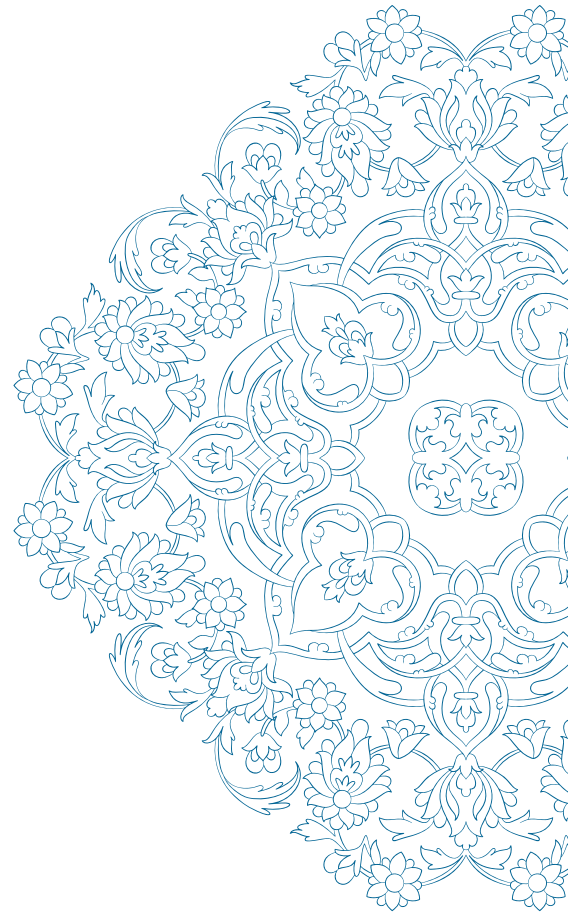


The UAE has introduced a new Commercial Companies Law (UAE Federal Law No. 2 of 2015) (the **New CCL**), which replaces the previous Commercial Companies Law (UAE Federal Law No. 8 of 1984, as amended) (the **previous CCL**). The New CCL will come into force on 1 July 2015.

In this briefing note, we comment on the key provisions of the New CCL and compare and contrast them with the regime in the previous CCL.

This note is based on the Arabic version of the New CCL, as published in the March 2015 edition of the Official Gazette.



Exempt companies

Cabinet and Federal Law exemptions: the New CCL, like the previous CCL, sets out a list of instances where companies may be exempt from its application. These include: (i) where a Cabinet Resolution has been issued (this approach was adopted in the recent Emaar Malls Group IPO and the Dubai Parks and Resorts IPO, where the listed companies secured exemptions from specific provisions of the previous CCL by way of a Cabinet Resolution); and (ii) where other Federal Laws specifically exempt companies from the application of the Companies Law (e.g. the Federal Telecommunications Law, which allows telecoms companies to elect to be exempt from the Companies Law). [*Articles 4 (1)(a) and 4(1)(e)*]

Sector specific exemptions: the New CCL retains the exemption afforded to companies operating in the fields of oil, power generation, gas production and water desalination and expands its application to companies operating in the energy sector. However, this sector exemption is narrower than what was provided for under the previous CCL as it requires at least 25% of a company's share capital to be held directly or indirectly by the Federal or an Emirate Government. [*Article 4 (1)(c)*]

Forfeiture of exemption: whilst the New CCL has expanded the list of instances where a company can be exempt from its application to include companies

wholly owned by the Federal or an Emirate Government (and wholly owned subsidiaries of such companies), it has narrowed the instances of availability of the exemption by:

- (i) limiting the application of the sector specific exemptions (as discussed above); and
- (ii) requiring a company that: (A) is exempt by virtue of being wholly Government-owned; (B) is relying on a sector specific exemption; or (C) has an existing exemption under the previous CCL, to cease its reliance on the exemption if it undertakes an IPO or lists its shares.

So practically speaking, if a Government-owned company undertakes an IPO it will (in the absence of securing an exemption by way of Cabinet Resolution) be subject to the New CCL and be required to carry out its IPO in accordance with the provisions of the New CCL.

