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# Corporate M&A 2023

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**UAE: Law & Practice**

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Ibrahim & Partners

# UAE

## Law and Practice

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**Ibrahim & Partners** is an independent MENA-region law firm, led by managing partner Ahmed Ibrahim, and comprising a team of lawyers that are experts in advising on all aspects of UAE law. The firm advises both local and international companies on a full range of matters from contentious to non-contentious corporate, commercial and transactional work. The corporate and M&A practice group provides services to a wide range of local, regional and international companies. The UAE team has been part of large-scale M&A across the various Emirates, the region and globally; in fact, the M&A team is one of the most active in public mergers and acquisitions in the UAE, in addition to working on many private M&A. Furthermore, the firm is the preferred local counsel of many international/magic circle law firms and banks in their cross-border and local M&A transactions.

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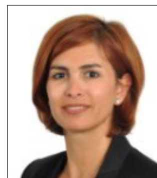

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# 1. Trends

## 1.1 M&A Market

At the beginning of the COVID-19 pandemic, M&A activity was badly affected, creating many uncertainties and challenges for investors and operators across the Middle East, including in the UAE. However, the UAE's swift actions and timely approach in implementing a cohesive COVID-19 response plan, its relatively diversified economy and flexible fiscal policy options made the UAE's path to economic recovery steady and sustainable. In fact, the past year saw a resurgence of transactions (with consolidation of existing market players in many sectors) and a record number of public listings.

## 1.2 Key Trends

### Changing Geopolitical Situation

The abrupt change in the geopolitical situation in early 2022 has led to a surprising shift towards the east. The impact of this change has also been felt in the transactional space in the UAE. Existing global market players are increasingly looking at the UAE as a place to base their new headquarters and head offices. Fuelled by this shift, dynamic deals are taking place in many sectors in the UAE, including cross-border transactions, with many deals finding support through investment by the government. Sectors such as green energy, real estate and power, in particular, have seen an increase in investment.

### New Tax and Regulations

The UAE has introduced a federal corporate tax, which will come into effect in June 2023. The implementation of corporate tax is likely to have a significant impact on potential transactions, as tax implications will now have to be factored in during an acquisition. Economic substance regulations, which came into effect in 2020 and for which there are hefty penalties for non-compliance, are also intrinsically linked with the taxability of a UAE entity and also have to be taken into consideration.

### Identification of UBO

Another important aspect which has become extremely relevant for M&A transactions is the identification of the ultimate beneficial owner (UBO). Under UAE regulations, the ultimate beneficial owner is an individual who owns or controls, whether directly or indirectly, 25% or more of the shares/voting rights of a company or has the right to appoint or dismiss the majority of its directors. UBOs have to be disclosed to the

authorities at the time of incorporation or change in shareholding or similar structuring actions. It is therefore imperative that transactions are structured in a way which permits the identification of the UBOs of the companies involved. Of course, if a public listed company is involved, the rules may differ.

**KYC Requirements**

There has also been significant impetus by the regulatory authorities to ensure satisfaction of know-your-customer (KYC) requirements, which are mandatory.

### 1.3 Key Industries

While transactional activity in the healthcare space has continued well into 2022, other industries have also shown good progress. Investments in green energy have significantly increased, in part due to the push from government authorities to focus on green energy solutions. Other sectors, like manufacturing, fintech, real estate, logistics, maritime and power, have also gained momentum. The education sector also continues to see new investment.

## 2. Overview of Regulatory Field

### 2.1 Acquiring a Company

**Acquiring a Private Company**

The most common way to acquire a private company is through a share purchase. Asset purchases exist in the UAE but are less common, owing to a lack of legal precedent and formality. In other regions there are usually corporation, income and capital gains tax considerations in structuring such transactions, but this is currently not the case in the UAE. That said, the UAE has introduced a federal corporate tax, which will come into effect in June 2023. The implementation of this corporate tax is likely to have a significant impact on potential transactions, as tax implications will now have to be factored in during an acquisition.

Furthermore, the practicality of moving assets is more complicated in the UAE owing mainly to the requirement of tripartite agreements to transfer assets (they do not automatically transfer by operation of the business of the company). A private company can also be acquired through a statutory merger, which allows the transfer of assets by operation of law. This was previously not common practice owing to the lack of precedents and the long procedural requirements in relation to creditor objections. However, this is no longer the case, and mergers have started to become more popular because of the rising demand to consolidate entities working in the same sector.

The merger of companies is clearly envisaged under the applicable law and there have been more mergers in the past few years than previously. However, these mergers have been of private and public joint-stock companies, rather than limited liability companies.

In addition, the new UAE Commercial Companies Law (Federal Law No 32 of 2021) or CCL, which came into force on 2 January 2022, introduces key changes that contemplate two new corporate vehicles, a special-purpose acquisition vehicle (SPAC) and a special-purpose vehicle (SPV). It is anticipated that SPACs will increasingly be used as vehicles to acquire or merge with another company. The CCL also recognises the concept of an SPV, which is defined as a company established for the purpose of separating the obligations and assets associated with a specific financing operation from the obligations and assets of its parent entity. An

SPV can offer a strategic structuring proposition for receiving and issuing equity investments.

