

# Foreign Investment Review

*Contributing editor*

**Oliver Borgers**



2019

GETTING THE  
DEAL THROUGH 

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# Foreign Investment Review 2019

*Contributing editor*  
**Oliver Borgers**  
**McCarthy Tétrault LLP**

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This article was first published in January 2019  
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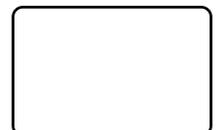


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3780 4147  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018  
No photocopying without a CLA licence.  
First published 2012  
Eighth edition  
ISBN 978-1-912377-41-1

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Preface

## Foreign Investment Review 2019

Eighth edition

**Getting the Deal Through** is delighted to publish the eighth edition of *Foreign Investment Review*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new article on the European Union.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE   
DEAL THROUGH 

London  
December 2018

# United Arab Emirates

Gregory Mayew and Silvia Pretorius

Afridi & Angell

## Law and policy

### 1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The United Arab Emirates (UAE) has not implemented a specific and separate legal regime regulating the activities and oversight of foreign direct investment (FDI) in the country. Nevertheless, the federal government assumes an active role in shaping the framework of policymaking in this regard. This is further complemented by, and coordinated with, strategies pursued within the particular emirates.

The UAE encourages the increased participation of foreign investors in the economy through various initiatives. One significant initiative to promote FDI is the creation of over 40 specially designated free trade zones (free zones). These free zones, which may establish separate regulatory environments within their designated jurisdiction, are attractive to international investors owing to clear and market-oriented regulations, the ability to incorporate wholly foreign-owned entities and guaranteed tax holidays on all corporate taxes. The UAE does not impose foreign exchange control regulations either in or outside the free zones. Foreign investors from the member states of the Gulf Cooperation Council (GCC) enjoy a special status in the UAE and are largely exempt from foreign ownership restrictions.

Notwithstanding various initiatives to encourage foreign investment, the UAE maintains stringent foreign investment restrictions in relation to strategically important sectors, including the defence, and oil and gas sectors. Further, certain economic activity remains the exclusive domain of UAE nationals and companies wholly owned by UAE nationals. The country is not a party to the WTO Plurilateral Agreement on Government Procurement. Accordingly, government procurement is generally awarded to local companies and suppliers where possible. Further, outside of the free zones, all companies incorporated in the UAE must have majority UAE ownership (unless 100 per cent owned by GCC persons or entities).

### 2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

Given the absence of a centralised investment law in the UAE, FDI is regulated by a number of distinct legislative texts, including but not limited to:

- Federal Decree Law No. 19 of 2018, on Foreign Direct Investment (the Foreign Direct Investment Law);
- Federal Law No. 2 of 2015, as amended (the Commercial Companies Law);
- Federal Law No. 18 of 1981, as amended (the Commercial Agency Law);
- Federal Law No. 4 of 2012, as amended (the Competition Law);
- Cabinet Resolution 37 of 2014 on the Regulation on Procurement and Warehouse Management in the Federal Government (the Government Tender Regulations);
- Dubai Law No. 7 of 2006 Concerning Land Registration in the Emirate of Dubai and similar laws enacted in other emirates (the Property Law);
- Federal Decree-Law No. 9 of 2016 On Bankruptcy (the Bankruptcy Law); and

- laws and regulations applicable in the various free zones.

### 3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

At the time of writing, a new law regarding foreign investment in the UAE was announced, Federal Decree-Law No. 19 of 2018 On Foreign Direct Investment. A detailed analysis of the new Foreign Direct Investment Law is beyond the scope of this article.

The Foreign Direct Investment Law provides that a Foreign Direct Investment Committee (the Foreign Direct Investment Committee) shall be formed by a decision of the Cabinet and shall be presided over by the UAE Minister of Economy.

The Foreign Direct Investment Committee shall have the authority to study and provide recommendations to the UAE Cabinet after coordinating with the local governments, regarding the following:

- setting out a list of economic activities that may be carried out by a company wholly owned by foreign investors in the United Arab Emirates (the Positive List);
- adding certain sectors and activities to the Negative List (defined below);
- approving foreign investment projects to conduct activities that are not set out in the Positive List following recommendations made by the relevant licensing governmental departments; and
- deciding on the benefits granted to foreign direct investment projects in the UAE.

