

Full Foreign Ownership in UAE Takes Shape: Abu Dhabi and Dubai Issue First FDI Licenses

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The United Arab Emirates' foreign direct investment regime is being put into action after both Abu Dhabi and Dubai recently issued their first foreign direct investment licenses (“**FDI Licenses**”) to foreign investors. Abu Dhabi has also recently adopted its own positive list of economic activities eligible for an FDI License in the emirate, featuring a generous total of 1586 activities across the agricultural, industrial and service sectors.

These developments substantively complete the implementation, in the largest two of the UAE's seven emirates, of the Foreign Direct Investment Law that was adopted in September 2018 through Federal Legislative Decree No. 19 of 2018 (the “**FDI Law**”) and the ensuing resolution by the UAE Council of Ministers No. 16 of 2020 that was adopted in March 2020 (the “**Cabinet Decision**”).

The FDI Law allows certain licensed foreign direct investments to benefit from specific exemptions from the provisions of the federal Commercial Companies Law No. 2 of 2015, including in relation to the restrictions on foreign ownership prohibiting foreign investors from holding more than 49% of an “onshore” UAE company. The FDI exemptions are not automatic, and will need to be applied for through a process set out in the FDI Law and the Cabinet Decision, and further detailed in subsequent guidance and regulations adopted at the level of each emirate.

In this alert memorandum, we provide a general overview of the positive list recently adopted by the emirate of Abu Dhabi and outline the process that foreign investors must follow to obtain an FDI License in the UAE.

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UAE Positive List	<p>The FDI Law envisaged a “positive list” of sectors and economic activities eligible for FDI exemptions (and, as such, for up to 100% foreign ownership in the UAE).</p> <p>A positive list featuring 122 activities was put together by the UAE Cabinet and approved by the Cabinet Decision earlier this year (the “Federal Positive List”).</p>															
UAE Negative List	<p>The FDI Law had explicitly set out a “negative list” of 13 activities ineligible for the FDI regime and that remain subject to the applicable limitations on foreign ownership (the “Negative List”).</p> <table border="1"> <tr> <td>Oil exploration and production activities</td> <td>Post, telecommunication and other audio-visual services</td> </tr> <tr> <td>Defence and security-related activities</td> <td>Road and air transport</td> </tr> <tr> <td>Banking and financial activities</td> <td>Printing and publishing</td> </tr> <tr> <td>Insurance activities</td> <td>Commercial agency</td> </tr> <tr> <td>Certain recruitment activities</td> <td>Medical retail (including pharmacies)</td> </tr> <tr> <td>Provision of water and electricity</td> <td>Poison centres, blood banks and quarantine facilities</td> </tr> <tr> <td>Fishing and related services</td> <td></td> </tr> </table>		Oil exploration and production activities	Post, telecommunication and other audio-visual services	Defence and security-related activities	Road and air transport	Banking and financial activities	Printing and publishing	Insurance activities	Commercial agency	Certain recruitment activities	Medical retail (including pharmacies)	Provision of water and electricity	Poison centres, blood banks and quarantine facilities	Fishing and related services	
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Case-by-case Exemptions	<p>The FDI Law contemplated a process for case-by-case exemptions for activities that are neither on the Federal Positive List nor on the Negative List. This possibility remains, unaffected by recent developments.</p>															
Existing Rules continue to apply to minority investments	<p>Foreign investors that plan on owning no more than 49% of a UAE onshore company can still do so without applying for an FDI License, as minority investments remain permitted under the Commercial Companies Law. It is unlikely that such investors would want to seek an FDI License, especially given the additional requirements that apply to FDI Companies (<i>see II. FDI License Application</i>).</p>															

The regulatory framework for FDI companies varies between emirates, and the FDI Law provides that the authority at the level of each emirate competent for issuing FDI Licenses (the “**Competent Authority**”) shall specify the conditions and procedures a foreign investor must meet or follow and the documents required in order to apply for an FDI License. Accordingly, Abu Dhabi established the Abu Dhabi Investment Office (ADIO) to support foreign investments in the emirate, and the Abu Dhabi Department of Economic Development (“**AD DED**”) has recently approved and issued a detailed positive list of economic activities eligible for an FDI License in the emirate (the “**AD Positive List**”). Both Dubai and Sharjah have also established a specific FDI unit within their respective emirate to offer information and support to foreign investors. It remains to be seen if Dubai, Sharjah or the other emirates will follow suit with Abu Dhabi’s strategy by issuing their own positive list, or whether they will simply rely on the Federal Positive List.

Prior to the establishment of the FDI regime, foreign investors had typically relied on a number of structures designed to allow them to own a higher percentage, in economic terms, of UAE companies. An industry grew around ways to mitigate limitations on foreign ownership, and the provision of nominee services became a lucrative business for certain service providers including law firms. We expect that the adoption of the FDI Law, along with the recent decision by the UAE Council of Ministers No. 58 of 2020 requiring companies to identify and disclose their ultimate beneficial owners to the competent registrar, would create an impetus for foreign investors to move away from nominee arrangements.

