty in balancing the concerns related to permitting full foreign ownership in a tax-free environment, and the expected adverse consequences for local investors in a globally interconnected and highly dynamic market such as the UAE.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no formal laws or regulations addressing FDI by SOEs or SWFs in the UAE.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The UAE does not have an independent FDI law, and there are no specific government agencies or authorities responsible for reviewing or authorising transactions on the grounds of national interest per se.

As discussed in question 3, the Competition Law Regulator scrutinises mergers or acquisitions that may result in a dominant market position within the UAE. Failure to seek the Ministry of Economy's approval in relation to such transaction will result in a fine of up to 5 per cent of annual turnover. Applications must be made at least 30 days prior to the proposed date of a relevant transaction taking place, after which the Ministry must respond to the request within 90 days or 135 days if additional information had been requested as part of the approval process.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The various economic departments of each emirate have fairly broad discretion to accept or reject any acquisitions of entities licensed by such departments. While national interest is not specified, a transaction may be rejected on this basis. There are, however, no regulatory rules or guidelines in this regard.

Procedure

8 What jurisdictional thresholds (such as turnover, asset size, sector, purchase price, etc) trigger a review or application of the law? Is filing mandatory?

There are no formal thresholds triggering a review. Transparent thresholds are provided in respect of the banking sector, which requires approval for all proposed mergers within the banking sectors from the UAE Central Bank, and acquisition by banks of non-banking related shares exceeding 5 per cent of control. However, these thresholds do not trigger a review based on national interest, and merely represent the general requirement for approval.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

In the absence of a clearly defined FDI review process, there is no fixed process or filing fees, standard forms, etc. Notification depends on the particular industry sector to which a proposed transaction relates.

10 Which party is responsible for securing approval?

The law is silent in relation to the party responsible for seeking relevant approvals. Applicable penalties, such as fines under the Competition Law, apply to conducting relevant transactions without prior approval (from the Ministry of Economy). Thus, it would appear that both parties are potentially responsible.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Unlike other international jurisdictions with clearly regulated review processes, the UAE's informal regulatory regime does not establish specific time frames for the approval of FDI transactions. These may vary significantly, depending on the particular authority involved in granting required approvals.

A specific example of relevant time frames is the response to applications for approval from the Ministry of Economy under the Competition Law discussed previously, which will occur within 90 days (135 days if additional information is requested from the applicant).

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Approvals must be sought and granted prior to engaging in a transaction. Heavy fines may be imposed for failure to wait for approval to be granted. Under the Competition Law, failure to seek clearance from the Ministry of Economy may result in fines of 2 to 5 per cent of annual revenue (up to 5 million dirhams if annual revenue cannot be accurately determined).

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

There is no formal review process of FDI transactions in the UAE, and relevant policy considerations inform the general approval process, which also considers economic and cultural objectives. It is common practice to seek informal pre-approval in relation to any transaction requiring government approval. Therefore foreign investors should contact the relevant authority informally to discuss the envisioned transaction prior to making a formal application. As a result, they will be informally notified of particular aspects of a proposed transaction that, in the reviewing authority's opinion, will pose a concern. Such informal notification may also include information relating to national security or other concerns that could lead to the rejection of the proposed transaction.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The Federal Department for Investment, which forms part of the Ministry of Economy, is the relevant government entity charged with assisting foreign (and local) investors in relation to the promotion of investments and securing relevant approvals. The department offers advice and technical support on the specific policy and regulatory directions relating to investments. Significantly, this includes the registration and licensing of FDI projects and transactions, and the settlement of investment disputes.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

There is no legislative guidance with respect to retroactive powers in relation to the approval of foreign investments. However, the government generally enjoys broad powers in this regard and future changes to approve of FDI can occur on a policy basis under the current regulatory environment.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Not applicable.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

While there is no regulatory clarification available in this regard, the authorities will be free to cooperate with officials in other countries at their discretion.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

As there is no centralised review of FDI, the process involves a number of different government institutions. However, parties other than the decision-making government authority will have no standing in this regard.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The UAE government enjoys extensive powers to prohibit a particular transaction on a policy basis or put conditions in place with respect to a particular transaction.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Specific shortfalls informally identified by the authorities may be rectified prior to submitting the final application for an approval. However, rectification of shortfalls subsequent to the making of a final decision by a government authority will be at the discretion of the relevant authority.

21 Can a negative decision be challenged?

The UAE legal system, including the legislative regime dictating the various processes relevant to the approval of FDI, does not allow for a decision to be challenged in court or through administrative means for reconsideration.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

There are sophisticated laws relating to the protection of data and non-disclosure of private information. However, given the lack of transparency associated with the FDI approvals required, it is difficult to ensure absolute certainty in this regard.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Given the absence of a formal review process and the inability to challenge relevant decisions made by government authorities indirectly charged with the oversight of FDI in the UAE, there are no cases to be discussed.

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