Jurisdiction: United Arab Emirates

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws that govern mergers and acquisitions ("M&A") taking place in the United Arab Emirates ("UAE") are Federal Law No. 2 of 2015 on Commercial Companies (the "Companies Law") and Federal Law No. 4 of 2012 on the Regulation of Competition (the "Competition Law").

The Companies Law sets out restrictions on share transfers and foreign ownership, and outlines the statutory merger regime. The Competition Law, on the other hand, identifies anticompetitive practices such as abuse of a dominant position.

The Federal Laws mentioned above are further supplemented by a host of other laws, regulations and cabinet resolutions, which include the:

a. Securities and Commodities Authority ("SCA") Disclosure and Transparency Regulations 2000;

b. Regulations for Trading, Clearing, Settlement, Transfer of Ownership and Safekeeping of Securities (SCA Board of Directors' Decision No. 2 of 2001);

c. Cabinet Resolution No. 13 of 2016 Concerning Application of the Competition Law;

d. SCA Administrative Decision No. (62/RT) of 2017 Concerning the Technical Requirements for Acquisitions and Merger Rules;

e. Rules of Acquisition and Mergers of Public Shareholding Companies (Decision of the Chairman of the SCA Board of Directors No. (18/RM) of 2017); and

f. Abu Dhabi Securities Exchange ("ADX") Rules (this is only applicable to companies listed on the ADX).

In respect of companies operating in one of the many free zones in the UAE, the separate legal framework of the free zone will apply. However, in the event that that a free zone company undertakes activity outside the legal remit of the relevant free zone, then the UAE laws, rules and regulations will apply regardless of the fact that the company is based in the free zone.

Finally, it is also worth noting that federal laws will also apply to free zone companies in the event that the relevant free zone authority has not implemented its own laws on the matter.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The regulators for M&A activity are the:

a. Securities & Commodities Authority for listed entities;

b. Competition Regulation Committee of the UAE Ministry of Economy;

c. UAE Central Bank for banks and licensed financial companies; and

d. Department of Economic Development in each of the emirates.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile takeovers in the UAE are essentially rare. The 49/51 ownership restrictions imposed on foreign investors rules out the prospect of a foreign bidder being able to acquire the control of a UAE company. This 49/51 rule stipulates

that foreign investors may not own more than 49% of the share capital of a UAE company (whether public or private) (the "49/51 Rule").

In addition, many listed companies are often significantly owned and run by governmental bodies, prominent local establishments and/or well-known family offices who often hold a considerable amount of influence and control in the UAE. This influence makes the possibility of a hostile takeover very slim, if not impossible. It is however worth noting that the SCA regulates takeover offers, and will review the potential tender on its own merits and facts. Therefore, it may be possible to block a takeover or force the acquirer to increase its offer price.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

In relation to the merger control regime, the Competition Law mandates obtaining approval for a merger or acquisition, whether by means of shares or assets, which would result in a market share exceeding 40% of the relevant market. Furthermore, there is a prerequisite that the resulting economic concentration has to affect the level of competition in the relevant market, or create or enhance a dominant market position. This threshold applies to domestic and international mergers and acquisitions in the UAE.

Exemptions from the merger control regime apply to SMEs, and entities owned or controlled by the government. In addition, certain regulated sectors such as the telecommunication, oil and gas, water and electricity, pharmaceuticals, postal services, transport, and waste disposal are also exempt.

Although the main Competition Law came into force in 2013 and the implementing regulations in 2014, the thresholds were only published in 2016. As a result of the piecemeal manner in which the law has come into force, the full effects of the merger control regime are not fully understood. Certainty of the law's application and effects will only emerge as practical and relevant cases emerge.

5. What documentation is required to implement these transactions?

The preliminary and principal documents required to implement a transaction include:

a. letter of intent / heads of terms agreement;

b. offer letter;

c. corporate authorisations, including board and shareholder resolutions and relevant power of attorneys;

d. sale and purchase agreement;

e. a standard share transfer form in Arabic or English and Arabic;

f. in the case of an asset sale, separate agreements for the transfer of specific assets;

g. shareholder agreements;

h. any ancillary documents such as transitional services agreement, key employee agreements, intellectual property licences and other material documents; and

i. a disclosure letter with the bundle of disclosed documents.

6. What government charges or fees apply to these transactions?

Under the Competition Law and its implementing regulations, there is currently no fee required to be paid. However, there is a SCA fee for an approval application in respect of a merger or acquisition.

In addition, apart from the obvious fees of lawyers (including local counsel), commercial, and financial advisors, the transacting parties can expect to pay a fee in relation to the execution of documents before the UAE notary. The fee for a document such as share transfer form, which has a value less than AED 100,000, is AED 300. For a document that has a value exceeding AED 100,000, the fee payable will be 0.5% of

the stated value with a maximum fee of AED 15,000. Various other filings are also likely to incur a charge, for example where the acquiring company has sought acquisition finance and has provided a security package to the relevant banks, the various filings at the relevant authorities in respect of the secured assets are also likely to result in fees or charges. In addition, there is also a transfer fee applicable to transfer of ownership in respect of real estate assets.