I. The AD Positive List

The Federal Positive List sets out a total of 122 activities open to foreign investment pursuant to the FDI Law: 19 activities in the agricultural sector, 51 activities in the industrial sector, and 52 activities in the service sector.

The AD Positive List is much more detailed and includes 1586 economic activities categorized as follows: 35 activities in the agricultural sector, 739 activities in the industrial sector, and 812 activities in the service sector.

The AD Positive List is largely a fleshed-out sub-categorization of the 122 activities included in the Federal Positive List rather than an expansion of or addition thereto, although certain activities that might previously have been argued to be within the UAE Negative List are now clearly permitted under the AD Positive List.

The AD Positive List Reflects the Abu Dhabi Economic Vision 2030

The type of activities included in the AD Positive List are a corroboration of the Abu Dhabi Economic Vision 2030 and, more generally, the UAE's development policies.

The size, scope and variety of activities covered by the AD Positive List confirm that not only is the emirate seeking to attract foreign direct investment, but it is also looking to foster the diversification of the emirate's economy and achieve sustainability.

For instance, the AD Positive List includes a large number of food-related activities, spanning from agricultural cultivation to industrial manufacturing and production, evidencing a strategy to grow local produce, decrease imports, and bolster food security and self-sufficiency.

Other activities included in the AD Positive List reflect a strong desire by Abu Dhabi to build a knowledge-based economy by attracting small and medium-sized enterprises, as well as multinational institutions, and inviting them to set up factories, branches, or other types of physical presence in the country. The UAE in general is seeking to position itself as a tech and manufacturing hub for the region, building upon its advanced infrastructure, economic and political stability, low labour costs, absence of income tax, and ease of doing business. This is best illustrated with the inclusion in the AD Positive List of activities such as manufacturing of motor vehicles, trailers and semi-trailers, aerospace vehicles and associated machinery, aircraft repair and maintenance, computer chips, etc.

With regards to the service sector, a number of professional activities previously subject to foreign ownership restrictions are now open to full foreign ownership. These include accounting, audit, and tax consultancy services. Legal consultancy services are included as well, although such activities are subject to certain limitations (for instance, the legal

consultant must not plead before UAE courts or perform notarization or authentication tasks).

Requirements and Conditions Attached to Eligible Activities

An activity included on the AD Positive List may need to meet certain additional requirements for it to be eligible for an FDI License.

For instance, all agricultural activities and a number of industrial activities must use modern technology, achieve high added value and contribute to the field of research and development, in addition to meeting other sector-specific licensing requirements in the UAE. This is generally in line with the conditions set out under the Federal Positive List in the Cabinet Resolution. We note that certain activities, in particular in the education and healthcare field, remain subject to additional approvals being obtained from the relevant licensing and regulating authorities, whether at federal or local level.

A large number of the service activities included the AD Positive List relate to engineering and construction. However, the AD Positive List specifies that such activities are only eligible in respect of infrastructure projects of large scale such as airports, highways, sports facilities, and projects worth more than AED 450 million.

Some of the conditions and requirements included in the AD Positive List are not entirely clear and

could give rise to subjective interpretation. For instance, most consultancy-related activities include a requirement that there be “a natural or legal person known for his excellence in this field”. It is not clear what criteria the ADDED will rely on in order to determine whether such a requirement is satisfied when reviewing an FDI License application.

The spectrum of activities on the AD Positive List suggests that activities included on the Negative List adopted in the FDI Law should be interpreted restrictively.

For instance, upstream oil and gas activities are on the Negative List, but the AD Positive List includes consultancy services for oil and gas search and exploration. The Negative List covers medical retail trading (e.g., pharmacies) but pharmaceutical studies, research, and biotech (in addition to hospitals and medical clinics) are all on the AD Positive List. Water and electricity services are on the Negative List, but water transmission and distribution engineering and consultancy services for water desalination plants are on the AD Positive List. Printing and publishing are on the Negative List, while market research and polls, photographic activities, and dramatic arts (theatre) are all on the AD Positive List. Blood banks seem to have erroneously been included on the AD Positive List since they are also included in the Negative List.

We also note that the Cabinet Decision provides that any eligible activity must be carried out under a legal entity (an “**FDI Company**”) in the form of a limited liability company or a private joint stock company. The AD Positive List specifies the minimum share capital requirement for each activity, which varies between AED 7.5

million-AED 10 million for agricultural activities, AED 2 million-AED 100 million for industrial activities, and AED 15 million-AED 100 million for services activities. These requirements are in line with those set out in the Cabinet Decision.

Where a minimum capital requirement is not specified (as is the case for most service activities), a general reference is made to the minimum capital required pursuant to applicable legislation.

II. FDI License Application

In general, the application process for obtaining an FDI License in the UAE differs depending on whether the activity that the foreign investor wishes to carry out is specifically contemplated by the Federal Positive List (and, in the case of Abu Dhabi, the AD Positive List) or not.