Foreign ownership

Foreign ownership restrictions: the New CCL does not diverge from the previous CCL in this regard and retains a 49% limit on foreign ownership. In addition, the New CCL appears to be more restrictive, as it grants the Cabinet of Ministers the right, upon the recommendation of the Minister of Economy, to limit certain sectors to UAE nationals only. [*Articles 10 (1) and 10 (2)*]

It is expected that the Emirates Securities and Commodities Authority (**SCA**) will include as part of its executive regulations clarification as to when such company would no longer be exempted. [*Article 4 (2)*]

Exemptions applicable to free zone companies: companies incorporated in free zones remain exempt from the application of the New CCL. If legislation in a free zone were to allow a free zone company to operate “onshore” (i.e. outside the free zone and in the UAE), then the New CCL would apply to such free zone company (it is not clear how this would work in practice). A free zone company would, however, not be permitted to operate onshore unless and until procedures to deal with the registration of such free zone companies are addressed by way of Cabinet Resolution. [*Article 5*]

Future developments: notwithstanding this foreign ownership restriction, the Minister of Economy has separately indicated the Government’s intention to enact a new foreign investment law that would relax the foreign ownership restriction in certain (but as yet unspecified) industries and sectors. Until the new foreign investment law is enacted, it remains to be seen what position the authorities will take in relation to companies whose activities do not fall within the exempt list but continue to maintain de facto (i.e. indirect) 100% foreign ownership.

Limited liability companies (LLCs)

Number of shareholders: the New CCL maintains the maximum limit of shareholders in an LLC at 50. It also allows an exception to the requirement for an LLC to have a minimum of two shareholders, by permitting a UAE natural or juridical person to incorporate a “single person” LLC. Details of how this will be applied in practice remain to be seen. [*Articles 71 (1) and 71(2)*]

Pre-emption rights: similar to the previous CCL, the New CCL imposes statutory pre-emption rights on a transfer of shares to non-shareholders. The pre-emption process remains the same overall, save that if there is a disagreement on pricing between the shareholders, the pre-emption price will be determined by technical/

financial experts (as opposed to the company’s auditor). This pre-emption process remains sub-optimal from a selling shareholder’s point of view as it may require it to sell its shares to another shareholder at a pre-emption price which may not necessarily be the same as the price offered by a third party purchaser. [*Articles 80 (1) and 80 (2)*]

Governance and managers: although it was anticipated that the New CCL would further develop the concepts relating to the governance of LLCs by introducing a “board of directors” structure, it has retained the language in the previous CCL which provides that LLCs will be managed by one or more managers. One positive

development is the removal of the requirement for a maximum of five managers. [Article 83]

Invitations to general assemblies: the New CCL better serves the requirements of practicality and modern technology, by now allowing invitations to attend the general assembly of LLCs to be sent by any means of communication that the shareholders agree upon (unlike the previous CCL which restricted these communications to registered mail). In addition, the New CCL sets a minimum notice period of 15 days and (in line with international market practice) allows the shareholders to agree on a shorter notice period (unlike the previous CCL, which required that shareholders' meeting notices be sent to the shareholders at least 21 days prior to the meeting). [Article 93]

Quorum and adjourned meetings: the quorum for general assemblies has been raised from shareholders representing 50% to shareholders representing 75% of the share capital. Non-quorate meetings are to be reconvened within 14 days from the date of the first meeting and will only be quorate if attended by shareholders representing 50% of the share capital. If a quorum is not present at the second meeting, then a third meeting is to be held after 30 days from the date of the adjourned meeting and such meeting will be quorate provided that at least one shareholder is in attendance. Under the previous CCL, a non-quorate meeting would reconvene within 21 days from the date of the first meeting and would be quorate

provided that at least one shareholder was in attendance. [Article 96]

Pledge over shares: the ability to create a pledge over the shares of an LLC is now included in the New CCL and as a result, shares in an LLC can be pledged and the pledge can be registered in the Commercial Register. This is a welcome development as it means that LLCs can now be more effectively used in financing structures, have greater access to debt finance and offer enhanced collateral. Although under the previous CCL there was nothing to prevent shares of LLCs being pledged, the lack of a specific recognition of this possibility under law, coupled with an inability to register such a pledge or take physical possession of share certificates, meant that pledgees faced considerable enforcement risk when taking an LLC pledge. Some enforcement risk still exists under the New CCL, however, as there is still an inability to take possession of share certificates; there is no possibility of pledgees holding pre-signed but undated share transfer forms; and pre-emption rights will continue to apply. [Article 79]

Application of the provisions applicable to joint stock companies: the New CCL provides that the provisions relating to joint stock companies will apply to LLCs, unless otherwise provided under the New CCL. It is not entirely clear, however, how this would apply in practice, given that there is a significant difference in the nature of these two types of entity. [Article 104]

Private joint stock companies (PvtJSCs)

Application of the provisions applicable to PJSCs: similar to the previous CCL, provisions applicable to PJSCs will also apply to PvtJSCs, unless such provisions relate to public subscription. [Article 265]

