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Know How

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United Arab Emirates

1. Four Key Articles to Consider in an LLC's Articles of Association

- The UAE Companies Law no longer requires 51% minimum national shareholding for all companies.
- It is anticipated that many onshore companies, especially limited liability companies, will be established to explore the resultant onshore opportunities.
- Four key articles should be considered when preparing the articles of association of a UAE limited liability company.

(a) Company's objects

The Companies Law provides that the articles of a company must state the company's objects. The company may not carry out any business that is not included in its objects. If the management inadvertently involves the company in an activity that cannot be considered within the scope of the company's objects (and this happens sometimes), this results in breach of the law and might give rise to liability toward the shareholders or third parties. Accordingly, the objects clause should be drafted carefully to address all anticipated business activities of the company.

(b) Profits and dividends

The share each shareholder is entitled to receive of the profits realised by a company must be stated in the articles. If not, the Companies Law provides that each shareholder is entitled to receive a share of the profits which is proportionate to its share in the capital.

Dividends are declared in accordance with rules set out in the articles. A legal reserve is imposed by the Companies Law, whereby each company must retain 10% of its profits until the legal reserve is equal to half the company's capital. Other reserves can also be specified in the articles. The determination of the amount of retained earnings can sometimes be a point of disagreement between the shareholders. Setting out the rules for retained earnings in the articles can prevent such future differences.

(c) Management structure

A limited liability company can be managed by one person, namely a general manager, or can have a number of directors constituting a board of directors.

- **The general manager** structure is easy to deal with. It nominates one person who is the legal representative of the company and responsible for authorising its acts. He or she signs off on relevant matters and is solely responsible before shareholders and the company's regulators.

- **The board of directors** structure requires additional consideration. It is important to designate one or more executive directors of the board who are authorised to carry out the day-to-day business of the company, otherwise all directors will have to sign off on relevant matters.

It is also important to set out the rules that govern how the board takes decisions. Significant matters must be decided by certain majorities or even unanimity in specific cases. One should also consider setting out procedures for dealing with situations where the board reaches a deadlock. These are situations where half the board is in favour of a decision and the other half is against it. This can be addressed by having the board consist of an odd number of directors or giving the chair of the board a casting vote.

(d) Management powers

The default position under the Companies Law is that the management of a company has full power in relation to managing the company and achieving its objects, except to the extent such powers are restricted by the articles or reserved to the general meeting.

If you do not wish to give full power to the management, you should consider specifying the powers and authorities of the management, together with the decisions that require the approval of the general meeting.

It is important, when outlining the powers and authorities of the management, to use comprehensive language, similar to the language that should be used in delineating the company's objects. For example, granting the management the right to sell the company's property might not be regarded by a government authority (e.g. Notary Public) to include the right to sell company's vehicles unless the ‘company's property' is defined to include vehicles.

2. UAE Cabinet Decision No 58/2020 on the Regulation of the Procedures of Real Beneficiary

The UAE Cabinet Decision No. 58/2020 is to be implemented to regulate the minimum obligations of the corporate entities incorporated in the UAE mainland and in the non-financial free zones (each an Entity) by requiring disclosure at the initial incorporation/registration stage, and maintenance thereafter, of a Register of Real Beneficiaries and Register of Partners or Shareholders (the Registers).

The Registers will be required to be filed (and updated to reflect changes as and when necessary) with the relevant registrar and licensing authorities responsible for supervising the register of commercial trade names registered in the UAE (the Registrant).

The filing should be undertaken at the time of incorporation/registration of a new Entity, with changes to be updated within 15 days from the date of the change.

For the purposes of the Registers of Real Beneficiaries a Real Beneficiary shall be:

(a) Whoever owns or ultimately controls an Entity through direct, or indirect ownership, at least 25% of the Entity's share capital, whoever holds 25% or more of the voting rights, or whoever has ownership powers through any other means (i.e. the right of appointment or dismissal of most of the Managers).

(b) If no Real Beneficiary fits the criteria above, or there is any doubt over who has final controlling say, the physical person who exercises control over the Entity through other means shall be the Real Beneficiary.

(c) If no physical person is determined, the Real Beneficiary shall be the physical person who holds the position of the person in charge of Senior Management.

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A Real Beneficiary can be made up of more than one person i.e. where more than one person participates in the ownership or control they shall all be dealt with as owners and controllers.