There is more regulatory control of public mergers and acquisitions, as explained below.

**Public Mergers**

Two companies that are merging will be required to get the appropriate board approval and call a general assembly to approve the merger. This will involve formal valuations of both companies. The relevant regulatory approvals will also be required. For public companies, these are acquired from industry-specific regulators, the Securities and Commodities Authority (SCA) and the Department of Economic Development (DED), usually by completing applications and submitting documentation.

An application will need to be submitted to the SCA, and a merger certificate obtained from the SCA approving the merger, before said merger can be completed. The SCA has 20 business days from the date of submission to issue a decision approving or denying the application. Practically, initial approval will be sought from the SCA, the DED and the relevant industry-specific regulator to ensure that they approve the merger in principle, before a formal and final application is made.

The DED will also need to give final approval and implement the merger, including the de-registration of the merging entity. There will also likely be industry-specific requirements that will need to be complied with before completion can occur.

Shareholders holding not less than 20% of the capital of the companies seeking to merge will have the right to oppose the merger and challenge the merger before the court within 30 days of the date of approval of the merger by the general assembly.

A notice confirming the intention to merge within ten business days from the date of approval of the merger by the general assembly will be sent in writing to all creditors and published in two daily newspapers (one in Arabic). Creditors and other concerned parties will then have a 30-day period to object to the merger.

**Public Acquisitions**

With the exception of over-the-counter transactions, the following applies to acquisitions in general.

The parties must perform the necessary due diligence to ensure the acquisition achieves their interests (this is limited to public information and information that will not have an impact on share price-sensitive information). The acquirer will deliver its intent to acquire the target company in writing and, if there is no requirement to declare before it is announced, the acquirer will announce the intention to offer on the relevant stock exchange market.

The acquirer is obliged to obtain the consent of the DED and any industry-specific regulator prior to applying to the SCA for approval of the offer, which it must submit no later than 21 days from the date of announcing its intent to acquire. If the acquirer fails to make the offer in this time, it will be prohibited from making any other offer to the target company for six months.

The SCA has seven days to either approve or reject the offer. If it is rejected, the acquirer has 14 days to appeal the decision. If approved, the acquirer will notify the relevant stock exchange market and the target company and publish a notice of the same. The shareholders will be noti-

fied by the board of directors of the target company within 14 days of the offer being received.

The offer will be valid for up to 60 days or as the SCA determines. The offer must satisfy its conditions and minimum acceptance restrictions, either within 28 days or as extended up to 60 days. Once satisfied, the offer should be completed no later than 21 days from the first or second closing date (as applicable). The acquirer will then have three days to settle the payment.

## 2.2 Primary Regulators

There are a few main regulatory bodies to consider for the UAE mainland (not covering the many free zones that form part of the UAE):

- the Department of Economic Development (DED) in each of the emirates, for all types of companies;
- the Ministry of Economy for private joint-stock companies;
- the Securities and Commodities Authority (SCA) for listed joint-stock companies;
- the relevant stock exchange market (in this case, Abu Dhabi Securities Exchange or Dubai Financial Market – the "Market") for any listed joint-stock companies;
- the Competition Regulation Committee (CRC) of the UAE Ministry of Economy;
- UAE Central Bank (CB) for banks and licensed financial companies; and
- the notary public for all types of companies, as notarisation is required for the completion of most M&A transactions.

The vast majority of onshore companies – that is, companies registered in the UAE outside the free zones – are regulated by the CCL, which came into force on 2 January 2022. Part 7 of the CCL sets out the rules for the transformation and merger and acquisition of companies. Yet some onshore companies, such as companies wholly owned by UAE federal or local governments, follow regulations that may differ from the CCL.

In addition to the CCL, private joint-stock companies (PrJSCs) are also regulated by additional ministerial decrees, namely Decree No 539 of 2017 (as amended). The decree has specific provisions that govern the acquisition of shares in PrJSCs.

Companies registered in a free zone are not necessarily governed by the CCL. Where corporate regulations have been issued for a free zone, the CCL applies only where a matter is not covered in the free zone corporate regulations. Certain free zone authorities (ie, those of the Dubai International Financial Centre and the Abu Dhabi Global Market) have been provided with comprehensive regulatory powers with an explicit exemption from the CCL.

Other free zone authorities have less legislative authority; however, while the scope may vary, corporate regulations exist for all free zones. Aside from corporate legislation, in the CCL, the Civil Code and the Commercial Code, sector-specific rules may also impact M&A activity in certain industries.

## 2.3 Restrictions on Foreign Investments

The amendments to the CCL now permit 100% foreign ownership of certain onshore companies.

The change follows the publication of amendments to the CCL on 30 September 2020, which generally removed the requirement for a UAE national to own at least 51% of the shares in the capital of a UAE company. The amendments also removed the requirement for branches of foreign companies in the UAE to appoint a UAE national agent, for most activities.