Corporate governance and PvtJSCs: under the New CCL, PvtJSCs with more than 75 shareholders must comply with corporate governance rules which will be issued pursuant to a Ministerial Resolution. No such obligation was imposed on PvtJSCs under the previous CCL. [Article 6 (1)]

Number of shareholders and members of founders' committee: under the New CCL, the minimum number of shareholders has been reduced from three to two and the maximum number of shareholders is 200. A PvtJSC can also, on an exceptions basis, be incorporated by a

single juridical shareholder. In addition, the minimum number required to constitute the founders' committee responsible for incorporating a PvtJSC has been reduced from three to two. [Articles 255 and 257]

Minimum share capital: the minimum share capital of a PvtJSC has been increased from AED2m to AED5m. Existing PvtJSCs are, however, exempt from this increased share capital requirement. [Article 256]

Lock-up period: under the New CCL, founders are locked-up for one financial year (as opposed to two financial years under the previous CCL). This period may be increased to two years or reduced to six months by a Ministerial Resolution. [Article 264]

Public joint stock companies (PJSCs)

General: various changes have been introduced to the provisions governing PJSCs. In some instances, the changes relax the procedures for establishing PJSCs in the UAE and convening general assemblies but, in others, they limit the options for composition of the board. It seems that not only should the majority of the board members and the chairman be UAE nationals, but in addition at least two-thirds of the directors must hold shares in the company. [*General, but Article 144 (2) is of relevance*]

Public body's shareholding: under the New CCL, a company in which a state or public body has a shareholding is no longer required to take the form of a PJSC. [*Article 7 of previous CCL*]

Minimum number of founders: under the New CCL, the minimum number of founders has been reduced from ten to five. This change will be welcome, in particular, by family companies and LLCs wishing to go public as it will allow them to carry out an IPO with an initial founder shareholder base of five. [*Article 107 (1)*]

Exception to the number of founders: the exception granted to the Federal and the Emirate Governments (and companies wholly owned by them) to solely establish PJSCs has been retained in the New CCL. [*Article 107 (2)*]

Quorum: with the aim of facilitating the process of incorporating PJSCs, the New CCL reduces the quorum requirement of the constitutive general assembly from shareholders representing 75% to shareholders representing 50% of share capital. This will allow founder shareholders who control a company after it has undertaken an IPO to vote through the incorporation of the PJSC (or the conversion of an LLC or PvtJSC to a PJSC) without having to rely on the support of the public shareholders. [*Article 131*]

General assemblies and resolutions: the distinction between an ordinary and an extraordinary general assembly has been abolished under the New CCL, and substituted with the concept of a "special resolution" to pass certain matters, such as: amending the articles of association; changing the name of the company; and extending the term thereof. A special resolution requires the approval of at least 75% of the shares represented at a general assembly meeting. [*Article 1 (definition of special resolution)*]

Board of directors: in addition to newly imposed eligibility requirements (see above), the New CCL retains the minimum of three board members under the previous CCL, but reduces the maximum number of board members from 15 to 11, with a requirement that the total number of directors must be an odd number. [*Article 143*]

Loans to board members: the New CCL prohibits companies from making loans to board members (including their family members) and creates an offence for anyone accepting such a loan. The previous CCL differed in this regard as it allowed banks to make loans to its board members. [*Articles 153 and Article 368*]

Overlap with other legislation: the New CCL contains provisions which overlap with provisions of other legislation, most notably the Corporate Governance Resolution No. 518 of 2009. The most notable areas of overlap relate to cumulative voting, the appointment of independent directors and the required minimum number of meetings to be held by the board of a PJSC in a given year. For example, whilst the minimum number of board meetings that should be held in one given year under the New CCL is four, the Corporate Governance Resolution prescribes a minimum number of six meetings. [*Articles 144 and 156*]

Unfair prejudice: in line with international practice with respect to the protection of minority shareholders' interests, the New CCL now contains a concept of unfair prejudice by allowing one or more shareholders holding 5% of the share capital to file an application with the SCA if they have been prejudiced by the company's actions, potential actions or failure to take action. Such shareholders are entitled to escalate matters to the court if the SCA denies the application or fails to respond within 30 business days. [*Article 164*]

Invitations to general assemblies: the minimum notice period for invitations to attend general assembly meetings has been reduced from 21 days to 15 days. Shareholders representing 95% of the share capital can also now agree on a shorter period of time for notice (in line with international market practice). This approach is certainly a welcome development, allowing for a more fluid and flexible regime in terms of timing of general assembly meetings. [*Article 172*]

Pre-emption rights: the New CCL maintains the concept of shareholder pre-emption rights upon the issuance of new shares. Like the previous CCL, such pre-emption rights do not apply in the context of conversion of convertible bonds and such disapplication has been extended to issuances to “strategic partners” (see below) and in a merger scenario.