For the Register of Partners and Shareholders an Entity shall maintain the details of the respective Partners and Shareholders (and Nominal Managers) as set out in the Decision and update the Register with any change occurring within fifteen (15) days from the date of said change.

A Nominal Manager, being "any physical person acting on the instructions of another person", shall notify the Entity of his nominal status and shall submit all the necessary data required in respect of the Register of Partners and Shareholders within fifteen (15) days of his appointment, or (30) thirty days from the date of this Decision. He shall similarly inform the Entity of any change to his information or status within fifteen (15) days of the occurrence.

Every Entity must take reasonable measures to obtain appropriate, accurate and up-to-date data for the Registers and preserve its records from damage, loss or destruction. They must also appoint an individual point of contact (resident in the UAE) and provide the details of that contact to the Registrant.

The Decision details the data to be collected and entered on each respective Register. Any additional data requested by the Registrant shall need to be provided by the deadline specified in the data request Entities in a regulated market, in a state of dissolution or liquidation are subject to adjusted filing requirements under the Decision.

Any case of a violation to the provisions of this Decision can result in the Minister of Economy or the Licensing Authority imposing one or more sanctions on the entity.

3. Dubai urges Dubai businesses to list on Dubai's securities exchanges

On 26 January 2021, Sheikh Mohammed bin Rashid Al Maktoum, the Ruler of Dubai, issued a royal decree requiring all public joint stock companies established in the UAE which have over half of their assets or profits derived from business activities in Dubai, to be listed on either the Dubai Financial Market (DFM) or Nasdaq Dubai (together, the Local Markets). If they are not already listed on a Local Market, they must do so by January 2022.

The provisions of Dubai Decree No. 3/2021 Listing of Joint Stock Companies in the Securities Markets in the Emirate of Dubai (the **New Decree**) are designed to encourage Dubai businesses to list on Dubai's securities exchanges in order to boost its capital markets by enhancing liquidity and investor choice.

Who does the New Decree apply to?

The New Decree distinguishes between 3 specific categories of companies and applies different statutory requirements for each category:

(a) public joint stock companies established in the Emirate of Dubai and its free zones (**Local Companies**),
(b) public joint stock companies established outside of the Emirate of Dubai but in the United Arab Emirates **(UAE**), with branches, assets or activities in the Emirate of Dubai (**Non-local Companies**); and
(c) foreign companies established and licensed outside of the UAE with branches, assets or activities in the Emirate of Dubai (**Foreign Companies**).

What are the new requirements?

(a) Local Companies
All Local Companies are required to list their shares on the Local Markets, subject to satisfying the listing requirements under applicable Federal legislation (Article 2(a)). For existing Local Companies that are not

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already listed on the Local Markets, such listing must take place within one year of the New Decree, subject to any extension from the relevant Licensing Authority (Article 7). In addition, Local Companies may not list their shares on financial markets outside of the Emirate of Dubai (a dual listing) prior to completing their listing on the Local Markets (Article 2(c)). This means that existing and future Local Companies must be listed on a Local Market.

(b) Non-local Companies

All Non-Local Companies which have either: (i) 50% of their annual profits or financial returns generated from carrying out activities in the Emirate of Dubai; **or** (ii) 50% of their assets are located in the Emirate of Dubai, must list their shares on the Local Markets (Article (3(a)). The mandatory listing must be completed by 25 January 2022, subject to any extension from the Dubai Economic Department or the applicable free zone regulator (**Licensing Authority**) (Article 7). Non-Local Companies that ***become*** subject to a mandatory listing by breaching either of the above thresholds are given a grace period of one year to complete the listing after such breach. It will be interesting to see if there will be a stay in the mandatory listing process if the relevant Non-local Company falls below the offending threshold during the one year grace period.

It should be noted that Article 2(b) of the New Decree ensures that private joint stock companies that are licensed by a Licensing Authority are also subject to mandatory listing provisions such that if they are wishing to list they must do so on the Local Markets. Private joint stock companies would have to list on the DFM's Second Market or, alternatively, convert to a public joint stock company and list on the main list of the DFM.

(c) Are Foreign Companies subject to a mandatory listing requirement?

No. The New Decree explicitly states that Foreign Companies may voluntarily list their shares on the Local Markets as a primary or dual listing, subject to the Local Market's eligibility for listing requirements. This means that Foreign Companies have the option, and not the obligation, to list on the Local Markets.

(d) Are mandatory listings a good thing?