In certain emirates, the DEDs have now issued their lists of approved activities and requirements for foreign shareholders. The Abu Dhabi DED has issued a list of more than 1,100 activities, and the Dubai DED has listed more than 1,000 activities but is open to allowing 100% foreign ownership in activities which are not set out in these lists. Subject to certain other approvals, the CCL also grants discretion to the relevant DED in each emirate to permit 100% foreign ownership in other types of activities. Applications of this nature are considered on a case-by-case basis.

Wholly foreign-owned companies will not be subject to higher fees or have greater guarantee or share capital requirements than would be the case for a UAE-owned or part-owned company.

However, in practice, some emirates have not fully implemented this change. Government and sector-specific authorities in some emirates are still in the process of: (i) either implementing this change; or (ii) issuing regulations to make this change effective. This sometimes creates practical difficulties in implementing a transaction with 100% foreign ownership, despite this being statutorily permissible.

These changes to foreign ownership rules are applicable equally to both new and existing companies.

## 2.4 Antitrust Regulations

The laws and regulations governing antitrust and competition in the UAE are:

- Federal Law No 4 of 2012 on the Regulation of Competition (the "UAE Competition Law"), which aims – according to Article (2) of the law – to protect and promote competition and anti-monopoly practices through:
  (a) providing a stimulating environment for organisations to enhance efficiency, competitiveness and consumer interest, and achieve sustainable development in the UAE; and
  (b) maintaining a competitive market governed by market mechanisms, by prohibiting restrictive agreements, the acts and practices that lead to the abuse of the dominant position, controlling economic concentration operations, as well as avoiding anything that would endanger, limit or prevent competition; and
  (c) the UAE Council of Ministers' Resolution No 37 of 2014 concerning the Implementing Regulations of the UAE Competition Law (the "Implementing Regulations"), which set out the procedures related to applying for exemptions to the Competition Regulation Committee, as well as approvals and examination of complaints.

In addition, Cabinet Resolution No 13/2016, in respect of the market share threshold, and Cabinet Resolution No 22/2016, in respect of small and medium enterprises, provide sufficient key information to enable the compliance and enforcement of the provisions of the UAE Competition Law and the Implementing Regulations.

This provides guidelines when major commercial transactions, such as large M&A, occur and it includes a set of merger control regulations. Any transaction that creates an "economic concentration" with industry share of at least 40% in the relevant industry in the UAE must be notified to the CRC of the UAE Ministry of Economy. This requirement applies to domestic M&A transactions as well as any international M&A transactions creating a notifiable (greater than 40%) economic concentration in the UAE. The concerned parties must make an application

for approval no later than 30 days prior to completing the relevant transaction. The CRC then has 90 days (extendable by a further 45 days) to review the transaction and issue a resolution approving or rejecting the transaction in question.

### 2.5 Labour Law Regulations

The laws and regulations governing labour fall under the newly introduced Federal Labour Law No 33 of 2021 (the "New Law"), which repeals Federal Labour Law No 8 of 1980. The executive regulations of the New Law were issued pursuant to Cabinet Resolution No 1 of 2022, and came into effect on 2 February 2022. The New Law sets out the following:

- classifications and establishments of workers;
- work models, remote and job sharing;
- work permits;
- freelance work;
- recruitment and scouting agencies;
- employment contracts;
- non-compete clauses;
- internal regulations;
- working hours; and
- annual leave.

The employment aspect is a crucial section to be taken into consideration when acquiring any company in the UAE.

It is also worth noting that only within the context of a share transaction or a merger would employees automatically transfer by virtue of the transaction. In the case of an asset transfer, employees would technically need to have their contracts terminated and be re-hired by the acquiring entity. Their rights and obligations are in practice regulated by virtue of a contractual arrangement.

### 2.6 National Security Review

There are no specific requirements within the context of an M&A transaction for managers/directors to go through security clearance to be appointed. However, as a general rule, the authorities can intervene on account of any violation of public policy or any threat to national security.

## 3. Recent Legal Developments

### 3.1 Significant Court Decisions or Legal Developments

Recently, a Dubai Court of Cassation set a unique precedent regarding the first mandatory tender offer and squeeze-out in relation to one of the leading public joint-stock real estate developers in the UAE. As background, an acquirer who acquires 90% plus 1% or more of the total share capital of a publicly listed company may apply to the SCA for approval to force the remaining minority shareholders to sell or swap their shares to the acquirer within 60 days of the date of the final settlement of the primary offer. The minority shareholders can object and take the matter to court; however, the mandatory acquisition will not be suspended save by court order.

The articles of association of the publicly listed company must permit the mandatory acquisition for it to be valid.

In the present case, the real estate publicly listed company had amended its articles through a general assembly resolution to include provisions related to a mandatory offer. While the offeror made its mandatory offer in line with the applicable rules and regulations, a shareholder holding less than 5% of the share capital of the public company objected to the general assembly resolution approving the amendment to the

articles. The grounds of the shareholder's objections included that:

- the resolution failed to comply with applicable procedural requirements (which were in fact applicable to a board resolution);
- the mandatory acquisition value represented an unfair offer to the shareholders; and
- mandatory acquisition was only issued in favour of the majority shareholders.