The Foreign Direct Investment Law provides for a list of economic sectors where foreign direct investment is not allowed (the Negative List). The Ministry reserves the right to amend the Negative List as it deems appropriate. These sectors are as follows:

- oil exploration and production;
- investigation, security, military (including manufacturing of military weapons, explosives, military hardware, equipment and clothing);
- banking and financing activities;
- insurance;
- Hajj and Umrah services;
- certain recruitment activities;
- water and electricity services;
- services related to fisheries;
- post, telecommunication and other audio visual services;
- road and air transport;
- printing and publishing;
- commercial agencies;
- medical retail activities, including as pharmaceuticals; and
- poison banks, blood banks and quarantine centres.

Although permitting majority or 100 per cent foreign ownership in certain sectors would be a major development, it is currently unclear which activities will fall under the Positive List and what restrictions will be imposed on the foreign direct investment companies.

The Commercial Companies Law stipulates that companies in the UAE must be 51 per cent owned by UAE nationals or companies wholly

owned by UAE nationals, thus limiting foreign ownership to 49 per cent (the foreign ownership restriction). Branch offices of foreign companies are permitted without the participation of a UAE shareholding, but require the appointment of a UAE agent to conduct limited commercial activity in the country. There are, however, significant exceptions to the foreign ownership restriction, such as:

- GCC nationals, and companies owned by GCC nationals, are granted national treatment in respect of most commercial activities and are therefore exempt from the foreign ownership restriction;
- the foreign ownership restriction does not apply in respect of economic activity in free zones, enabling foreign investors to wholly own relevant entities established in free zones; and
- foreign companies may establish branch or representative offices to conduct limited amounts of economic activity in the UAE (however, these do not have a separate legal personality) (together, the foreign ownership exceptions).

The Property Law prevents foreign ownership of real property with the exception of areas designated by the respective governments of a particular emirate.

The Commercial Agency Law effectively excludes foreign investors from undertaking distribution and agency businesses in the UAE as it requires that distribution of a foreign principal's products must be conducted through an exclusive UAE agent, which in turn must be a wholly owned UAE entity or a UAE citizen. Exclusive agents may be appointed for the UAE or a particular emirate. Underlying agreements establishing commercial agencies may be registered by the agent (provided it is a UAE national or wholly owned by UAE nationals) with the UAE Ministry of Economy (Ministry), and following such registration, can only be terminated by mutual agreement, notwithstanding the expiry or breach of such contract.

Under the Competition Law, the conduct of any form of economic activity or holding of intellectual property rights by a natural or legal person in the UAE that affects competition inside the UAE, or occurs outside the country but has the ability to affect competition in the country, requires the approval of the Ministry. This includes any transaction, including mergers and acquisitions that result in a dominant market position. Similar approvals must be sought in respect of transactions relating to particular industry segments, such as the banking sector, which is further subject to a 20 per cent profit tax. The Competition Law has only recently been enacted and its exact scope is still unclear.

The provisions of the Government Tender Regulations apply to all procurement operations and contracts of supply, execution of work and provision of services performed by UAE federal bodies, but exclude the following federal entities: the Ministry of Defence, the State Security apparatus, and all military purchase transactions conducted by the Ministry of Interior and determined by a decision from the Minister of Interior and federal bodies bound by international agreements or obligations pertaining to the purchase transactions carried out by such bodies.

The Bankruptcy Law replaces and repeals the previous legislation on the subject, Book 5 of the Commercial Code, which was seldom used in light of its perceived shortcomings. Perhaps the most important new feature of the new Bankruptcy Law is the introduction of a regime that allows for protection and reorganisation of distressed businesses. Other key features of the new Bankruptcy Law include the following:

- A debtor can seek court protection and assistance while it agrees to a financial arrangement with its creditors without having to proceed to bankruptcy proceedings (preventive composition). Rather than having to proceed directly (or at all) to bankruptcy proceedings, preventive composition will afford the debtor the opportunity to reach an agreement with its creditors for the repayment of sums owed, while under court protection from individual creditor claims. This option will be available to the debtor only if it has not been in default for more than 30 consecutive business days and is not insolvent. The debtor will not be able to dispose of any property, stocks or shares, make any borrowings, or (if a company) change ownership or corporate form while it is undergoing this process.
- A creditor (or group of creditors) must now have a debt owed of at least 100,000 dirhams before it can initiate bankruptcy proceedings.
- Under previous law, the UAE Penal Code treated bankruptcy as a potentially criminal act, even if not accomplished by fraud. The

new Bankruptcy Law abolishes the criminal provisions relating to non-fraudulent bankruptcy, eliminating the perceived stigma under the prior law. Despite this, the new Bankruptcy Law in many circumstances still provides for criminal liability of entities and persons involved in a case of bankruptcy, and the existence of these provisions may continue to give owners, directors and management significant cause for concern.

- Criminal proceedings relating to 'bounced' cheques will be suspended for the duration of the preventive composition or restructuring procedures.
- A debtor can raise new finance during the preventive composition or restructuring process, with court approval.

While the new Bankruptcy Law favours debtors by giving them greater flexibility and protections in the event of insolvency, it will remain to be seen how it will be implemented in practice and whether debtors make use of its provisions. Nevertheless, the introduction of an insolvency regime that offers protection and encourages restructuring to enable troubled businesses to survive what would otherwise have been a bankruptcy situation is welcome, and is a milestone development in the UAE's business law landscape.

Lastly, free zones enable 100 per cent foreign ownership. However, companies established in a particular free zone are limited to conducting their business within the designated geographic area of the free zone and thus prevented from engaging in commercial activity in the UAE outside the relevant free zone.

#### **4 How is a foreign investor or foreign investment defined in the applicable law?**

The Foreign Direct Investment Law defines a foreign investor as a physical or legal person not holding the nationality of the United Arab Emirates and investing therein in accordance with the provisions of this law.

It further defines foreign capital as all that can be valued in the currency of the United Arab Emirates or in any currency convertible as per market rates, and all that is considered equivalent to foreign capital in accordance with the provisions of this law.

A foreign direct investment project is defined to be any economic activity that takes one of the legal forms of the companies set out in the Companies Law, through which the foreign capital is directly invested in accordance with the provisions hereof, and a foreign investment company is a company carrying out the foreign direct investment project in accordance with the provisions of the Foreign Direct Investment Law.

#### **5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?**

There are no formal laws or regulations addressing FDI by SOEs or SWFs in the UAE.

#### **6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?**

There are no specific government agencies or authorities responsible for reviewing or authorising transactions on the grounds of national interest per se.

As discussed in question 3, the Ministry is the supervisory and regulatory authority responsible for implementing, monitoring and enforcing the Competition Law. In addition to the enactment of the Thresholds Regulations in 2016, the Ministry has also established a 'competition committee' (Competition Committee), which is tasked with the day to day enforcement and development of the Competition Law. This Competition Committee has been formed and is operational. To date, we understand that a few merger control filings (and decisions related thereto) have been made. Failure to seek the Ministry's approval in relation to such transaction will result in a fine of up to 5 per cent of annual turnover. Applications must be made at least 30 days prior to the proposed date of a relevant transaction taking place, after which the Ministry must respond to the request within 90 days, or 135 days if additional information had been requested as part of the approval process.

**7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?**

The various economic departments of each emirate have fairly broad discretion to accept or reject any acquisitions of entities licensed by such departments. Though national interest is not specified, a transaction may be rejected on this basis. There are, however, no regulatory rules or guidelines in this regard.

**Procedure**

**8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?**

The Competition Law requires that entities seek merger clearance from the Ministry if they are contemplating a transaction that:

- will result in the acquisition of a direct or indirect, total or partial interest or benefit in assets, equity, or obligations of another entity to which the Competition Law applies;
- will create or promote a dominant position; or
- may affect the level of competition in the relevant market.

In addition, the Competition Law prohibits entities from entering into agreements or arrangements (which should be broadly construed) the aim, object or effect of which is to restrict competition.

