

CCL AMENDMENTS: ANOTHER STEP TOWARDS MAKING UAE A GLOBAL INVESTMENT HUB

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The United Arab Emirates (“UAE”) Government recently passed Federal Decree Law No. 26 of 2020 (the “Amendment Law”), which makes significant changes to the country’s Commercial Companies Law (i.e. Federal Law No. 2 of 2015 on Commercial Companies) (the “CCL”). These changes mandate certain actions for all UAE ‘onshore’ companies and will impact the structure of investments and transactions in the UAE going forward. In this article we provide a synopsis of the key amendments to the CCL contained in the Amendment Law.

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FOREIGN OWNERSHIP REGIME

The UAE foreign ownership regime has historically been a major consideration, and at times a deterrent, for foreign investors looking to invest in the country. It was as recent as 2018 that the government passed the Foreign Direct Investment Law (i.e., Federal Decree Law No. 19 of 2018) (the “FDI Law”), which contemplated 100% foreign ownership of onshore UAE companies in certain sectors. That Law has now been repealed by Article 6 of the Amendment Law.

We summarise following the most pertinent changes.

Previous restrictions on foreign ownership lifted (save for certain “strategic activities”)

The requirement for a minimum of 51% ownership of UAE onshore companies’ share capital to be held by UAE nationals has been removed from Article 10 of the CCL. The previous restrictions on foreign ownership (under the CCL, ignoring the FDI Law for present purposes) have not, however, been lifted entirely; rather, the Amendment Law allows companies to be wholly owned by non-UAE nationals, unless a specific restriction is created with respect to companies that engage in business activities that will have a “strategic impact” on the UAE economy.

The Amendment Law does not provide clarity on what these strategic impact activities are nor the exceptions that will be applied. A list of such activities, and the applicable licensing requirements, will be determined by a Committee comprising representatives from each Emirate’s economic department and published at a later date.

We anticipate that this list may largely correspond with the “negative list” issued under the (now repealed) FDI Law at the very least (thereby covering 13 sectors including banking, insurance, exploration and production of petroleum products, transportation, commercial agency, water and electricity services etc.) and retain up to 100% UAE national ownership requirement for certain key activities.

Subject to the powers of the Committee, each Emirate’s economic department will determine the percentage of UAE national contribution towards the capital of all companies within the scope of their competence, essentially retaining the position under the (now repealed) FDI Law. Therefore, it is possible that different Emirates will set different UAE national ownership requirements for similar business activities.

UAE national chairmanship and board members for JSCs no longer required

Article 151 has also been amended to remove the previous requirements for UAE nationals to hold the chairmanship and majority of the board positions of joint stock companies; going forward, new specific restrictions will be provided for in subsequent regulation.

UAE national service agent for onshore branches no longer required

Article 329, which stipulated the requirement for appointment of a UAE national service agent for onshore branches of foreign companies, has been repealed. It remains to be seen how this amendment will work in practice, but it appears that foreign companies can now establish onshore branch offices without having to appoint a UAE national service agent.

"Considering that the FDI Law has been repealed and the foreign ownership provisions of the Amendment Law will only come into force from 30 March 2021, the foreign ownership regime appears to now default back to the pre-FDI Law regime under Article 10 of the CCL."

Effectiveness and implementation of foreign ownership amendments

Considering that the FDI Law has been repealed and the foreign ownership provisions of the Amendment Law contained in Articles 10, 151 and 329 will only come into force on 30 March 2021, companies are left in the somewhat confusing and uncomfortable position that the foreign ownership regime appears to now default back (albeit temporarily) to the pre-FDI Law regime under Article 10 of the CCL.

Point to Note: Foreign partners of onshore LLCs should review their arrangements with any UAE national nominee shareholders and seek legal advice to assess whether these may be terminated and if so whether there are any requirements/conditions that must be satisfied to ensure a legal and valid termination.

CHANGES REQUIRING AMENDMENTS TO COMPANIES’ CONSTITUTIONAL DOCUMENTS

Shareholder Meetings

The Amendment Law has implemented the following changes with respect to shareholder meetings of onshore companies:

"It is now mandatory to include a dispute resolution mechanism in the memorandum of association of an LLC with respect to "disputes that arise from the affairs of the company, whether between the company and any of its managers or among the partners in the company"."

- **Notice:** The notice period for calling shareholders' meetings (for LLCs and joint stock companies) has been increased from 15 to 21 days (bringing this back in line with the position under the repealed Federal Law No.8 of 1984 concerning Commercial Companies). Moreover, there is a requirement to file a copy of the shareholders' meeting notice with the competent authority (relevant economic department, Ministry of Economy, SCA);
- **"Virtual" meetings:** The Amendment Law also allows for shareholders' meetings to be convened via "modern technologies" subject to controls prescribed by the relevant competent authority in this regard; and
- **Quorum:** The quorum requirement for the first AGM of an LLC has been reduced from partners owing 75% of share capital to 50% (unless the company's constitutional documents set a higher threshold). There are also certain related changes to procedural formalities for second meetings and the need for a third shareholders' meeting has been eliminated.

