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UAE Foreign Direct Investment Law

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On 23 September 2018, one of the most anticipated legal developments in the UAE was brought to life. The UAE issued Federal Decree-Law No. 19/2018 on Foreign Direct Investment (the FDI Law). Subsequently, the FDI Law was published in the Federal Gazette on 30 September 2018 and came into force on 1 October 2018. The FDI Law establishes a framework and pathway towards enabling 100% foreign ownership of UAE Limited Liability Companies (LLC) outside of the various UAE designated freezones. Up until the promulgation of the FDI, all onshore LLCs in the UAE were subject to foreign ownership restrictions meaning a foreign investor could only hold a maximum of 49% of the share capital with a UAE national or company holding as a minimum 51% of the LLC's shares. As explained below, the FDI Law has removed the foreign ownership ceiling in certain sectors. However, as with most new legislation, further guidance and clarity is expected as to how the FDI Law will be interpreted and implemented in practice.

For the purposes of conducting business in the UAE, a foreign company/investor is required to establish a legal presence in the UAE by means (typically) of any of the following:

1. incorporating an onshore local entity (e.g., an LLC);
2. registering an onshore branch or representative office of a foreign company;
3. establishing a freezone entity (by way of a limited liability company, a branch or representative office); or
4. entering into a commercial agency relationship (i.e., having no corporate presence in the UAE, but instead trading in the UAE via a commercial agent).

Article 10 of Federal Law No. 2/2015 (Commercial Companies Law) provides that, 51% or more of the shares in any corporate entity established onshore in the UAE (i.e., outside an economic freezone) must be owned by a UAE national(s). Consequently, any foreign investor who wishes to establish a corporate entity in the UAE is either restricted to:

1. conducting business in an economic freezone allowing 100% of foreign ownership; or
2. establishing an onshore LLC and holding a maximum of 49%.

Background of the new FDI Law

In September 2017, Federal Decree-Law No. 18/2017 authorised the UAE Cabinet to issue a resolution determining the activities and companies in which a foreigner may own all or the majority of the share capital in an LLC. The aim was to increase the flow of foreign direct investment (FDI) into the UAE in priority industry sectors to support the transformation of the UAE into a knowledge-based and innovative economy. Currently, the priority industry sectors are education, healthcare, renewable energy, space, technology, transportation and water.

Consequently, the FDI Law is a further step towards achieving these aims and under Articles 5 and 6 of Federal Decree-Law No. 19/2018, the following bodies were established:

- - The Foreign Direct Investment Committee (FDI Committee); and
  - The Foreign Direct Investment Unit (FDI Unit).

The FDI Committee and the FDI Unit, along with the UAE Cabinet, will establish the procedure and process which foreign investors will be required to follow in order to apply to own a majority shareholding in an onshore LLC operating in certain sectors in the UAE.

The FDI Committee

Under Article 6 of Federal Decree-Law No. 19/2018, the FDI Committee will be established and presided over, by the Economy Ministry. The FDI Committee, under the guidance of the Cabinet, will be responsible for proposing FDI policies in the UAE including (without limitation):

- preparing a list of economic sectors and activities in which greater levels of foreign investment will be permitted (i.e., greater than 49% share ownership) (the Positive List);
- adding to the Restricted List; and
- approving foreign investment projects to conduct activities which are not set out in the Positive List, following recommendations made by the relevant licensing Government entities.

Article 6 of Federal Decree-Law No. 19/2018 also permits the FDI Committee to mandate a company or its shareholders satisfy certain requirements before greater levels of foreign investment are permitted; such as:

- minimum capital requirements;
- Emiratisation thresholds; and
- restrictions or requirements on the type of legal entity which may conduct business in a specific sector.

The FDI Unit

Article 5 of Federal Decree-Law No. 19/2018 refers to the FDI Unit as the administrative arm of the FDI Committee and it will oversee the creation of an attractive environment for FDI by facilitating procedures for registering and licensing FDI activities, as well as monitoring and evaluating FDI performance in the UAE. In addition, the FDI Unit will be responsible for establishing a comprehensive database of approved FDI economic activities which must be reviewed and updated periodically.