Various regulations enacted pursuant to the Competition Law (Cabinet Decision No. 37 of 2014, the 'Implementing Regulations' and Cabinet Decision No. 13 of 2016 and Cabinet Decision No. 22 of 2016 (the Thresholds Regulations)) set out the market share thresholds for the application of: (i) the de minimis exception (to the prohibition on restrictive agreements and abuse of dominant position); and (ii) merger control rules, as well as the criteria for identifying small and medium undertakings, which are exempted from the Competition Law. The Threshold Regulations set the market share threshold for establishing dominance at 40 per cent of the total transactions in the concerned market.

Certain entities and industry sectors are expressly exempted. These include:

- federal and local government entities, and entities owned or controlled by the federal or emirate governments;
- entities operating in telecoms, financial services, pharmaceutical production and distribution, cultural activities, oil and gas, postal services, including express delivery, electricity and water production and distribution, sewage and waste disposal, transportation and railways; and
- small and medium-sized entities (SMEs). The latter are defined in the Threshold Regulations into three sectors: trade, industry and services.

For the trade and services sectors, an undertaking will be considered an SME if it has 200 or fewer employees and annual revenues do not exceed 200 million dirhams. For industry sectors, the thresholds are 250 employees and 250 million dirhams.

Transparent thresholds are provided in respect of the banking sector, which requires approval for all proposed mergers within the banking sectors from the UAE Central Bank, and acquisition by banks of non-banking related shares exceeding 5 per cent of control. However, these thresholds do not trigger a review based on national interest, and merely represent the general requirement for approval.

**9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?**

It is possible to apply for an individual exemption from application of article 5 (banning restrictive agreements) and article 6 (prohibiting abuse of a dominant position) of the Competition Law, through notifying the relevant agreement or practice to the Ministry's Competition Committee by means of the relevant notification form. The application forms for the purpose of individual exemption applications and merger control notifications have been issued by the Ministry. The procedure for seeking an exemption is set out in the Threshold Regulations and involves a written application to the Competition Committee seeking an exemption for a transaction. The entity seeking the exemption must provide copies of its constitutive documents and financial statements

(for the past two financial years). In addition, it must submit an economic rationale for the transaction and its reasons for requesting the exemption. All documents submitted must be in Arabic, but may be accompanied by an English translation. The applicant may identify possible confidential information contained in the materials submitted to the Competition Committee, and in this case must also submit a non-confidential summary of it. Further documents and information can be requested during the proceedings by the Competition Committee. The Competition Committee can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the request. To gather additional information and insight on the possible impact of the notified concentration on the market, the Competition Committee can also hold interviews with the relevant undertakings and interested third parties in the course of the proceedings.

**10 Which party is responsible for securing approval?**

For exemptions, the relevant party seeking an exemption must apply. For other cases of notification (such as of dominant position), the interested parties are responsible for seeking and securing approval. As in the case of notifications for exemption, the Competition Committee can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the approval request.

**11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?**

Unlike other international jurisdictions with clearly regulated review processes, the UAE's informal regulatory regime does not establish specific time frames for the approval of FDI transactions. These may vary significantly, depending on the particular authority involved in granting required approvals.

A specific example of relevant time frames is the response to applications for approval from the Ministry under the Competition Law discussed previously, which will occur within 90 days (135 days if additional information is requested from the applicant). If the Minister does not issue a decision by the specified deadline, the transaction shall be deemed to be authorised.

**12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?**

Approvals must be sought and granted prior to engaging in a transaction. Heavy fines may be imposed for failure to wait for approval to be granted.

The Competition Law provides for potentially far-reaching penalties in the event of violation. These penalties include: fines of between 500,000 and 5 million dirhams for entering into restrictive agreements or abusing market dominance; and fines of 2 per cent to 5 per cent of the infringing entity's annual revenue derived from the sale of the relevant goods and services in the UAE for failure to notify a transaction that must be notified pursuant to the Competition Law. Continued violation of the provisions of the Competition Law may result in fines being doubled. The courts may also order the violating enterprise to shut down operations for a period of between three and six months. An entity violating the Competition Law also exposes itself to possible criminal sanctions.

**13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?**

There is no formal review process of FDI transactions in the UAE, and relevant policy considerations inform the general approval process, which also considers economic and cultural objectives. It is common practice to seek informal pre-approval in relation to any transaction requiring government approval. Therefore, foreign investors should contact the relevant authority informally to discuss the envisioned transaction prior to making a formal application. As a result, they will be informally notified of particular aspects of a proposed transaction that, in the reviewing authority's opinion, will pose a concern. Such

informal notification may also include information relating to national security or other concerns that could lead to the rejection of the proposed transaction.