In practice, not all companies are suitable to be listed and so making a listing mandatory forces some "square pegs into round holes" which is not necessarily a good thing for investors in capital markets. Investors want to see companies come to the public markets that can comply with all of the ongoing obligations of a public company, particularly around market disclosure and corporate governance. In reality, the safeguard is still there in the New Decree such that a company that is mandated to list is still subject to all of the eligibility requirements of the relevant regulator and stock exchange and such regulator and/or stock exchange may reject the application for listing. This would ensure that companies that are inappropriate for listing do not come to market, despite the mandatory requirement to do so.

Further, mandating listing on specific exchanges to the exclusion of others is not necessarily an efficient flow of capital for issuers who may be better suited to listing on other exchanges because of the industry or geographical sector in which it operates. Certain exchanges benefit from having large numbers of active investors focused on a particular industry sector that benefit from benchmarking against peers.

Also, requiring a listing to take place within a certain time limit may not be commercially viable for all companies as the timing of a listing should take into account the state of the market at the time of listing. It may not be commercially advisable to list at the mandated time. In reality, it is assumed that the Licensing Authority will use its discretion and would permit a delay in listing in unforeseen or force majeure circumstances, as expressly provided for in Article 7.

(e) What is the real impact?

Local Companies – it is unlikely that there are any existing Dubai established PJSCs that are not already listed on the Local Markets meaning, in practice, this will have little immediate impact for existing Local Companies. For future Local Companies wishing to list, it is clear that they must first do so on the Local Markets. It should be noted that the requirements do not apply to Dubai Limited Liability Companies (LLC) and so such companies could still list on other international exchanges, which is quite often the case where

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a foreign holding company is established as the listing vehicle and owner of the LLC (Foreign Companies are also not required to list on the Local Markets – see below).

Non-local Companies – it will be interesting to see just how many Non-local Companies this could actually affect given that Abu Dhabi established PJSCs will most likely be listed on the Abu Dhabi Securities Exchange and Non-local Companies in other Emirates will either already be listed on the DFM or will not trigger either of the percentage tests.

Foreign Companies – they have the option, and not the obligation, to list on the Local Markets which is important for companies that have conducted IPOs outside the UAE such as Network International (a UK public limited company listed on the London Stock Exchange) and Yalla Group Limited (a Cayman company listed on the New York Stock Exchange) who are encouraged, but not forced, to subsequently dual list on the Local Markets.

The New Decree builds in sufficient flexibility for Dubai businesses and there is likely to be accommodation for market circumstances when the provisions of the New Decree are actually enforced. There are still listing options for Dubai businesses that are foreign companies but it is quite clear that the New Decree is setting an expectation that Dubai businesses wishing to list should do so on the local stock exchanges. This is certainly in line with longer term Government strategic plans to develop and encourage the local capital markets.

Further, this is a Dubai Royal Decree that relates to Dubai stock exchanges, subsequently it will be interesting to see if there is any reciprocal development from the Abu Dhabi Government.

(f) When do the New Rules come into force?
The New Decree was published on 26 January 2021 and came into force on that date. Existing Local Companies and Non-local Companies that are subject to a mandatory listing must list by 25 January 2022, subject to any extension from the Licensing Authority and Non-Local Companies that become subject to a mandatory listing are given a grace period of one year to complete the listing.

4. ADGM enacts Electronic Transactions Regulations 2021 to provide greater certainty for electronic dealings

The Abu Dhabi Global Market (ADGM), one of the financial free zones in the UAE, has enacted the Electronic Transactions Regulations 2021 bringing ADGM's regulatory framework more in line with international best practice in relation to e-commerce and electronic dealings.

Previously, the ADGM's laws had only addressed electronic transactions in a limited manner. By way of example, the company regulations allow various documents and communications by electronic means and the court regulations refer to "writing" as including electronic means. In addition, there were certain protections under English common law around the formation of contracts adopted through the Application of English Law Regulations 2015 (although the UK Uniform Electronic Transactions Act was not one of English statutes that were expressly adopted to apply in the ADGM).

The Regulations are based on the United Nations Commission on International Trade Law (UNCITRAL) Model Laws on: (1) Electronic Commerce (1996); (2) Electronic Signatures (2001); and (3) Electronic Transferable Records (2017).

This means that the Regulations adhere to internationally recognised principles of non-discrimination, technological neutrality and functional law equivalence of electronic documents as compared to documents in a tangible written form. Further the Regulations provide a technical reliability criteria for equivalence between e-signatures and handwritten signatures.

