

# Foreign Investment Review

*Contributing editor*  
**Oliver Borgers**



2017

GETTING THE  
DEAL THROUGH 

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*Contributing editor*

**Oliver Borgers**

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# United Arab Emirates

Gregory Mayew and Silvia Pretorius

Afridi & Angell

## 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 over 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);
- Cabinet Resolution 37 of 2014 on the Regulation on Procurement and Warehouse Management in the Federal Government (the Government Tender Regulations);
- Dubai Law No. 7 of 2006 Concerning Land Registration in the Emirate of Dubai and similar laws enacted in other Emirates (the Property Law); and
- 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.

The provisions of the Government Tender Regulations apply to all procurement operations and contracts of supply, execution of work and provision of services performed by UAE federal bodies, but exclude the following federal entities: the Ministry of Defence, the State Security apparatus, all military purchase transactions conducted by the Ministry of Interior and determined by a decision from the Minister of Interior

and federal bodies bound by international agreements or obligations pertaining to the purchase transactions carried out by such bodies.

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.

#### **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 jurisdiction thresholds trigger a review or application of the law? Is filing mandatory?**

The Competition Law requires that entities seek merger clearance from the UAE Ministry of Economy if they are contemplating a transaction that:

- will result in the acquisition of a direct or indirect, total or partial interest or benefit in assets, equity, or obligations of another entity to which the Competition Law applies;
- will create or promote a dominant position; or
- may affect the level of competition in the relevant market.

In addition, the Competition Law prohibits entities from entering into agreements or arrangements (which should be broadly construed) the aim, object or effect of which is to restrict competition.

Various regulations enacted pursuant to the Competition Law (Cabinet Decision No. 37 of 2014, the 'Implementing Regulations' and Cabinet Decision No. 13 of 2016 and Cabinet Decision No. 22 of 2016, the 'Thresholds Regulations') set out the market share thresholds for the application of: (i) the de minimis exception (to the prohibition on restrictive agreements and abuse of dominant position); and (ii) merger control rules, as well as the criteria for identifying small and medium undertakings, which are exempted from the Competition Law. The Threshold Regulations set the market share threshold for

establishing dominance at 40 per cent of the total transactions in the concerned market.

Certain entities and industry sectors are expressly exempted. These include:

- federal and local government entities and entities owned or controlled by the federal or emirate governments;
- entities operating in telecoms, financial services, pharmaceutical production and distribution, cultural activities, oil and gas, postal services including express delivery, electricity and water production and distribution, sewage and waste disposal, transportation and railways; and
- small and medium-sized entities (SMEs). The latter are defined in the Threshold Regulations into three defined sectors: trade, industry and services.

For the trade and services sectors, an undertaking will be considered an SME if it has 200 or fewer employees and annual revenues do not exceed 200 million dirhams. For industry sectors, the thresholds are 250 employees and 250 million dirhams.

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?**

It is possible to apply for an individual exemption from application of article 5 (banning restrictive agreements) and article 6 (prohibiting abuse of a dominant position) of the Competition Law, through notifying the relevant agreement or practice to the Ministry of Economy's Competition Department by means of the relevant notification form. However, the Competition Department is not yet fully operational and the application forms for the purpose of individual exemption applications and merger control notifications are still to be issued. The procedure for seeking an exemption is set out in the Threshold Regulations and involves a written application to the Ministry of Economy seeking an exemption for a transaction. The entity seeking the exemption must provide copies of its constitutive documents and financial statements (for the past two financial years). In addition, it must submit an economic rationale for the transaction and its reasons for requesting the exemption. All documents submitted must be in Arabic, but may be accompanied by an English translation. The applicant may identify possible confidential information contained in the materials submitted to the Competition Department, and in this case must also submit a non-confidential summary of it. Further documents and information can be requested during the proceedings by the Competition Department. The Competition Department can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the request. To gather additional information and insight on the possible impact of the notified concentration on the market, the Competition Department can also hold interviews with the relevant undertakings and interested third parties in the course of the proceedings.

#### **10 Which party is responsible for securing approval?**

For exemptions, the relevant party seeking an exemption must apply. For other cases of notification (such as of dominant position), the interested parties are responsible for seeking and securing approval. As in the case of notifications for exemption, the Competition Department can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the approval request.

#### **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

### Update and trends

According to press reports, a new foreign investment law is currently under consideration that will allow for 100 per cent ownership of foreign investments in certain sectors. It is not clear which sectors would qualify for 100 per cent ownership, nor is there any timetable for implementation.

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). If the Minister of Economy does not issue a decision by the specified deadline, the transaction shall be deemed to be authorised.

#### 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.

The Competition Law provides for potentially far-reaching penalties in the event of violation. These penalties include: fines of between 500,000 and 5 million dirhams for entering into restrictive agreements or abusing market dominance; and fines of 2 per cent to 5 per cent of the infringing entity's annual revenue derived from the sale of the relevant goods and services in the UAE for failure to notify a transaction that must be notified pursuant to the Competition Law. An entity violating the Competition Law also exposes itself to possible criminal sanctions.

#### 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?

In general, the starting point is the department of economic development in the applicable emirate. Depending on the proposed business activities, other industry sector authorities may need to be approached.

#### 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?

The Competition Department can take into account certain criteria listed in the Implementing Regulations, including:

- the real and potential competition level in the concerned market;
- how easy it is for new establishments to enter the concerned market;
- the extent of the potential impact on the prices of relevant commodities or services;
- the extent of the existence of legal obstacles affecting the entry of new competitors;
- the probability of emergence of a dominant position in the concerned market;
- the extent of the potential impact on creation, innovation and technical competence;
- the extent of contribution in the promotion of investment or export, or the enhancement of the national establishments' ability to compete internationally; and
- the extent of the impact on the interests of consumers.

#### 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?

The Competition Department can start an investigation into a possible violation of competition provisions either of its own initiative or following a complaint.

Any interested party may file a complaint with the Competition Department by completing the relevant form (which is still to be issued). The complaint must identify, *inter alia*, the undertakings submitting the form and those that are alleged to have breached the Competition Law, and provide a description of the relevant conduct and of the provisions which are deemed to be violated, together with all available evidence.

#### 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.

Pursuant to the Competition Law, the Minister of Economy can withdraw a clearance that has already been granted if:

- the conditions and circumstances in light of which the clearance was issued in the meantime have changed;
- the company did not comply with the remedies imposed by the Minister in its decision; and
- it is determined that the information whereby the concentration was authorised was incorrect or misleading.

#### 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.

With the exception of conduct in breach of confidential provisions pursuant to article 15 of the Competition Law, the Minister may enter into a settlement with the companies that are deemed to have breached the Law, provided that:

- these companies pay a fine whose amount is no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

Settlement becomes effective following the payment of the fine by the relevant company.

**21 Can a negative decision be challenged?**

See question 20.

**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.

With regards to applications submitted pursuant to the Competition Law, this law specifically requires the Ministry of Economy to take steps

to maintain the confidentiality of sensitive information in relation to companies in the context of competition proceedings. Companies submitting documents to the Ministry will need to mark confidential information as confidential and also submit non-confidential summaries. The Competition Law also provides for a fine of between 50,000 and 200,000 dirhams in case of breach of the confidentiality obligations.

**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.**

Not applicable.

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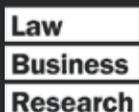
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