**14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?**

In general, the starting point is the department of economic development in the applicable emirate. Depending on the proposed business activities, other industry sector authorities may need to be approached.

**15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?**

There is no legislative guidance with respect to retroactive powers in relation to the approval of foreign investments. However, the government generally enjoys broad powers in this regard and future changes to approve of FDI can occur on a policy basis under the current regulatory environment.

**Substantive assessment**

**16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?**

The Competition Committee can take into account certain criteria listed in the Implementing Regulations, including:

- the real and potential competition level in the concerned market;
- how easy it is for new establishments to enter the concerned market;
- the extent of the potential impact on the prices of relevant commodities or services;
- the extent of the existence of legal obstacles affecting the entry of new competitors;
- the probability of emergence of a dominant position in the concerned market;
- the extent of the potential impact on creation, innovation and technical competence;
- the extent of contribution in the promotion of investment or export, or the enhancement of the national establishments' ability to compete internationally; and
- the extent of the impact on the interests of consumers.

**17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?**

Although there is no regulatory clarification available in this regard, the authorities will be free to cooperate with officials in other countries at their discretion.

**18 What other parties may become involved in the review process? What rights and standing do complainants have?**

The Competition Committee can start an investigation into a possible violation of competition provisions either of its own initiative or following a complaint.

Any interested party may file a complaint with the Competition Committee by completing the relevant form (which is still to be issued). The complaint must identify, inter alia, the undertakings submitting the form and those that are alleged to have breached the Competition Law, and provide a description of the relevant conduct and of the provisions that are deemed to be violated, together with all available evidence.

Though the Competition Law is now in force and the Competition Committee active, enforcement activity is still rare. However, to the extent a complainant wishes to file a complaint against anticompetitive practices, the Competition Committee will accept and investigate the complaint.

**19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

The UAE government enjoys extensive powers to prohibit a particular transaction on a policy basis or put conditions in place with respect to a particular transaction.

Pursuant to the Competition Law, the Minister can withdraw a clearance that has already been granted if:

- the conditions and circumstances in light of which the clearance was issued in the meantime have changed;
- the company did not comply with the remedies imposed by the Minister in its decision; and
- it is determined that the information whereby the concentration was authorised was incorrect or misleading.

**20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?**

Specific shortfalls informally identified by the authorities may be rectified prior to submitting the final application for an approval. However, rectification of shortfalls subsequent to the making of a final decision by a government authority will be at the discretion of the relevant authority.

With the exception of conduct in breach of confidential provisions pursuant to article 15 of the Competition Law, the Minister may enter into a settlement with the companies that are deemed to have breached the Law, provided that:

- these companies pay a fine whose amount is no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

Settlement becomes effective following the payment of the fine by the relevant company.

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**21 Can a negative decision be challenged or appealed?**

The Implementing Regulations provide for an appeal whereby any stakeholder may submit a written petition for review to the Minister in order to reconsider the decisions issued thereby by virtue of the provisions of the Competition Law, within a period of maximum 14 days as of the date of taking note thereof, provided that the justifications are stated in such petition and supporting documents are enclosed therewith.

The Competition Committee shall study the petition and submit its recommendation to the Minister within a period of maximum 10 days as of the date of referral of the petition thereto. The Minister shall decide upon the petition by accepting or rejecting the same within 30 days as of the date of submittal thereof. If this period lapses without a decision issued by the Minister, the appeal is deemed rejected.

**22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?**

There are sophisticated laws relating to the protection of data and non-disclosure of private information. However, given the lack of transparency associated with the FDI approvals required, it is difficult to ensure absolute certainty in this regard.

With regard to applications submitted pursuant to the Competition Law, this law specifically requires the Ministry to take steps to maintain the confidentiality of sensitive information in relation to companies in the context of competition proceedings. Companies submitting documents to the Ministry will need to mark confidential information as confidential and also submit non-confidential summaries. The Competition Law also provides for a fine of between 50,000 and 200,000 dirhams in case of breach of the confidentiality obligations.

**Recent cases****23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.**

Not applicable.

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