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Significantly, the ADGM is now one of only a few jurisdictions in the world to have enacted legislation to allow the use of transferable documents and instruments (such as bills of lading, bills of exchange, promissory notes and cheques) in electronic form.

Another interesting aspect of the law is that it provides for the electronic witnessing of documents. Where an enactment requires a witness to a signature of a person, that requirement can be satisfied if the witness is able to observe the affixing of the signature of that person on the document or record in real-time by audio-visual electronic means.

The Regulations expressly do not apply to legal requirements for writing or signatures in respect of: (1) powers of attorney; (2) wills, codicils or testamentary trusts; (3) certain real estate transactions (including a lease for a term of more than 10 years); or (4) any document to be notarised before a notary public.

The Regulations are an important part of reforms being made by the ADGM addressing digital transformation in that jurisdiction. In the last month the ADGM also enacted the Data Protection Regulations 2021.

5. Emergency Financial Crisis period – Announcement by the UAE Cabinet

Further to our previous update, the UAE Cabinet has announced the existence of an Emergency Financial Crisis through the Official Gazette dated 31 January 2021. By way of reminder, Federal Decree-Law No. 9/2016 (the Corporate Bankruptcy Law) was amended in 2020 to add a new chapter addressing provisions which would apply during a period of Emergency Financial Crisis. The amendment defined an Emergency Financial Crisis as *'A general situation that affects trade or investment in the country, such as a pandemic, natural or environmental disaster, war, etc*'.

The UAE Cabinet has now confirmed that an Emergency Financial Crisis shall be deemed to exist during the period from 1 April 2020 until 31 July 2021 due to COVID-19.

In summary, during the Emergency Financial Crisis period:

(a) Debtors are not required to file for bankruptcy.
(b) If a debtor does elect to file an application for bankruptcy (which may result in restructuring or liquidation of the debtor), the Court:
    (i) may accept such application and elect not to appoint a trustee in the bankruptcy proceedings, provided that the debtor proves to the Court that their financial disruption was a result of the Emergency Financial Crisis; and
    (ii) shall not take any precautionary measures against the debtor's assets which are necessary for operation of the debtor's business during the Emergency Financial Crisis period.
(c) Creditors may not apply to place a debtor into bankruptcy.
(d) If the Court accepts the debtor's bankruptcy application, the debtor may request from the Court a period of not more than forty business days to negotiate a settlement with its creditors (with the settlement period offered not to exceed twelve months). Such a settlement will be binding on all creditors if agreed by creditors holding at least two thirds of the total debt (noting there is no need for a majority of creditors).
(e) Bankruptcy proceedings filed and accepted by the Court prior to the declaration of the Emergency Financial Crisis will continue and the Court is entitled to extend the time periods set out under the Corporate Bankruptcy Law (doubling the prescribed time periods).
(f) Directors and managers of a corporate debtor may pay unpaid wages and salaries of the company's employees (excluding allowances, pay raise and other contingent payments) without considering preference issues.
(g) The debtor may request from the Court to obtain new financing on a secured or unsecured basis.

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6. Data Protection Law: revised by ADGM

The new Abu Dhabi Global Market (ADGM) Data Protection Regulations 2021 (New Regulations) have now been issued, and replace the Data Protection Regulations 2015.

The New Regulations are binding after a 12-month transition period for existing establishments in the ADGM, and a 6-month transition period for new establishments that are registered after the date the new regulations were published i.e. 14 February 2021.

The New Regulations align the ADGM's legal requirements for the processing of personal data with the EU's General Data Protection Regulation (GDPR). The New Regulations follow the DIFC's adoption of the new DIFC Data Protection Law, DIFC Law No. 5/2020 (DIFC Law) in July 2020, which is also based on the GDPR.

Key Features of the New Regulations

Below are some key features of the New Regulations that will likely affect the Processing of Personal Data that is already being carried out in the ADGM.

It is not a comprehensive list. Matters such as data subject rights and transfers of personal data outside of the of the ADGM are not discussed in further detail in our full update but do need detailed consideration by Data Controllers and Data Processors responsible for those conducting business in the ADGM.

(Please note that unless otherwise defined above, capitalised terms used below have definitions under the New Regulations available here).