The court rejected the arguments of the minority shareholder, noting that:

- the minority shareholder did not qualify to challenge the resolution on account of not holding at least 5% of the shareholding; and
- any objection to a general assembly resolution has be carried out in accordance with the prescribed procedural rules, including requesting the authority to stop the execution of the general assembly resolution within three days of the passing of the resolution, and whether the procedure for objecting to a board resolution had been followed or not was not relevant in this case since the subject matter was a general assembly resolution.

The Dubai court's decision is a significant judgment regarding the difference between challenging a shareholder's resolution (that allows for a mandatory acquisition and squeeze-out of minority shareholders) and a board resolution.

On the other hand, there have also been some significant legal developments in 2022. Most importantly, the UAE has introduced a federal corporate tax, which will come into effect in the UAE in June 2023. The implementation of corporate tax is likely to have a significant impact on potential transactions, as tax implications would now have to be factored in during an acquisition.

Economic substance regulations, which came into effect in 2020 and have hefty penalties for non-compliance, are also intrinsically linked with the taxability of a UAE entity and will also have to be taken into consideration.

Agency laws in the UAE have also recently been overhauled, which may have an impact on entities proposing to undertake commercial agencies. Under the new law, international companies are now permitted to act as an agent, subject to obtaining the necessary permissions from the competent authorities and complying with certain conditions, including not having a registered agency for their products or services in the UAE. Permission for international companies to undertake agency activities is a noteworthy change, in particular since, historically, only UAE nationals could act as an agent (subject to certain specified exemptions).

### 3.2 Significant Changes to Takeover Law

The takeover rules have always been part of the CCL, however in 2020 and 2021, the concept of "squeeze" was given legislative standing. In practice, there have been no mandatory tender offers in the UAE, except for very recently, when a few squeeze-out transactions were carried out successfully by two real estate listed public joint-stock companies. It is expected that these precedents, together with the explicit reference in the CCL, will see the market implementing more of these takeover/squeeze-out mechanisms.

## 4. Stakebuilding

### 4.1 Principal Stakebuilding Strategies

We have seen bidders build up stakes in the target prior to launching an offer, however, this is not necessarily very common and is not necessarily a prerequisite to launching a mandatory

tender offer, which is triggered at 30%. Although recent developments in the market have seen an increase in takeovers, which may encourage this type of practice, to date there are no principal stake-building strategies per se.

## 4.2 Material Shareholding Disclosure Threshold

In private M&A transactions there are no material disclosure thresholds or filing obligations, only procedural approvals and beneficial ownership filings in the case of a change in 25% or more of the ultimate beneficial ownership. However, for publicly listed companies, strict disclosures and filings are required, as set out below.

### Mergers

*SCA*

Owing to the disclosure obligations on publicly listed companies, the SCA will be aware of potential transactions (whether a stay has been requested or not). However, a formal application to the SCA will be required that includes details of the merger as well as a copy of the merger contract; the proposed articles of the merged company; financial statements for the two preceding financial years; the initial approvals from the DED in each of the emirates and from any industry-specific regulator; an action plan and approach report for the merger; the audited financial position of the merging companies (which reflects the financial position no later than three months from the date of submitting the application); valuation from the company or their financial advisers; the valuation report of the merging companies; an auditor's report; the resolutions of the board of directors approving the merger; the shareholder circular; and special resolutions.

*Industry-specific regulator*

Initial approval is often sought from any industry-specific regulators early in the negotiations, to incorporate any comments or requirements that such regulator may have, and so that when applications for final approval are made, the regulator has already agreed to the transaction in principle and provided its feedback.

*DED*

As with the industry-specific regulator, initial approval is commonly sought from the DED to approve the transaction in principle. The DED will carry out the implementation of certain parts of the merger, including amending and cancelling the commercial licences of the relevant merging company; amending and updating the memorandum and articles of association; deregistration of the "merging" company; and a capital increase of the "surviving" company.

*Market*

Where the publicly listed company has been approved a stay, it will only be required to disclose to the Market (as a whole) once the merger contract is signed.

### Acquisitions

*Exempt acquisitions*

All acquisitions of shares listed on the Market must be carried out on the market trading system through one of the Market's registered brokers, unless it is an over-the-counter (OTC) acquisition or one of the following exempt transactions:

- a transfer of ownership between spouses and relatives to the second degree;
- a transfer of ownership taking place as a result of inheritance, wills or gifts made to official charitable bodies in the state without consideration;

- a transfer of ownership taking place pursuant to court orders;
- a transfer of ownership taking place pursuant to an amicable settlement with a financial institution;
- a transfer of ownership taking place between persons whose names appear on one single certificate of ownership;
- the sale of securities by public auction; or
- a transfer of ownership requested through a bank, finance company or mutual fund licensed to complete the financing operations in securities (the Market will set the necessary controls for this purpose with the SCA's approval).