Minimum share capital: the minimum share capital of PJSCs has been raised from AED10m to AED30m. Unlike the case for PvtJSCs, the New CCL does not allow existing PJSCs to be exempt from this increased share capital requirement. As such, unless competent authorities would otherwise permit, an existing PJSCs with a share capital less than AED30m will have to increase its share capital within one year of the New CCL coming into force. The New CCL also introduces for the first time the concept of “authorised” share capital. The authorised share capital serves the function of a pre-approval obtained from the

general assembly (and granted to the board of directors) to increase issued share capital up to the limit of authorised share capital (which must not exceed twice the issued share capital). The SCA is expected to issue legislation regulating the method of such increase. [*Articles 193 and 374*]

Time period for issuing new shares: under the previous CCL, any shareholder approval to issue new shares would lapse after five years from the date of the approval. In the context of convertible bonds, this means that if bonds would convert into shares five or more years from the date of the relevant shareholder approval, the shareholder approval would need to be “refreshed” after five years (with the risk that the shareholders would not approve, thereby rendering the convertible bond incapable of conversion into shares). Under the New CCL, this five-year limit has been reduced to one year. [*Articles 193 and 194*]

Capital markets

General: the New CCL has introduced a number of much-awaited concepts, such as the ability of a company to issue different classes of shares; new book-building regulations with respect to the IPO price discovery process; and a “strategic partner” concept to which pre-emption rights on an issue of shares would not apply. The New CCL, however, only introduces these concepts, deferring the detailed provisions required to implement them to regulations which need to be promulgated in the future. It therefore remains to be seen how these concepts will be realised.

Liability for IPO prospectus content: the New CCL expands the persons who may be liable for the content of the IPO prospectus to include the founders’ committee, the advisers and all parties involved in the establishment procedures together with their representatives. This liability is joint. [*Article 121*]

Underwriters: unlike the previous CCL, the New CCL now permits the local underwriting of IPOs and rights issues, by underwriters licensed by the SCA. Legislation regulating underwriting activities will be issued by the SCA. [*Article 123*]

Book-building: the New CCL authorises the SCA to issue a decision regulating the book-building process in relation to the pricing of shares. [*Article 129*]

IPO free float: the New CCL reduces the minimum free float requirement in an IPO from 55% to 30%, which will

be a welcome development for company owners who would like to take their company public but do not wish to relinquish control (this minimum 30% free float requirement previously only applied to family-owned companies). In addition, the maximum stake that can be sold by founders in an IPO has been reduced from 80% to 70%. [*Article 117*]

Tradable issue rights: in a move which reflects the provisions of SCA Board Decision No. 38 of 2013 Concerning the Trading of Rights Issues, the New CCL now provides for statutory subscription rights granted to shareholders on a rights issue to be tradable. Shareholders will be entitled to trade their subscription rights to other shareholders or to third parties for consideration. [*Article 197*]

Classes of shares: the New CCL expressly prohibits the issuance of different classes of shares but, as an exception, allows the Cabinet-based on a recommendation from the chairman of the SCA-to issue a decision prescribing the other classes of shares that may be issued, the conditions of their issuance and the rights and obligations pertaining to these different classes. [*Article 206*]

Lock-up period: the New CCL retains the lock-up period of two financial years on shares held by the founders. This period may be increased to three years pursuant to a decision issued by the SCA’s board of directors. [*Article 215*]

Financial assistance: the New CCL introduces provisions prohibiting the giving of financial assistance. Under the new provisions, neither the company nor any of its subsidiaries may give financial assistance to any person to subscribe in or buy its shares, bonds or *sukuk*. Such financial assistance includes advancing loans, giving gifts or providing any security or guarantees. Interestingly, the prohibition on financial assistance applies to bonds and *sukuk*. This would effectively mean that if a bank is an issuer of *sukuk* or bonds, then such bank may not extend loans to enable potential investors to buy such securities. This may have several implications on the lending business of the issuing bank. Additionally, the New CCL does not include any “whitewash” procedure that would allow financial assistance to be approved by shareholders in certain circumstances. This is an important development, the application of which in practice remains to be seen, but will no doubt limit the options available to purchasers when looking to finance (and give security with respect to any financing of) their acquisition of shares. [Article 222]