The Negative List

Under Article 7 of Federal Decree-Law No. 19/2018, FDI activities are permitted in certain industry sectors provided the same do not appear on the 'Negative List', i.e., areas of economic activity where foreign ownership in whole or part will continue to be prohibited-which simply reflects existing arrangements (the Negative List). As of the date of this note, the following activities have been included in the Negative List:

- Oil exploration and production
- Investigation, security, military (including manufacturing of military weapons, explosives, dress and equipment)
- Banking and financing activities
- Insurance
- Pilgrimage and umrah services
- Certain recruitment activities
- Water and electricity provision
- Fishing and related services
- Post, telecommunication and other audio visual services
- Road and air transport
- Printing and publishing
- Commercial agency
- Medical retail (including pharmacies)
- Blood banks, quarantines and venom/poison banks

Article 7 of Federal Decree-Law No. 19/2018 is perhaps the most crucial element of the FDI Law as it aims to balance the desire to increase the flow of FDI into the UAE without negatively affecting national interests and national companies. Interestingly, the FDI Law does not explicitly confer powers on the FDI Committee to remove activities from the Negative List. Rather, Paragraph 2(B) of Article 6 of Federal Decree-Law No. 19/2018 simply states the FDI Committee can add to the Negative List. Therefore, it is unclear whether those activities listed are 'set in stone'. However, should a foreign investor wish to undertake FDI activities in the Negative List, they are encouraged to liaise with the FDI Committee to determine whether some form of dispensation can be given and this will be assessed by the FDI Committee on a case-by-case basis based on individual circumstances and the merit of the application.

The Positive List

Article 6(3) of Federal Decree-Law No. 19/2018 stipulates that the FDI Committee must take into account the following criteria in respect of the proposed activity and economic sector whilst compiling the Positive List:

- integration with the strategic plans of the UAE;
- any added value to the UAE economy (e.g., achieving economic returns, innovation and technological enhancement and job opportunities for UAE nationals);
- competence, experience and reputation of the relevant foreign investor;
- impact on other national companies engaged in similar activity; and
- whether the activity achieves a positive impact on the environment in the UAE.

On 2 July 2019, based on the mandate set out under the Federal Decree-Law No. 19/2019, the UAE Cabinet issued a resolution ("Positive List") whereby it specified a total of 122 economic activities across 13 sectors which will be eligible for up to 100% foreign ownership. These sectors include:

- Administrative services;
- Agriculture;
- Art and entertainment;
- Construction;
- Educational services;
- Healthcare services;
- Hospitality and food services;
- Information and communication;
- Manufacturing industry;
- Professional, scientific and technical activities;
- Renewable energy;
- Space; and
- Transport and storage.

It is anticipated that the opening up of foreign investment in these sectors will stimulate new business opportunities in the UAE. We expect to see significant interest in respect of projects involving e-commerce, supply chain, logistics and storage, biotechnology and laboratories, as well as opportunities in green technology.

Impact and next steps

In addition to the issuance of the Positive List, the UAE Cabinet has also confirmed that it will be left to the discretion of each Emirate of the UAE to decide on the percentage of foreign ownership for each sector/ activity according to their individual circumstances. As such, we may see certain Emirates encouraging certain activities over others subject to their local economic development needs. In order for the FDI Law to be fully effective and for it to achieve its stated goals, the FDI Committee and each Emirate will have to exercise its mandate in a flexible and transparent way, defining procedures which truly encourage FDI in the UAE. In particular, fees, procedures and other rules such as minimum capital requirements and Emiratisation thresholds and the like which may be imposed by the FDI Committee should work in tandem with the spirit of the FDI Law and act as an incentive to FDI rather than a disincentive.

Further, a great deal of consideration will be required as to the implementation of the FDI Law in practice by each of the seven Emirates. Particularly in relation to the existing legal landscape such as companies already existing under the 49%/51% shareholding structure wishing to restructure (many of which are governed by customary side agreements) and fall under the new FDI Law and the impact on well-established economic freezones across the UAE whereby 100% foreign ownership is already permissible.

The FDI Law, coupled with the Positive List, is certainly a significant and welcomed development which should encourage further FDI into the UAE, help diversify the local economy and stimulate growth in various industry sectors, and further cement the role of the UAE as a global business hub for foreign investment.