(a) **Who is covered by the New Regulations?** The New Regulations includes within its scope Processing of Personal Data carried out by either a Controller or a Processor operating or conducting business in or from the ADGM, regardless of whether the Processing takes place in the ADGM or whether the Controller or Processor is incorporated in the ADGM.

(b) **Data Protection Fee:** A Controller must pay a Data Protection Fee (in an amount yet to be determined by the ADGM) to the Commissioner of Data Protection in respect of the twelve months from the date it commenced Processing Personal Data. Yearly Renewal Fees are payable thereafter.

(c) **Data Protection Officer "DPO":** Generally, it is not mandatory for Controllers or Processors to appoint a Data Protection Officer (DPO). However, the appointment of a DPO is required where: (1) Processing is carried out by a public authority (excluding courts acting in their judicial capacity); (2) Processing operations which require regular and systematic monitoring of Data Subjects on a large scale are being undertaken; or (3) Processing on Special Categories of Personal Data is undertaken on a large scale. The New Regulations explicitly state that the DPO does not need to be an employee of the Controller or Processor, or be present in the ADGM. The DPO must be appointed on the basis of professional qualities and, in particular, expert knowledge of Data Protection Law and practices and the ability to fulfil the tasks referred to in the New Regulations. The New Regulations includes an exemption from the requirement to appoint a DPO for organisations employing fewer than five employees unless it carries out High Risk Processing Activities.

(d) **High Risk Processing Activities:** The New Regulations introduce the concept of High Risk Processing Activities, which lead to an obligation on the Controller to conduct a Data Protection Impact Assessment This is consistent with both the GDPR and the DIFC Law. The New Regulations create an exemption where Processing of such data is required by Applicable Law.

(e) **Time-line for Responding to Data Subjects requests:** The New Regulations sets a timeline of two months (which can be extended for a further one month where necessary, taking into account the complexity of the request).

(f) **Notification of a Personal Data Breach:** In the case of a Personal Data Breach, the Controller must without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the Personal Data Breach to the Commissioner of Data Protection, unless the Personal Data Breach is unlikely to result in a risk to the rights of natural persons. Where the notification to the Commissioner is not made within 72 hours, it must be accompanied by reasons for the delay. When the Personal Data

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Breach is likely to result in a high risk to the rights of natural persons, the Controller must communicate the Personal Data Breach to the Data Subject without undue delay.

(g) **“Appropriate Policy Documents”:** A unique provision in the New Regulations, is the explicit requirement to have an “appropriate policy document” in place when processing Special Categories of Personal Data on the basis of carrying out the obligations and the specific rights of the Controller or the Data Subject “in the field of employment law”, and/ or where they are processed on the basis of a “substantive public interest”. The New Regulations explicitly set out what such a document must include to be considered as “appropriate”. Given the breadth of what may come under the scope of “employment law” or “substantive public interest', as defined under the New Regulations, we anticipate that in order to achieve full compliance under the New Regulations, companies will not only be required to update their privacy policies, but may also need to review and update their fraud policies, diversity and inclusion policies, employment policies, AML policies, and any other policies falling within this scope.

(h) **A New Fines Regime:** The New Regulations imposes significant fines for data breach, with a strict cap not exceeding exceed USD 28 million. Data Subjects also have direct rights under the New Regulations to claim compensation.

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1. Turkish Competition Board to Investigate WhatsApp Terms of Service

The Turkish Competition Authority (the Authority) announced that the Competition Board (the Board) has initiated an investigation in respect of Facebook Inc. and Facebook Ireland Ltd., (together Facebook) as well as WhatsApp Inc. and WhatsApp LLC (togetherWhatsApp) and imposed an interim measure on the prospective WhatsApp terms of service and privacy policy (the Terms of Service) with its decision dated 11 January 2021 and numbered 21-02/25-M.

Introduction

The Terms of Service, which are the main subject of the investigation initiated ex-officio by the Board, were published on the website of WhatsApp on 4 January 2021 and met with intense public criticism since WhatsApp "as part of the Facebook companies" declared that it was to receive information from and share information with other Facebook Companies.

The main reason for this criticism was that Facebook had no good track record in terms of data protection due to its involvement in the Cambridge Analytica scandal and the heavy sanctions imposed on it by many data protection authorities throughout the World.

Terms of Service

WhatsApp can already access a mass of data such as its users' account information, connections, status, transactions, locations, information regarding messages not including content (i.e. recipients, the time when messages were sent and cookies). If the users consent to the new Terms of Service, such data will be shared with other Facebook companies and Facebook will be authorised to collect, process and use the provided data. Those users, who do not consent to these Terms of Services, will be prevented from accessing WhatsApp as of 8 February 2021.

