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FOREIGN DIRECT INVESTMENT IN THE UNITED ARAB EMIRATES UPDATES ON THE U.A.E.'S "NEW FDI LAW"



INTRODUCTION

On 23 September 2018, the President of the U.A.E., His Highness Sheikh Khalifa bin Zayed Al Nahyan, issued Federal Law by Decree No. 19 of 2018 Regarding Foreign Direct Investment ("**New FDI Law**"), which went into force in November upon its publication in the U.A.E. Official Gazette. The New FDI Law is the latest in a number of policies implemented to liberalize domestic markets and increase the U.A.E.'s competitiveness globally. By loosening existing regulations of onshore companies, the New FDI Law strives to enhance the investment climate in the U.A.E. and to attract additional foreign investment in certain specified business sectors to be tentatively identified in early 2019 ("**Positive List**").

The Positive List will align with U.A.E. Vision 2021 policy, as well as the country's overall innovation strategy, potentially attracting companies in Positive List industries, who otherwise would have incorporated in a free zone, to invest onshore in the U.A.E. The Ministry of Economy has established a new Foreign Direct Investment Committee ("**Committee**") and this Committee will issue the Positive List. In addition, the Ministry of Economy has established a Foreign Direct Investment Unit ("**Unit**"), which together with the Committee is expected to administer the New FDI Law and related activities.

The New FDI Law partially overturns the existing requirement that foreign companies established onshore in the U.A.E. maintain at least 51% ownership by a U.A.E. national; instead, the New FDI Law permits foreign ownership of 50% or more of Positive List companies in specified emirates (percentages and applicable emirates to be identified with the publication of the Positive List). Specific requirements may be imposed to achieve certain levels of foreign ownership, such as the maintenance of minimum capital, Emiratization, maintenance of regular accounts, appointment of a licensed auditor, and the provision of information and statistics to the Committee, Unit, and other relevant authorities. Notably, the New FDI Law addresses many of the concerns that foreign investors have had to date about the previous regulatory regime, including those regarding decision-making with respect to the fundamental aspects of the business, the true reflection of the value contributed by each shareholder including good-will, and uncertainties in relation to the enforcement of rights vis-à-vis the local partner.

The New FDI Law also includes a list of business sectors that will be ineligible for majority foreign ownership ("**Negative List**"). If a business sector is neither included in the Positive List nor the Negative List, then foreign investors may still apply to obtain higher ownership percentages in such business sector on a case-by-case basis. The New FDI Law sets out the procedures for such an application as well as the overall procedural and licensing framework for all foreign investment occurring outside of the free zones already established in the U.A.E.

QUESTIONS

1. If one wants to open a majority foreign-owned business in the U.A.E., should he/she do so now or wait until issuance of the Positive List? What advantages exist for opening a company in an established free zone now as opposed to waiting until issuance of the Positive List?

The main advantage to establishing in a free zone may be timing (i.e. one can start incorporation processes immediately), however the decision ultimately depends in large part on the business type. If the business is in a knowledge-based industry (consulting, legal, or financial services, for example), one could start in a free zone now, many of which have sophisticated infrastructure for knowledge industries and significantly expedited registration and business support. Depending on the industry, one may also appreciate the branding associated with certain free zones such as the DIFC or twofour54. In many cases, including when a business is not involved in selling goods or services into the U.A.E. market, and in light of the current taxation regime, having an onshore knowledge services company may not provide additional benefits over having a company established in a free zone. Regardless of the relevant sector, when to enter a new market is a multi-dimensional issue involving more than legal considerations.

2. If a proposed foreign direct investment is in a Positive List sector, what is the process for onshore establishment? How does the process for onshore establishment differ if the proposed foreign direct investment is not in a Positive List sector?

The specific requirements for Positive List companies to obtain licensing for foreign direct investment will be determined by the applicable licensing authorities once Positive List sectors have been identified. Following publication of these requirements, one would obtain a preliminary approval from the relevant licensing authority and submit an application for approval. If the requirements are met, the relevant authority will issue its approval in no more than five business days, after which the company would be registered and issued a license. If one does not receive approval within such five-day period, the application will be deemed rejected.