The size, complexity and timeframe of the deal will impact the charges and fees that apply to the transaction in question. The transaction may also involve the appointment of various external consultants who may perform a variety of highly specialised services such as risk management review, post-acquisition integration, due-diligence and public relations services.

7. Do shareholders have consent or approval rights in connection with a deal?

Under the Companies Law, a director must act in accordance with the company's objectives and the powers granted to him or her by the shareholders of the company. Therefore, a director must ensure that he or she has obtained the necessary internal approvals before entering into any arrangement to bind the company.

It is often the case that prior shareholder approval is a prerequisite for such transactions, especially for free zones which require the shareholders' resolution to be submitted to the free zone authority.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

In respect of corporate governance requirements under the Companies Law, Article 22 stipulates that the directors of a company must "do all acts in agreement with the objective of the company and powers granted" to them by the company.

In addition, as set out under Article 14 of the SCA's Corporate Governance Code, a director of a public shareholding company listed on the securities market must avoid actual or potential conflicts of interest and may not participate in voting on the decision relating to the deal or transaction. If these duties have been breached, then under Article 162 of the Companies Law, the directors of a company will be "liable towards the company, the shareholders and the third parties for all acts of fraud, misuse of power, and violation" of the provisions of the Companies Law or the articles of association of the company or an error in management.

Under the merger control regime and in accordance with the implementing regulations of the Competition Law, the Competition Regulation Committee may seek the views of parties that may be affected by the transaction and other stakeholders. Moreover, the Committee may request information from such stakeholders or conduct a meeting to obtain their comments on the proposed transaction.

Contractual duties to third parties:

On an acquisition, a purchaser of shares faces a danger in respect of long-term contracts entered into by the relevant target company. Such contracts often include a term which entitles the third party to terminate the contract if the control of the target changes hands. These 'change of control' clauses would be a cause of concern for the purchasing entity, but the company divesting its interest should be aware that they may also have a duty to obtain such consents for the 'change of control' from the relevant third parties under existing arrangements.

Duties to employees:

There are no obligations under statute in the UAE whereby a seller needs to consult with its employees before terminating their employment contracts. However, it is advisable that the sellers take into account any relevant contractual terms and internal company policies and processes when terminating employment contracts.

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Hasan Rizvi is the Middle East Managing Partner of RIAA Barker Gillette. He specialises in corporate, commercial and private equity. Hasan's areas of practice include project finance, restructuring, corporate finance and dispute resolution. He has acted on a number of high profile transactions across the Middle East, Asia and Africa regions in diverse industries and sectors.

Hasan's corporate expertise includes working with multinational and domestic corporations, private equity firms and family business groups on their operations and management, corporate structures, mergers, acquisitions and investments. He frequently acts for fund sponsors, investors and asset management firms on fund formation, investment structuring and regulatory compliance.

Hasan has extensively worked on infrastructure and energy projects, equity and debt capital markets transactions, and corporate restructurings.

His private client expertise covers strategic advisory services to high-net-worth individuals and family groups in relation to family offices, private investments and holding structures.

Prior to establishing RIAA Barker Gillette (Middle East) LLP, Hasan was a partner in other international law firms. He has been based in the Middle East for more than 15 years.

9. In what circumstances are break-up fees payable by the target company?

Break-up fees is recognised under the SCA regulations as 'termination fees'. It is payable where the parties have agreed that the target company must pay the acquirer a specific sum when a certain event takes place and results in the suspension or failure of an offer.

The SCA regulations stipulate that the termination fees cannot exceed 2% of the value of the terminated offer, and any such arrangement should be disclosed in the offer document. In addition, the SCA's approval is required before an arrangement in respect of termination fees is entered into.

10. Can conditions be attached to an offer in connection with a deal?

Many acquisitions are carried out on a split exchange and completion basis because of the various approvals and consents required from external bodies. Naturally, the purchaser will want to ensure as a prerequisite, that certain

conditions are included as conditions precedent or subsequent to the deal. This would include the necessary waivers, approvals and consents, and a condition that that the Department of Economic Development or relevant free zone authority will approve and authorise the share transfer, and issue an amended licence reflecting the change in ownership since the target will not be permitted to operate without it.

There will also be conditions attached in respect of specific sectors that the target company operates within. In respect of a banking or financial services business for example, the approval of the UAE Central Bank is required. Other sectors that are subject to certain approval requirements include education, healthcare and telecommunications. The conditions attached to the offer would be purely dependent on the sector, and the diligent purchaser should seek to include the ones necessary for the target company.