Dispute Resolution

The Amendment Law has amended Article 73 of the CCL to make it mandatory to include a dispute resolution mechanism in the memorandum of association of an LLC with respect to "disputes that arise from the affairs of the company, whether between the company and any of its managers or among the partners in the company". For this dispute resolution mechanism to be binding on the manager(s) and companies, they will need to be parties to the LLC's constitutional documents.

Point to Note: One important question that arises is whether an amendment to the LLC's memorandum of association will be required each time its manager is replaced so as to ensure that the new manager is bound by this dispute resolution mechanism.

OTHER KEY CHANGES

Auditor Appointment

The period for replacing a joint stock company's and an LLC's auditor has been increased from three to six fiscal years provided that the "auditing partner" (i.e. partner in charge of the audit) must be replaced every three years.

That said, the same auditor may be reappointed after the lapse of at least two consecutive years from the expiration date of its appointment.

Corporate Governance

The Amendment Law has amended Article 6 of the CCL to state that the Minister of Economy shall issue a resolution regulating the governance of companies (except in the case of public joint stock companies, to which corporate governance rules issued by the SCA would apply). We therefore encourage LLCs to prepare for the implementation of a new corporate governance regime.

Increase in Minority Shareholder Protections

The Amendment Law has lowered the threshold by which a shareholder can request the board to convene a general meeting to 10% from 25% for LLCs and 20% for joint stock companies.

Moreover, any shareholder owning 5% or more (as opposed to 10% or more under the CCL) of the company's capital can now add items to the agenda of the general assembly.

Directors' Duties

The Amendment Law has amended Article 162 of the CCL to extend the duties of the directors of a company to its "Executive Management". "Executive Management" includes "the general manager, the CEO or the executive chairman of the company, their deputies, everyone in high executive positions, executive management officers and those appointed to their positions personally by the board of directors".

Moreover, if a final judgment for breach of their duties is issued against any director or member of the Executive Management, they will be prohibited from holding an office in any company for a period of three years.

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Financial Distress

Article 101(2) of the Amendment Law provides that if an LLC is facing liquidation or is unable to pay its debts due to financial distress, a shareholder may, based on a report of the company's financial manager or their delegate, file an application to the court seeking "an urgent judgment to increase the capital as necessary to save the company or settle the debts". In such a case, pre-emption rights on the issuance of new shares will be overridden by the court order.

Where the losses of a joint stock company have reached 50% of its capital, the CCL imposes an obligation on the board to call a shareholders' meeting to determine whether the company should be liquidated. The Amendment Law supplements this provision by setting out the procedures to be followed by the board when calling this meeting. Specifically, it requires the board to include along with the meeting notice (i) a restructuring plan and the auditor's report, where a restructuring is recommended; and (ii) the auditor's report, liquidation plan, timeline, and name(s) of the nominated liquidator approved by the SCA, where liquidation is being proposed.

Related Party Transactions

The Amendment Law provides that a Cabinet Resolution will be issued upon the recommendation of the Ministry of Economy setting out the related party transactions regime for LLCs.

In terms of the related party transaction regime applicable to joint stock companies under the CCL, the Amendment Law adds certain disclosure requirements. These include an obligation on the related party to disclose all relevant details with respect to the transaction to the board of directors, before entering into the transaction and an obligation on the chairman of the board to notify the relevant authority when entering into a related party transaction together with all the relevant details of the transaction.

"Companies have until 2 January 2022, unless this period is extended by a Cabinet Resolution, to "adjust their status" to comply with the requirements of the Amendment Law."

Financial Assistance

Two exceptions to the financial assistance provisions under the CCL have been introduced by the Amendment Law:

- any securities, undertakings or compensations provided to any underwriter during an offering or subscription of the company's shares; and
- any ordinary course non-preferential business loans provided by entities licensed by the Central Bank to "any person to enable them to hold any securities issued by such companies".

Initial Public Offerings

The Amendment Law has introduced certain important changes to the CCL with respect to capital markets transactions. Liability for the accuracy of the company's prospectus has been shifted from third party advisors solely to the founding committee and the board of directors. Third party advisors are still however under an obligation to perform their duties with due care, skill and diligence.

The maximum limit of free float by the founders has been increased from 30% to 70% and the founder lock-in period has been reduced from two years to six months.

Implementation and Compliance

All provisions of the Amendment Law came into force on 2 January 2021 except those relating to amendments to the foreign ownership regime, which comes into force on 30 March 2021.

Companies have until 2 January 2022, unless this period is extended by a Cabinet Resolution, to "adjust their status" to comply with the requirements of the Amendment Law. Whether or not the government will legislate to deem the provisions of the Amendment Law into existing companies' constitutional documents (as it did with as part of the implementation of the CCL), remains to be seen, though this is not referred to in the Amendment Law.

Point to Note: In light of the above, all companies should review their constitutional documents and take action in good time to ensure compliance with the Amendment Law.

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CONCLUSION

While the removal of foreign ownership restrictions, albeit subject to exceptions, is certainly a welcome development, it remains to be seen how this will play out in practice and what conditions will be attached to different business activities by the Committee and the different Emirate's economic departments.

We will continue to monitor developments in this area and issue further updates on the Amendment Law and any implementing regulations in due course.

If you have any questions about the Amendment Law or its practical implications for your business, please contact the authors who will be glad to assist.

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