The Scope of the Board's Investigation

The Authority announced on 11 January 2021[3] that an investigation vis-à-vis Facebook was commenced by the Board pursuant to Article 6 of the Law on the Protection of Competition numbered 4054[4] (the Law). The investigation will focus on whether Facebook holds a so-called "dominant position" in terms of competition rules. If it is determined that a dominant position does indeed exist, the investigation will then concentrate on whether there is an abuse of such dominant position.

The Board has also imposed an interim measure against the implementation of the Terms of Service pursuant to Article 9 of the Law in view of the potential material and irreparable damage that may be caused until a final decision is reached. According to this interim measure, Facebook is obliged to halt the implementation of the Terms of Service, which was anticipated to be implemented on 8 February 2021, and notify all WhatsApp users accordingly prior to such date.

Conclusion

In the age of technology where data is a strong asset, disclosure of data between large companies providing world-wide services such as Facebook and WhatsApp constitutes an activity which should be reviewed on

many fronts. It is only natural that the concepts of personal data privacy and big data will collectively be subject to further evaluations, considering the steps that need be taken to secure the former in view of the ever-increasing value of the latter. The Board has announced that it is now on the watch and on the verge of setting a precedent. As to whether the Board will strike the right balance remains to be seen.

2. Oman's New Executive Regulations on Competition Law

Oman's Ministry of Commerce, Industry and Investment Promotion has issued Oman Ministerial Decision No. 18/2021, the executive regulations of the Law on Protection of Competition and Prevention of Monopoly (Regulations) that supplement Oman Sultani Decree No. 67/2014 (Competition Law). The Regulations, which took effect on 25 January 2021, clarify the interpretation of the Competition Law of Oman.

The Regulations will be of interest and importance to investors acquiring targets with a physical presence in Oman as well as large consumer orientated businesses selling products and services into the Omani market.

Economic Concentrations

When advising on the competition law aspects of large M&A transactions involving an Omani target, legal practitioners in Oman have become accustomed to the document requests that have been sought by the Competition Authority in Oman. The Regulations now clarify the data and materials that are required whenever a request has been made for the creation of economic concentration under Article 11 of the Competition Law.

In addition to adducing general market share data, specific information will be requested including information concerning key competitors, the effect of the economic concentration on the concerned market and the justification for the economic concentration, for example whether the national workforce is likely to be affected by the transaction. Details of approvals or clearances obtained from competition regulators in other jurisdictions will also be requested. As part of its decision making process the Ministry of Commerce, Industry and Investment Promotion will consider the following factors:

(a) the effect of the economic concentration on competition within the relevant market;

(b) actual or possible competitiveness in the relevant market;

(c) ease of access to the relevant market / specific barriers;

(d) effect on prices, innovation and technical competence in the relevant market;

(e) contribution to the promotion of investment, exports and domestic value add (including creation of employment); and

(f) interests of consumers.

The Regulations re-state the position under the Competition Law, namely that the decision making process takes up to 90 days following filing of all requested documents and data. It is important to recognise that this 90 day period can be ‘frozen' if documents have been requested but not provided, meaning that the actual decision making process is likely to exceed 90 days. Appeals against the decision taken under the Regulations and the Competition Law can be made within 60 days following issue of the decision.

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Geographical and product market

From a consumer perspective, the Competition Law seeks to restrict the taking of certain behaviour, either through the implementation of agreements or by one or more dominant market participants, that would have an adverse effect on the Omani market. Examples of such behaviour include clearly identifiable acts such as price collusion, predatory pricing and fixing re-sale prices.

It has always been necessary to determine the relevant market when assessing the effect of offending behaviour to ascertain whether such action falls within the scope of the Competition Law and the Regulations provide guidance on how the relevant market, which comprises a geographical market and a product market, is determined:

(a) the geographical market can be determined by factors including the ease with which new competitors can enter the market and preference of customers to certain products; and
(b) the relevant product market can be determined by factors including the ease with which a purchaser can be diverted from one product to another due to pricing changes and changes experienced by the market that reveal alternative products.

It is noteworthy that when determining both the relevant geographical market or the relevant product market, the Regulations state that feedback from customers and competitors will be considered.

