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Authors:

Marco de Leo

Local Partner

Marco.DeLeo@belex.com

+971 45646618

Roberto Flammia

Local Partner

Roberto.Flammia@belex.com

+971 45646618

Carlo Pianese

Local Partner

Carlo.Pianese@belex.com

+971 45646618

Africa Committee contacts:

Andrea Carta Mantiglia

Partner & Executive Chairman of

BonelliErede Middle East LLP

Andrea.CartaMantiglia@belex.com

+39 02771131

+971 45646618

Rindala Beydoun

Managing Partner of

BonelliErede Middle East LLP

Rindala.Beydoun@belex.com

+971 45646618

New Foreign Direct Investment Law

On 30 October 2018 his Highness Sheikh Khalifa Bin Zayed Al Nahyan, the president of the United Arab Emirates (UAE), issued the highly anticipated and much discussed Federal Decree-Law No. 19 of 2018 concerning Foreign Direct Investment (the **UAE FDI Law**). The UAE FDI Law was published in the UAE Official Gazette on 30 October 2018 and came into effect the following day.

We have set out below the UAE FDI Law key take-away points.

I. Background

Pursuant to article 10(1) of the UAE commercial companies' law¹, foreign investors who wish to incorporate a limited liability company in mainland UAE are required to incorporate such company subject to **51% of the shareholding being owned by a UAE national** or a company that is fully owned by UAE nationals (the **Ownership Restrictions**).

Additionally, laws in relation to certain sectors impose further ownership restrictions on foreign investors by only allowing UAE nationals to be involved in such sectors and/or activities. By way of example, the commercial agencies law² requires that all commercial agency activities be carried out by UAE nationals only, therefore preventing foreign investors (even as a minority shareholder) to carry out such activities in the UAE.

Article 10(2) of the UAE commercial companies' law (as amended by Federal Decree Law No. 18 of 2017) states that it will be the responsibility of the UAE Cabinet³ to determine:

- the activities that can only be carried out by UAE nationals; and

¹ Federal Law No. 2 of 2015 concerning Commercial Companies (as amended).

² Federal Law No. 18 of 1981 concerning Commercial Agencies (as amended).

³ The UAE Cabinet is the executive branch of the federation of the UAE which handles the execution of all internal and external affairs related to the UAE and comprises of the Prime Minister, two deputy prime ministers, the ministers of the UAE, and an active general secretariat.

- the activities where foreign investors may own all or majority of the share capital.

The UAE FDI Law aims at further clarifying the provisions of article 10(2) of the commercial companies' law by:

- identifying the list of sectors and activities which will not be subject to the liberalisation of sectors and activities brought in by the UAE FDI Law (the **negative list**); and
- setting out the legal framework for the establishment of competent bodies and committees tasked with the aim of identifying sectors and activities where foreign investors may own all or majority of the share capital (the **positive list**) and recommending such sectors and activities to the UAE Cabinet.

It is worth noting that the **UAE FDI Law does not apply to free zones⁴** in the UAE as such free zones are not subject to the Ownership Restrictions that are otherwise applicable in mainland UAE.

II. The Negative List

Article 7(2) of the UAE FDI Law contains a negative list that sets out the economic sectors and activities in the UAE that will **not** be subject to such envisaged liberalisation. Such list includes, amongst others, the following sectors/activities:

- Exploration and production of oil;
- Economic sectors related to carrying out investigations, security services and military activities, including, but not limited to the manufacturing of weapons, explosives, military equipment, devices and uniforms;
- Banking and financing;

⁴ Free zones are special designated zones in the UAE where investors may establish their corporate presence. Entities incorporated in free zones, while not subject to the Ownership Restrictions, are subject to certain limitations in terms of the activities that they can carry out and the territory in which such activities may be carried out. There are more than thirty free zones in the UAE and most free zones have their own set of regulations as well as cater towards entities of particular sectors, *e.g.* financial services, media activities, logistical services.

- Insurance;
- Hajj and Umrah travel services;
- Certain services in relation to recruitment of personnel;
- Provision of water and electricity services (utilities);
- Services related to fishing;
- Post, telecommunication and other audio-visual services⁵;
- Road and air transportation;
- Printing and publishing services;
- Commercial agencies;
- Medical retail; and
- Blood bank, quarantine and poison banks.

The UAE FDI Law further provides that the UAE Cabinet has the right to amend the negative list.