Companies in sectors omitted from the Positive List may also obtain licensing for foreign direct investment by submitting a request for license approval to the relevant authority. Licensing in this case is discretionary and must be ultimately approved by the Ministry of Economy.

3. What happens if one applies for foreign direct investment under the New FDI Law and gets denied?

If one's application is for a Positive List company, the New FDI Law permits the lodging of an appeal with the competent authority within 15 days of rejection or deemed rejection. If no response is received within 10 business days or if the appeal is denied, one may appeal within 30 days to the court of competent jurisdiction. Rejections are final and may not be appealed if issued to companies not on the Positive List.

4. Which business sectors are likely to be included on the Positive List and why?

The answer to this question is inherently conjectural, but one can speculate based on the New FDI Law, which sets forth a list of goals for the Committee to consider when drafting the Positive List. These goals align with the U.A.E.'s overall innovation strategy and strategic planning documents including U.A.E. Vision 2021 and include, among others, raising the level of innovation in the national economy, creating job opportunities and training for national cadres, limiting the impact on affected national companies, and making the best use of modern technology. Based on these considerations, the Positive List is expected to include industries in science and technology and other areas where the U.A.E. wants to develop its own resources or where it lacks significant local capacity. To attract investment into Positive List sectors, the New FDI Law will, among others, treat such companies as national (U.A.E.) companies, allow such companies to repatriate annual profit and proceeds resulting from the liquidation or sale of the business, and permit employees of such companies to repatriate their salaries and entitlements.

5. Which business sectors are included on the Negative List?

The Negative List was published as part of the New FDI Law and includes the following sectors:

- *Exploration and production of petroleum materials;*
- *Investigations, security, military sectors, manufacturing of arms, explosives and military equipment, devices and clothing;*
- *Banking and financing activities, payment systems and dealing with cash;*
- *Insurance services;*
- *Hajj (pilgrimage) and Umrah services, providing employment and recruitment services for staff and domestic workers;*
- *Water and electricity services;*
- *Services related to fisheries;*
- *Postal services, telecommunications services and audio and video services;*
- *Land and air transport services;*
- *Printing and publishing services;*
- *Commercial agents' services;*
- *Medical retail such as private pharmacies; and*
- *Blood banks, venom and quarantine centers.*

Note that the Ministry of Economy may add or remove sectors from the Negative List from time to time.

6. If a proposed business is on the Negative List, what does this mean?

Being on the Negative List does not carry any negative connotations. It merely means the business is ineligible for majority foreign ownership permitted to some businesses under the New FDI Law. Negative List companies operating onshore in the U.A.E. must continue to be majority owned by a U.A.E. partner.

7. What will happen to the free zone regime now that foreign investors can simply own onshore companies?

Any answer to this question is necessarily speculative, but in the short term free zones will probably continue doing business as before. As noted above, free zones offer streamlined processes for incorporation and will manage many of the details of incorporation, including providing readily available office space. This will continue to be attractive to certain customers even in the new legal landscape. Over a longer period, free zone and onshore rules may harmonize or free zones may alternatively become niche areas for specific industries, in particular those that are not involved in directly selling goods or services into the U.A.E. market.

8. How will the New FDI Law impact existing onshore companies that have contractual or other arrangements with local partners and entities?

The New FDI Law does not appear to immediately or directly impact existing onshore foreign investment projects, which will retain all existing incentives in accordance with the legislations, agreements, and contracts applicable to them for the time periods specified in those existing documents. Existing foreign investment projects may take advantage of the New FDI Law by reconciling their positions with the New FDI Law and implementing resolutions yet to be issued, however it would appear that this reconciliation would need to occur within the bounds of existing agreements and arrangements. Each existing onshore foreign investment project will need to be analyzed and assessed on an individual basis in light of its existing obligations.