*Acquiring less than 5% of a publicly listed company*

In this case, there are no specific notification or disclosure obligations to the SCA, DED or the Market. There are often no share transfer agreements on transactions of this size. Whether acquiring 5% or more of a publicly listed company or 10% or more of a parent, subsidiary, sister or affiliate of a publicly listed company, there are no prior notification or disclosure obligations to the SCA, DED or the Market. However, the acquirer is required to provide an immediate post-notification of the acquisition to the Market (as a whole). Furthermore, the industry-specific regulators may have their own rules and regulations in this regard, for example, where a bank is acquiring 5% or more of shares in a publicly listed company, it will require the prior approval of the CB. This process is repeated for each additional 1% of shares in such publicly listed company purchased by the acquirer.

*Acquiring 30% or more of a publicly listed company*

The SCA: the acquirer will be required to apply to the SCA and obtain prior approval for the acquisition. The acquirer will need to provide the details of the acquisition including the share price, number of shares, acquirer's details and whether the acquisition is being transacted on an OTC basis.

Industry-specific regulator: it is likely that the approval of any industry-specific regulator will be required prior to obtaining approval from the SCA. For example, an acquirer purchasing shares in a bank will need approval from the CB before it can obtain approval from the SCA.

The DED: there are no specific notification or disclosure obligations to the DED.

The Market: where the acquirer has been approved a stay, it will be required to disclose to the Market (as a whole) immediately upon execution of the purchase order.

*OTC acquisitions*

Certain transactions can be carried out on an OTC basis, meaning that they are executed outside of the market trading system.

The Market: the seller and the acquirer will need to submit a formal request to the chair of the Market containing the details of the transaction (including the agreed price) and containing a signed undertaking to the Market. OTC acquisitions must exceed a certain financial threshold (eg, under the Dubai Financial Market, the aggregate price of the shares being acquired through a block deal must be at least AED10 million and such price must be equal to the last traded price or equal to the previous closing price if no trade occurred on the security).

### Mandatory Tender Offer (MTO)

A mandatory tender offer is triggered where an acquirer acquires, or where an acquisition will

result in such acquirer holding, 30% plus 1% or more of a publicly listed company. The acquirer is obliged to immediately stop increasing its ownership ratio, notify the SCA of its ownership ratio and whether there is any intention to make an MTO; if not, the acquirer's ownership ratio must be reduced to 30% or less within three months of notification to the SCA.

Where the acquirer wishes to make an MTO, it will be completed if such offer results in the acquirer holding at least 50% plus 1% or more shares in the capital of the publicly listed company. If this threshold is not reached, the offer will be cancelled and the acquirer's share ratio must be reduced to 30% or less.

The SCA can make exceptions to this rule including, among others, government-owned companies, distressed companies and securities acquired through inheritance.

Any transaction that creates an "economic concentration", with an industry share of at least 40% in the relevant industry in the UAE, must be notified to the Competition Regulation Committee (CRC) of the UAE Ministry of Economy. This requirement applies to domestic M&A transactions as well as any international M&A transactions creating a notifiable (greater than 40%) economic concentration in the UAE. The concerned parties must make an application for approval no later than 30 days prior to completing the relevant transaction. The CRC then has 90 days (extendable by a further 45 days) to review the transaction and issue a resolution approving or rejecting the transaction in question.

### 4.3 Hurdles to Stakebuilding

A publicly listed company cannot make any changes to the mandatory reporting thresholds set out under applicable laws and regulations. Any changes to the articles of incorporation will not be accepted by the notary and if the notary accepts them for any reason, they will be deemed void and the applicable law will take precedence.

### 4.4 Dealings in Derivatives

Dealings in derivatives are expressly set out under SCA regulation number 22/RM of 2018 regulating derivative contracts. Therefore, in principle, derivatives are allowed and recognised in the UAE.

### 4.5 Filing/Reporting Obligations

If derivatives are regulated, they are listed and traded on the relevant financial market where disclosure and other requisites of such markets would apply.

### 4.6 Transparency

When it comes to private M&A transactions, there are no requirements in relation to transparency, however, shareholders must be treated equally, and statutory pre-emption rights apply in the event of any transfer of shares. The rules applicable to any share transfer are expressly set out under the CCL and any acquirer must obtain an explicit or implicit waiver from existing shareholders. In relation to public M&A, there are strict disclosure requirements depending on the level of ownership. Such disclosure can be a pre/post-notification to the authorities and the Market. The company may request a stay on the requirement to notify the Market until the transaction is binding. The authorities are entitled to grant or reject such stay at their discretion. However, the authorities generally do grant stays and extend the duration of a stay depending on the stage of each transaction.

## 5. Negotiation Phase

### 5.1 Requirement to Disclose a Deal

For private M&A transactions, there is no obligation to disclose a deal. However, where there is a potential merger or acquisition taking place, the publicly listed companies and acquirer involved will usually apply for consent to stay the obligation to disclose in relation to such negotiations until such time as a binding contract is signed. Such application must be made by the publicly listed companies involved in the merger, or the publicly listed company and the acquirer in the case of an acquisition.