Please also see Question 11 below.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Currently, there are no laws or regulations which require a minimum level financing from a potential bidder or purchaser. Nevertheless, the SCA requires that the acquirer include a confirmation from its financial consultants, in the announcement of the intent to make an offer, that the acquirer has the required financial resources to execute the offer. In addition, a condition may also be imposed in the sale and purchase agreement in respect of the purchaser's ability to finance the transaction in question. This will depend however on the bargaining strengths of the parties involved.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The Decision of the Chairman of the SCA Board of Directors No. 18/R.M of 2017 concerning the Rules of Acquisition and Merger of Public Shareholding Companies states that an acquirer may submit an application to the SCA for approval to enforce minority shareholders of the target company to sell their shares to the acquirer.

The acquirer will only be able to make such an application where the acquirer has acquired at least 90% of the entire shareholding plus 1(one) share. In addition, the articles of association of the target company must permit the possibility of minority shareholders being 'squeezed out'.

13. What is the waiting or notification period that must be observed before completing a business combination?

The SCA regulations set out the various time frames in respect of an acquisition, some of the primary notification periods are as follows:

a. Once the acquirer announces its intent to make an offer, it must file an application for offer with the SCA no later than 21 days from the date of delivering the intent of acquisition to the target company.

b. The SCA has 7 days from the date of filing a complete application to issue a decision approving or rejecting the application.

c. The validity term of an offer approved by the SCA is 60 days commencing from the day following which the target company has received the offer (the 'Second Closing Date'). Nevertheless, it is possible that the SCA may extend this term where required.

d. In the event that the offer completes its minimum number of acceptance applications, all conditions, requirements and approvals related to the offer should be completed no later than 21 days from the

'First/Second Closing Date' as the case may be. (First Closing Date is 28 days starting from the day following which the target company has received the offer.)

In respect of the Competition Law, an approval is required for a merger or acquisition, whether by means of shares or assets, which would result in a market share exceeding 40% of the relevant market. The application for approval has to be submitted at least 30 days prior to completing the transaction. Then the Competition Committee has 90 days to review the deal and issue a decision, although the period can be extended by an additional 45 days.

14. Are there any industry-specific rules that apply to the company being acquired?

As mentioned Question 10 above, acquisitions in a number of industries are subject to the prior approval of the relevant governmental bodies. This would depend on the relevant industry of the target company. Common industries that have their own specific set of rules and restrictions include:

a. financial services;

b. telecommunications;

c. healthcare;

d. education; and

e. the utilities sector.

15. Are cross-border transactions subject to certain special legal requirements?

As noted earlier, the 49/51 Rule has long imposed significant restrictions on foreign investors. The 49/51 Rule favours state nationals, and requires every company incorporated under the Companies Law to have not less than 51% of its share capital owned by UAE nationals. Thus, foreign investors acquiring a company are prevented from owning more than 49% of the UAE company. There are however certain ways around this rule; some of these methods include:

a. tailored constitutional documents to provide the foreign investor with more control and rights in the company; and

b. a shareholders' agreement, which can set out the rights of the shareholders and provide the foreign investor with more control over the UAE company.

Certain regulated industry sectors including real estate outside defined zones remain off-limits to foreign investment and/or require approvals which can be time consuming and often difficult to obtain.

Moreover, acquisitions taking place in specific sectors such as airlines, utility companies and banks will be subject to additional ownership restrictions and thus appropriate consents may need to be obtained from the relevant authorities.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

In respect of an asset sale, it should be noted that employees of the target company do not automatically transfer to the acquirer. If the acquirer wishes to employ the target company's employees then the target company must first terminate the employee's employment and the acquirer must then re-employ the employee.

In the case of a share sale, the employment contracts will remain unchanged.

Nonetheless, Federal Law No. 8 of 1980 on Regulation of Labour Relations is the applicable employment legislation in the UAE. The prospective acquirer should be aware of the following:

a. All employees who are not Emiratis are required to enter into an employment contract in the form required by the Federal Ministry of Labour (the "Ministry"). The contract of employment will need to be registered with the Ministry in order to obtain a labour card and residency visa for the new employee. The employment contract can be

supplemented with additional terms and conditions provided that it does not conflict with the law;

b. Contracts of employment in the UAE may be for either:
   i. a limited period (a fixed term not to exceed two years) and the employment contract must also include a notice for termination; or
   ii. an unlimited period, whereby the employer can terminate the employment under an unlimited term contract by giving 1 to 3 months' notice.

c. As there are no pension schemes for expatriates, upon the termination of the employment contract, an employee is entitled to an end-of-service gratuity. The end of service gratuity is calculated on the final basic salary taking into account the length of service of the employee;

d. Medical health insurance is now mandatory for the employer to provide to its employees; and

e. There are no social security or income tax payable on the employees' wages.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

There have been recent discussions in respect of relaxing the 49/51 Rule and to encourage foreign direct investment into the UAE. The Ministry of Economy in the UAE has indicated that that a new investment law will be introduced. However, it is still unclear how this will impact public M&A or what sectors foreign investors will be able to invest in with 100% participation.

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