3. New regulatory guidelines on the Qatar Personal Data Protection Law

Qatar was the first country in the Middle East to introduce a national data privacy law. The local data protection authority has recently issued a series of regulatory guidelines that both clarify the existing legislation and introduce new compliance requirements for data controllers. In this article, we provide an overview of the key changes to the data protection regime and some specific considerations for all organisations doing business in Qatar.

Background

Qatar was one of first countries in the Middle East to introduce a standalone data protection law: Qatar Law No. 13/2016 Concerning Personal Data Protection (the PDPL) was issued more than four years ago. The PDPL incorporated concepts familiar from other international privacy frameworks at the time.

In November 2020, the Compliance and Data Protection Department (CDP) of the Ministry of Transport and Communications issued 14 regulatory guidelines on the PDPL. Notably, the guidelines introduced new concepts that are not expressly addressed in the PDPL. Many of these concepts are aligned with principles in the EU General Data Protection Regulation, which came into force in 2018. These include requirements for controllers to carry out data privacy impact assessments and to maintain records of processing activities.

The guidelines are likely to be a precursor to increased enforcement activity by the CDP. Compliance with these new measures may, depending on their current internal data protection policies and procedures, require substantial effort for organisations doing business in Qatar and failure to do so could lead to fines of up to QAR 5,000,000 (USD 1,370,000).

Key action points

There are currently 14 guidelines covering a range of different privacy compliance issues. The guidelines are intended to clarify obligations under the PDPL and, in many cases, they go further by introducing new requirements.

We set out below the key takeaways that organisations need to consider incorporating into their business practices to ensure continued compliance:

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(a) **Third party processors:** There are enhanced requirements in the guidelines to carry out due diligence on data processors and put in place adequate contracts to regulate how they process personal data.
(b) **Personal Data Management System:** The PDPL introduces the new concept of a Personal Data Management System (PDMS) that must be implemented by organisations to effectively manage the personal data that they process and to report any violations of procedures and controls.
(c) **Privacy notices:** The new guidelines are more prescriptive on the information that should be included in a privacy notice, which may require organisations to update existing policies and forms.
(d) **Record of processing activities:** Data controllers now need to maintain a record of processing activities (ROPA) and ensure that any departments which process personal data are informed and trained on how to update the ROPA.
(e) **Special nature personal data:** Authorisation from the CDP is required to process any data of a 'special nature', which includes data relating to health, religion, criminal convictions and children.
(f) **Data subject requests:** Organisations must implement appropriate policies and procedures to enable individuals to exercise their rights, including the right to withdraw consent and to request erasure or correction of personal data. Data controllers have 30 days to respond to such requests.
(g) **Data breach notification:** The guidelines clarify that required notifications of data breach incidents (to the CDP and affected individuals) must be made within 72 hours.
(h) **Data Privacy Impact Assessments:** The PDPL does not expressly refer to a requirement for controllers to conduct a Data Privacy Impact Assessment (DPIA). However, the guidelines now make it a requirement to conduct a DPIA before undertaking new processing activities, particularly in the case of prospective data exports or the processing of special nature personal data. Organisations could be subject to a fine of QAR 1,000,000 (USD 275,000) for failing to carry out a DPIA.
(i) **Privacy by design and default:** Organisations must embed privacy into their processing activities and business practices, from the design stage and throughout their life cycle. The guidelines include a number of recommendations on how to achieve this.
(j) **Direct marketing:** The guidelines clarify that consent for direct marketing communications must be explicit, unambiguous and a clear, affirmative statement. It should also be easy for individuals to withdraw their consent. Previous methods of inferring consent, such as pre-ticked boxes or implied consent, may no longer be considered valid.

Considerations for employers

Since health information is considered special nature personal data and requires permission from the CPD, organisations that process such data (e.g. medical leave, Covid-19 symptoms, vaccination status or sick benefits of employees) will need to submit a Special Nature Personal Data Form with the CDP. Organisations will need to show that they have a permitted reason as well as an 'additional condition' to process the personal data. The guidelines state that consent is not advisable as a legal basis for processing for employees, meaning that employers should try to avoid relying on consent when they collect and process personal data of their employees. Organisations should therefore assess their employment contracts and legal grounds for processing employee data.

Employers will also need to conduct DPIAs when processing employees' personal data as this is considered an example of processing that 'may cause serious damage' by the CPD. Employers should undertake DPIAs with respect to their processing of employee data, identifying measures to reduce risk of serious damage and recording their decision-making.