A request for a stay will usually include a list of names that are prohibited from trading certain shares (the "Insiders' List"). This will usually include the board of directors, management, advisers, relatives and connected persons of the relevant companies (and acquirer). The Insiders' List will be prohibited from trading in shares of the publicly listed company in question and any parent, subsidiary, sister or affiliate company for certain periods (known as "black-out" periods).

### 5.2 Market Practice on Timing

Market practice on the timing of disclosure cannot differ from legal requirements which are mandatory, and any deviation can expose the relevant party to penalties, etc. The UAE regulator is very active in imposing penalties and suspending trading if disclosure requirements are not constantly and consistently followed. This does not, of course, apply to private companies.

### 5.3 Scope of Due Diligence

In an attempt to reduce costs, more red-flag due diligence is being carried out, as opposed to narrative and comprehensive reports being issued for such purpose.

Specific consideration is given to matters such as:

- anti-fronting laws and foreign ownership restrictions;
- real estate ownership restrictions and hidden costs;
- change-of-control provisions in material agreements; and
- employee gratuities and pension schemes.

It has become customary for the seller to organise a virtual data room (VDR) onto which documentation of a legal and financial nature is uploaded. The use of VDRs makes the process much more efficient, particularly if the VDR service provider is a sophisticated one.

Generally, sellers are also more open to adopting a full-disclosure approach, after having the comfort of executing non-disclosure agreements with potential buyers. However, it is not very common to produce vendor due diligence reports except in large-scale deals, owing to the cost involved.

Very little information on private companies incorporated in the UAE is publicly available. In particular, a private company's articles of association and licences do not form part of any publicly available record in the UAE (only certain information is sometimes available). Conducting effective due diligence on the target is, therefore, not possible without the co-operation of the target and its management and shareholders. It is possible to carry out a limited search for a company online and in person at the local chamber of commerce in Dubai and Abu Dhabi. Practices differ between emirates, but a business report providing a brief company profile will generally be available.

In addition to reviewing information provided by the seller, legal review will involve conducting appropriate searches and investigations at public registries and authorities; however, this requires the co-operation of the seller and target company.

As with private M&A transactions, in public M&A transactions there will be a due diligence survey. However, the due diligence will usually be limited to publicly available information and information that is not share-price sensitive, to ensure that the relevant market is not affected.

### 5.4 Standstills or Exclusivity

Terms of business and memoranda of understanding are usually executed before starting work on any M&A transaction. These generally include exclusivity and confidentiality provisions and other non-binding commercial terms. In some transactions, these documents are sometimes also binding in relation to provisions such as price, subject to completion of due diligence.

### 5.5 Definitive Agreements

The following documents are commonly executed at the signing of a private company share purchase:

- a long-form share purchase agreement (SPA) or merger contract/shareholders' circular, as the case may be;
- a disclosure letter (making disclosures against the seller's warranties in the SPA);
- board resolutions of the buyer and the seller approving the transaction;
- powers of attorney authorising the signatories; and
- a shareholders' agreement (where there will be more than one shareholder following closing).

The following are commonly executed at the closing of a private company share purchase:

- updated disclosure letter (where it has been agreed that the seller's warranties will be repeated at closing);
- any required releases of security over shares in the target;
- resignation letters from the directors;
- the documentation required for the appointment of new directors; and
- a share transfer instrument and amended memorandum or articles of association.

Where the target company is a limited liability company or a private joint-stock company, the implementation of the share transfer will follow the UAE procedural requirements, regardless of the law chosen to govern the deal documentation.

The SPA will contain provisions that deal with the order of events, including details of how the purchase price will move from buyer to seller, as the share transfer onshore can take up to one week to complete. The negotiating power of the parties will determine how this is done. An escrow agent will often be appointed to hold the purchase price pending the transfer of title to the shares.

As with private M&A transactions, there will be the usual suite of documents, including an SPA or merger contract. However, these will usually have limited indemnities, representations and warranties compared with those considered standard in private M&A transactions.

Publicly listed companies will also have disclosure requirements for their relevant market, along with general assembly notices and shareholder circulars to approve the transaction. The

transaction agreements are usually governed by UAE law, given that publicly listed companies are subject to strict rules and regulations under UAE law. To avoid contradiction and ambiguity in the legal interpretation of the contracts, UAE law is the prudent choice.

## 6. Structuring

### 6.1 Length of Process for Acquisition/ Sale

The process of acquiring/selling a business is usually mandated by the commercial side of the transaction. Some transactions close in a few months or even less, while others can take up to a year or more to close, depending also on the size of the target.

#### Private Acquisition

From a procedural perspective for a private acquisition, closing will require notarisation and regulatory approvals that would generally take no more than a few weeks to one month, depending on the industry. The UAE has been very efficient in moving towards electronic submissions that require some handling at this stage, but which will in the long run make transfers more efficient and less time consuming.

#### Public Acquisition

From a public acquisition perspective, closing that does not involve a mandatory tender offer should not take more than a few weeks to one month, as with private acquisitions. However, in the case of an MTO process, closing would take no less than three months.