Strategic partner: the New CCL retains the concept of shareholder pre-emption rights on the issuance of new shares. However, a company may now increase its share capital outside the pre-emption regime by issuing shares to a “strategic partner” (pursuant to regulations to be issued by the SCA) if the shareholders pass a special resolution to that effect. To be eligible, a “strategic partner” must, amongst other things, add value to the company and must have a track record of at least two financial years. [Articles 223 and 224]

Capitalisation of debt: the New CCL explicitly permits companies to increase their share capital through capitalising debt on such terms as are approved by the shareholders by special resolution and pursuant to regulations that will be issued by the SCA. A similar provision did not exist under the previous CCL. [Article 225]

Share schemes: the New CCL permits companies to issue shares pursuant to an employee share incentive scheme on such terms as are approved by the shareholders and pursuant to regulations that will be issued by the SCA in this regard. A similar provision did not exist under the previous CCL. [Article 226]

Conversions and mergers

Conversion: the New CCL specifically addresses the conversion of a company from one form to another. This is subject, however, to further regulations to be issued by the SCA or the Ministry of Economy. The New CCL deals with several types of conversions, most importantly: (i) the conversion of a PJSC to a PvtJSC; and (ii) the conversion of any company to a PJSC. We anticipate that this may be a catalyst to boost the IPO market, clarifying the path to PJSC conversion. However, there are a number of conditions to PJSC conversion which may limit the ability of many companies to convert to PJSCs, including that:

- (i) a company must complete at least two audit cycles before conversion; and
- (ii) a company must have made net distributable profits equal to an average of 10% of the share capital for two years prior to conversion. [Articles 273 to 276]

Creditor objection period: the New CCL retains the concept of creditors being able to object to the conversion of a company to PJSC status within 30 days following the conversion. In the context of a UAE IPO, where the

conversion process can only be completed after the IPO subscription period has closed, this potentially means that the gap between closing of the subscription period and listing will need to include this 30-day creditor objection period. This lengthy gap will not be attractive for international investors looking to invest, since they would typically expect shares they have purchased in an IPO to be listed and traded within a few days of subscription closing. [Articles 277 and 278]

Shareholders’ objection period: the New CCL allows a shareholder who objects to the conversion decision to have its shares redeemed pursuant to a written request submitted to the company within 15 days from the date of publishing the conversion decision. The shares shall be redeemed at either their book value or market value on the date of conversion, whichever is higher. [Article 278]

Types of mergers: unlike the previous CCL, the New CCL does not specify the possible options to effect a merger. Under the previous CCL, there were two ways to effect a merger, namely a merger by affiliation (e.g. the merger between Aldar Properties PJSC and Sorouh Real

Estate PJSC completed in June 2013) and a merger by consolidation. The provisions of the New CCL suggest that mergers under the New CCL must be effected by way of a merger contract. However, the New CCL does not detail the types of merger available. The New CCL contemplates that mergers will be further regulated by the

competent authorities (being the UAE Central Bank in relation to companies regulated by it, the SCA in relation to PJSCs and the Ministry of Economy in relation to all other companies). [*Articles 283 and 284*]

Other new concepts

Companies' registrar: the New CCL introduces the concept of a companies' registrar, who is required to maintain a trade name register. The Minister of Economy will issue regulations to regulate this role. [*Articles 33 and 34*]

Holding companies: the New CCL introduces the concept of holding companies. A holding company may take the form of either a joint stock company or an LLC, but may only conduct business through its subsidiaries. The objects of a holding company are limited to holding shares in companies, extending finance and acquiring assets and intellectual property. [*Articles 266 and 267*]

Investment funds: whilst the SCA has issued regulations with respect to investment funds, the New CCL now includes the concept of an investment fund in its

provisions and grants investment funds a separate legal personality. It is anticipated that the provisions of the SCA board of directors' Decision No. 37 of 2012 Concerning the Regulations on Mutual Funds will continue to apply. [*Article 271*]

Issuance of bonds/sukuk: under the New CCL, the issuance of tradable bonds, *sukuk*, or other debt instruments (whether or not convertible to equity) shall be made pursuant to regulations to be issued by the UAE Central Bank and the SCA. [*Articles 1 (definition of securities) and 229*]

Social responsibility: there is an explicit provision indicating that regulations incentivising companies to engage in social responsibility will be issued in due course by the Cabinet of Ministers. [*Article 375*]