We note from the UAE FDI Law that there are **two types** of activities set out in the negative list:

(i) the first, being those activities that may be carried out by foreign investors but subject to the Ownership Restrictions (*e.g.* pharmacies, printing and publishing services);

(ii) the second, being those activities that may be carried out by the state or UAE nationals only (*e.g.* commercial agencies, road transportation). This distinction is not expressly set out in the UAE FDI Law, nonetheless, it could be included in the implementing regulations and decisions.

III. The Positive List

The UAE FDI Law does not specify which economic sectors or activities will be included in the positive list. However, the law enables the UAE Cabinet to deliberate on such list based on recommendations by a “foreign direct investment unit” to be formed by the Ministry of Economy and a “foreign direct investment committee” to be formed by way of resolution of the UAE Cabinet.

⁵ There is no clarity in the law as to what such audio-visual services may be related to. However, in the context of telecommunication, it could be argued that references to audio-visual services may be in relation to VoIP (voice over Internet Protocol) services such as WhatsApp calling, Facetime, Google Video etc.

IV. Other take-away points

Definition of foreign capital. Article 4 of the UAE FDI Law sets out the definition of foreign capital. This is the first time that such definition is included in a statute in the UAE and provides a background as to what assets, funds and/or rights may be construed as foreign capital for the purpose of the foreign investment company.

Protections of a foreign investment company. Article 8(1) of the UAE FDI Law provides that foreign investment companies will be treated in the same manner as national companies. Further, articles 8(2) to 8(5) provide a great degree of flexibility to such foreign investment companies with respect to their investment and ownership structure. It is also worth noting that article 9(1) sets out restrictions on the expropriation of ownership of foreign direct investment projects and restricts such expropriation to cases where there is a public interest and where fair compensation has been provided. It will be interesting to note the stance of what fair compensation may entail. Finally, it is also worth noting that the UAE FDI Law recognizes the right of the foreign investment company to use real estate allocated for foreign direct investment projects and provides protection against cancellation, suspension or limitation of such right to use real estate, except where such use of real estate is in breach of the foreign investment company's licence.

Confidentiality. Article 8(4) of the UAE FDI Law states that foreign investment companies will be guaranteed confidentiality over technical, economic and financial information that they submit to the competent authority for the licensing of such foreign direct investment company. Such provision will alleviate certain foreign investors' concerns in relation to disclosing sensitive business information.

Expedited application and approval process. Although the particulars of the application and approval process for foreign investment companies are yet to be issued, article 10(1)(C) of the UAE FDI Law provides for an expedited timeline for the approval of foreign direct investment projects by stating that the competent authority will issue its approval on the licence request within five working days from the submission of the licence request and all supporting documents.

Expedited status for disputes referred to courts. Article 12(2) of the UAE FDI Law states that disputes that are referred before the competent courts in the UAE and which relate to foreign direct investment projects will be allocated an “urgent” status, which we hope will expedite the dispute resolution process before the courts of the UAE.

Emiratization. Article 13(3) of the UAE FDI Law states that foreign direct investment companies will be required to employ and train Emirati nationals based on the standards of Emiratization specified by the UAE Cabinet. This implies a link between the level of foreign ownership that may be permissible in a certain sector and the percentage of Emiratization required in such sector.

V. Implications for foreign investors

The UAE FDI Law is undoubtedly a **promising step towards the economic liberalisation** aimed at lifting the Ownership Restrictions that are otherwise applicable to foreign investors, however there is still some way to go before the effect of the UAE FDI Law coming into force can be fully realized.

In fact, the UAE Cabinet is yet to issue the positive list based on the recommendations it obtains from the foreign direct investment unit and committee. In addition, along with the positive list, **other important clarification** matters such as: (i) the maximum percentage of shareholding permitted by a foreign shareholder in such foreign investment company; (ii) the minimum share capital requirement; (iii) the minimum investment amount; and (iv) particulars on the application process for the incorporation of a foreign investment company, are yet to be determined.

Only once the UAE FDI Law and its implementing regulations and decisions are fully implemented at the grass-root level, can the effect of the UAE FDI Law be truly ascertained. However, the UAE FDI Law is definitely a positive step in the journey towards a new and exciting chapter in the foreign investment legal regime of the UAE, which we expect will solidify the UAE’s position as a business friendly jurisdiction and hub for foreign investors.

Over the next few months, we will closely follow the implementing regulations and decisions in relation to the UAE FDI Law and publish further alerts containing such updates.

In the meantime, if you have any queries with respect to above or would like to discuss the several options available to foreign investors wishing to establish their corporate presence in the UAE, please do not hesitate to contact us.