### 6.2 Mandatory Offer Threshold

An MTO is triggered where an acquirer acquires, or where an acquisition results in such acquirer holding, 30% plus 1% or more of a publicly listed company. The acquirer is obliged to immediately stop increasing its ownership ratio and notify the SCA of its ownership ratio and whether there is any intention to make an MTO; if not, the acquirer's ownership ratio must be reduced to 30% or less within three months of notification to the SCA.

### 6.3 Consideration

In the majority of transactions, the consideration is cash, which can be paid in a variety of ways, such as:

- a lump-sum payment at completion;
- by instalments post completion; and
- with parts of the consideration deferred or retained for payment at a later date.

However, share swaps are also very common in the UAE.

No pricing practice is customary, and this mainly depends on the structure of the transaction. There has also been a noticeable increase in the use of the locked-box approach to consideration, particularly where a private equity player is selling or buying. However, there has been an increase in the use of purchase price adjustment mechanisms by buyers and sellers in determining the consideration to be paid. Where the purchase price is subject to adjustment, this is most commonly based on completion accounts (earn-out mechanisms being relatively rare, although they do exist in certain types of management buyouts).

### 6.4 Common Conditions for a Takeover Offer

Generally, a takeover offer is subject to the following corporate/regulatory conditions:

- receipt of all required government, corporate, regulatory and statutory approvals, exemptions and/or waivers in connection with the transaction, including receipt of the final written approval(s) of the SCA in relation to the transaction;
- provision to the target of all the information required or requested by the SCA in relation to the transaction;
- dispatch of the offeree circular to the shareholders (and no subsequent revocation of or change to the recommendation by the board of directors to the shareholders to accept the offer and vote in favour of the relevant resolutions at the general meeting);
- issuance of the certificate by the SCA evidencing its approval of the share capital increase, if required for the issuance of a new licence under the offer structure;
- the shareholders' passing of the requisite resolutions in relation to the offer at the general assembly;
- issuance of the certificate by the SCA evidencing its approval of the share capital increase, if so required under the offer structure;
- no material breach of certain undertakings or warranties given by the target having occurred; and
- no material adverse effect having occurred.

## 6.5 Minimum Acceptance Conditions

Where the acquirer wishes to make an MTO, it will be completed if such offer results in the acquirer holding at least 50% plus 1% or more shares in the capital of the publicly listed company. If this threshold is not reached, the offer is cancelled and the acquirer's share ratio must be reduced to 30% or less.

The SCA can make exceptions to this rule, including for government-owned companies, distressed companies and securities acquired through inheritance.

## 6.6 Requirement to Obtain Financing

In M&A transactions in the UAE it is possible for the acquisition to be subject to obtaining the necessary finance. The amount of equity that would be required from the bidder, as opposed to the value of the acquisition finance, usually depends on the lender. A minimum of 30% of the acquisition value is usually required to be in place for lenders to finance acquisitions.

## 6.7 Types of Deal Security Measures

Material adverse change clauses ("MAC clauses") are often used in M&A transactions to give the acquirer the right to walk away from a deal in the event of a material adverse change occurring between the signing and the closing of the transaction. Acquirers have become more focused on MAC clauses as a result of COVID-19. There has also been a reduction in break-up fees in view of the uncertainty created by COVID-19. In relation to non-solicitation, this of course remains a very important requirement that attempts to provide some certainty to the parties.

## 6.8 Additional Governance Rights

In private M&A transactions, shareholders can seek to control the company through the board. However, this becomes a less likely option for public transactions, as board members are appointed by cumulative vote.

## 6.9 Voting by Proxy

Voting by proxy is standard in the UAE, and is permitted and regulated under applicable laws and regulations.

## 6.10 Squeeze-Out Mechanisms

Minority squeeze-outs are referred to as "mandatory acquisitions" under the SCA M&A Rules,

which only apply to joint-stock companies that are listed. An acquirer who acquires, or as a result of an acquisition will hold, 90% plus 1% or more of the total share capital of a publicly listed company may apply to the SCA for approval to force the remaining minority shareholders to sell or swap their shares to the acquirer within 60 days of the date of the final settlement of the primary offer (the "Offer Period"). The minority shareholders can object and take the matter to court; however, the mandatory acquisition will not be suspended save by court order. If there is no objection or no court order to suspend the mandatory acquisition, it will be completed seven days after the Offer Period.

The articles of association of the publicly listed company must permit the mandatory acquisition for it to be valid.

The minority shareholders have the equivalent right to tag along with an acquirer who acquires, or as a result of an acquisition will hold, 90% plus 1% or more of the total share capital of a publicly listed company – any holders with at least 3% of the total share capital of a publicly listed company may submit an offer to the acquirer to purchase the minority shares. The acquirer must respond within 60 days and can approve or reject the offer. If the offer is rejected or the acquirer does not respond, the minority shareholders can ask the SCA to force the acquirer to make an offer. If the SCA agrees, the acquirer will be required to make an offer within 60 days of being notified of the SCA's agreement.

### 6.11 Irrevocable Commitments

Irrevocable commitments have occurred in the past, however, clients are not generally advised to enter into such commitments, as they could be viewed as a violation of the law when it comes to public M&A.