A Foreign Investor Guide (the “**Guide**”) prepared by the Ministry of Economy (“**MOE**”) in coordination with the relevant authorities in the UAE and available [here](#) aims to provide practical guidance for foreign investors and to clarify the requirements and procedures related to obtaining an FDI License.

It is to be noted that major corporate events affecting the life of an FDI Company (e.g., amendment of constitutional documents or legal form, addition of new partners or investors whether through capital issuances or share sales, mergers and acquisitions) require the written approval of the relevant Competent Authority, which reveals the UAE’s desire to keep a watchful eye on the identities of the foreign investors benefiting from the FDI Law and the economic activities they undertake. This is not the case of normal, non-

FDI, companies to which these requirements do not apply.

Activities Included in the Positive List

Once a foreign investor has decided that it would like to carry out an activity specifically eligible for an FDI License in the UAE, such investor must select the legal form of the entity, fix the registered capital (which must not be less than the minimum capital for the relevant activity), reserve a trade name (which shall mandatorily be followed by the expression “Foreign Direct Investment (FDI)”) and then submit an application to the Competent Authority in the relevant emirate to obtain initial approval of the FDI project.

The application for initial approval shall include draft memorandum and articles of association of the FDI Company, a feasibility study, and any other prior approvals that may be specifically required for the exercise of the activity. Upon obtaining the initial approval, the investor can proceed to select a location for the exercise of its business and then submit an official application for FDI project licensing, including the signed memorandum and articles of association. Any specific approval required for the exercise of the activity from a licensing authority (e.g., Ministry of Health for activities in the healthcare field) that would not have been obtained up until this stage must be secured. The investor must then apply to become a member of the Tawteen Partners Club, an institution established by the Ministry of Human Resources and Emiratization. Once these steps are completed, the Competent Authority will issue its decision. If the decision is favorable, the foreign investor must proceed to pay the fees for the commercial license of the FDI Company, open a

bank account in the name of the FDI Company, fully pay up at least 20% of the FDI Company's capital, register the FDI License with the MOE and the Chamber of Commerce, and finally obtain a notice of commencement of business.

The FDI Law does not specify a timeframe for the approval or rejection of the FDI License, but the Guide indicates that the Competent Authority must issue its approval of the FDI License application within a maximum period of 5 working days from the date of submission of the application and fulfillment of all required conditions, documents and procedures. While this seems to be an encouraging timeframe, we note that the application must still go through an initial approval which is not subject to a specific timeframe itself. In addition, according to the Guide, the FDI License application is deemed rejected if the 5 working day-period lapses without the issuance of any decision from the Competent Authority in this respect.

As such, the short timeframe may end up being disadvantageous to foreign investors and challenging for the authorities, especially given that the process to obtain an FDI License is new and that it will take time to build up experience and precedents.

Activities Not Specifically Stipulated

If the activity is not on the Federal Positive List (and, in Abu Dhabi, the AD Positive List) but also not prohibited under the Negative List, the investor can submit an application for an FDI License to the Competent Authority, which has the right to reject the application or, after coordinating with the relevant licensing authority and consulting the local government in the relevant emirate, to refer it to the

Foreign Direct Investment Committee ("FDI Committee") which is responsible for studying and submitting FDI-related recommendations to the UAE Cabinet. If the UAE Cabinet approves the FDI License application, the Competent Authority will notify the foreign investor of the data, information and documents necessary to complete the application.

The Competent Authority will then issue its approval of the FDI License within 5 working days from the date on which the foreign investor completes the required documents and procedures. In case of a rejection, such decision will be final and not subject to appeal.

Converting an Existing Company Into an FDI Company

The FDI Law expressly stipulates that it applies to all FDI projects established and licensed in the UAE following the date on which the FDI law is implemented. The FDI Law entered into force in September 2018.

As such, we are of the view that any entity established following September 2018, or that may be established as a regular non-FDI Company in the future, may at any time decide to convert into an FDI Company. This interpretation is reinforced by the inclusion in the Guide of a specific section dedicated to converting an existing company into an FDI Company, which is similar in various aspects to the process applicable to the creation of a new FDI Company.

It remains to be seen whether such conversions will be required to be linked to an infusion of new equity or debt financing into an existing company (as opposed to a mere acquisition of shares from one or more existing shareholders).

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The legal framework and procedures for applications for foreign direct investments in the UAE seem to be coming together quite nicely, as major emirates move forward towards completing important milestones in this respect. In July this year, the UAE was ranked 19th globally in the 2020 Kearney Foreign Direct Investment Confidence Index, up from 21st place when it was last represented in the index in 2017. While the country's recent ranking reflects positive investor sentiment, the success of the UAE's FDI regime and processes, and its ability to achieve the objectives underlying its *raison d'être*, will need to be assessed in light of practical implementation. Only empirical evidence will show to what extent the FDI licensing process is clear, consistent and efficient.

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