## 7. Disclosure

### 7.1 Making a Bid Public

When it comes to private M&A transactions, there are no requirements in relation to making any bid public. However, shareholders are treated equally, and statutory pre-emption rights apply in the event of any transfer of shares.

In relation to public M&As, there are strict disclosure requirements depending on the level of ownership. Such disclosures can be a pre/post-notification to the authorities and the market, otherwise, the company may ask for a stay on the requirement to notify the market until the transaction is binding. The authorities are entitled to grant or reject such stay at their discretion. However, the authorities generally do grant stays and extend the duration of a stay depending on the stage of each transaction.

### 7.2 Type of Disclosure Required

For private companies, corporate and regulatory approvals are required to issue shares; however, there are no disclosure requirements. For listed companies, any issuance of shares is referred to as a rights issue and follows a mandatory process that includes approvals and disclosures to the regulator and the market.

### 7.3 Producing Financial Statements

Bidders do not need to produce financial statements; however, the target company may be required to do so. Generally, financial statements need to be prepared in accordance with the IFRS.

### 7.4 Transaction Documents

The only transaction documents that are disclosed in full are the shareholder circulars, which mainly include all the terms of the relevant transaction. For example, the merger agreement itself

is not required to be disclosed, but most of its provisions are already set out in the shareholders' circular.

## 8. Duties of Directors

### 8.1 Principal Directors' Duties

The directors' duties are to act within the company's best interests, exercising independent judgement to promote the success of the company. In doing so, directors must always avoid conflicts of interest. The duties of the directors in an LLC are owed to the company, the shareholders and any interested third parties. In public joint-stock companies, it is the same position, however, the SCA extends the directors' duties to all stakeholders, including creditors.

### 8.2 Special or Ad Hoc Committees

In public M&A transactions, special and ad hoc committees are often established to address a specific issue. For example, a merger committee is established to oversee the merger process. These committees are not used in practice to resolve any conflict-of-interest issues. Board members that are conflicted must declare such conflict and abstain from voting.

### 8.3 Business Judgement Rule

Although there are apparently no precedents, a recommendation of the board is generally required to be made to the shareholder to either recommend the offer or vote against it. If the offer is challenged before the courts, judges and court experts would likely take into consideration the recommendation of the board of directors.

### 8.4 Independent Outside Advice

Independent advice is generally provided by appointing counsel to carry out the following: a legal and financial due diligence on the target, an independent valuation issued by an independent valuer (not the auditor of the company) and a fairness opinion to be issued by an appointed financial adviser.

### 8.5 Conflicts of Interest

Numerous clients have been assisted in relation to conflict-of-interest issues regarding resolutions passed by the general assembly related to takeovers.

## 9. Defensive Measures

### 9.1 Hostile Tender Offers

Other than a competing offer, there are no hostile takeovers in the UAE.

A competing offer can be announced but may not be submitted any later than 53 days after receipt of the primary offer. The competing offer must be on better terms for the shareholders than the primary offer. The offeror must seek approval from the SCA before submitting the competing offer. The SCA may approve the offer where it contains material amendments in favour of the shareholders (including, but not limited to, price) or where the target company has recommended the offer (subject to the directors not being related to such competing offeror).

### 9.2 Directors' Use of Defensive Measures

A dissenting board member has the right to record their objection in the minutes of the board meeting on matters they do not recommend, and such record will clear them of any liability with regard to such decision.

### 9.3 Common Defensive Measures

A dissenting board member has the right to record their objection in the minutes of the board

meeting on matters they do not recommend, and such record will clear them of any liability with regard to such decision.

### 9.4 Directors' Duties

See **9.2 Directors' Use of Defensive Measures**.

### 9.5 Directors' Ability to "Just Say No"

Directors are entitled to say no and record such action in the minutes, however, they do not have the ability to prevent a transaction from taking place.

## 10. Litigation

### 10.1 Frequency of Litigation

In private M&A transactions, litigation is not common, however, it is relatively common when it comes to public M&A transactions.

### 10.2 Stage of Deal

Litigation is usually brought in a public M&A transaction before the completion of the takeover, squeeze-out or merger.

### 10.3 "Broken-Deal" Disputes

Transactions should be accompanied by valuations (independent valuer) and issuance of a fairness opinion by the investment bank advising on the transaction, and the offering should be at a premium to the valuation in terms of share price to avoid liability. Acquirers should not sit on the board of the target and if they do, they should resign prior to any decisions being taken in relation to the transaction.

## 11. Activism

### 11.1 Shareholder Activism

Shareholder activism depends on the shareholding structure of the company. If a company is dominated by the ownership of one shareholder holding more than 50%, then shareholder activism will have less weight than it will have in companies where the shareholding is scattered, and where decision-making can be affected by such activism.

### 11.2 Aims of Activists

Activists might encourage companies to enter into M&A transactions if they are at a premium in comparison to the market price. However, activists have had less influence since the pandemic due to the fact that general assembly meetings have been carried out virtually.

### 11.3 Interference With Completion

Activist shareholders in the UAE have previously threatened to bring claims against the directors of a company and/or the acquirer, and some have actually filed claims.

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