What next?

Organisations operating in Qatar must now comply with a more detailed and comprehensive regulatory framework. The new guidelines clarify many of the questions that existed under the PDPL.

The release of the CDP guidelines has generated a number of new requirements that will require a fundamental shift in the approach to data protection compliance for many organisations. Multinationals that already comply with global standards will also need to evaluate their data privacy frameworks to ensure local compliance.

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The creation of an effective data protection framework requires an enterprise-wide approach that will typically necessitate the involvement of a number of business units, including HR, marketing, sales, customer service and IT.

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Interesting Case Law:

February – March 2021

Authorised Push Payment Fraud - court rules on scope of banks' obligations

In March 2018, Mrs Philipp transferred two payments to accounts in the UAE, totaling £700,000, representing her and her husband, Dr Philipp's savings. In doing so, Mrs and Dr Philipp thought they were assisting an investigation by the FCA and National Crime Agency ("NCA") into fraudulent activities. Unfortunately for the Philipp family, they were, in fact, the victims of that fraud, not helping to tackle it.

Dr Philipps authorised transfers to Mrs Philipps' accounts from his own, and Mrs Philipps authorised the transfers to the two UAE based bank accounts. They knew the destination of the funds, and meant for them to be sent. What they did not know was that the two accounts were controlled by fraudsters, who had tricked them into making the payments to "safe" accounts, as part of investigations into an alleged fraud.

This type of scam is known as authorised push payment ("APP") fraud. The customer instructs their bank or other payment services provider to transfer money from their account and the transaction is carried out with their consent. As such it is authorised by the customer (even if the authorisation resulted from a fraud). APP fraud is a growing problem in the UK.

Whilst Mrs Philipp's bank tried to get the funds back from the receiving bank on being made aware of the APP fraud, it was unable to do so. Mrs Philipp sued the Bank, on the basis that it was under a duty to do more to prevent Mrs Philipp failing victim to the scam. This following paragraphs analyse the judgment on a summary judgment application made by the Bank, which sought to have Mrs Philipp's claim struck out.

The Bank's duties

Banks and other payment services providers have a duty to exercise reasonable care and skill when executing customers' orders. This boils down to two primary duties when processing customer transactions:

They need to comply with instructions given by the customer in accordance with their mandate, and make sure the right sums are transferred to the instructed accounts.

They are also under a Quincecare duty (named after the decision in Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363).

The second obligation is subordinate to the primary duty. Mrs Philipp's case hinged on the extent of that secondary obligation.

The Quincecare duty

In Quincecare, the scope of the duty was found to be "*that a banker must refrain from executing an order if and for so long as the banker is "put on inquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company…And the external standard of the likely perception of the ordinary prudent banker is the governing one*."

Mrs Philipp argued that the Bank had a duty to protect her from making a payment like the payments she made, and so falling victim to this type of APP scam. She said the Bank should have in place policies to detect and prevent APP fraud, and to reclaim monies subject to a potential APP fraud. Mrs Philipp

suggested that had the Bank done this, it would have led to the payments being stopped or delayed, giving Mrs Philipp a chance of recovering the money.

It is worth noting that Mrs Philipp was asked by the Bank when making the transactions whether she wished to proceed, and confirmed that she did. She also confirmed to the Bank (incorrectly, but as the fraudster had directed) that Dr Philipp had had prior dealings with one of the purported beneficiaries to whom the transactions were directed. Mrs and Dr Philipps also refused to engage with police enquiries, having been told by the fraudster that police involvement could jeopardise the FCA/NCA investigation.

In contrast, the Bank's argued that the broader duty contended for by Mrs Philipp was not a recognised duty in law, and should not be recognised since it conflicts with a Bank's duty to comply with its customer's mandate. The Bank was not an "insurer of last resort" for fraud against their customers, and Quincecare did not impose a duty to protect Mrs Philipp from the consequences of her own actions, where her payment instructions were valid and the payment reflected her intention.

The High Court agreed with the Bank that the scope of duty suggested by Mrs Philipp went beyond the boundaries of the Quincecare duty. The Quincecare duty is confined to cases of attempted misappropriation by an agent of the customer. The duty depends on an agent of the payor attempting to misappropriate funds, rather than any intention of the recipient of the funds. This significantly limits the circumstances in which banks can be said to have breached their Quincecare duty to an individual.

The High Court found two fundamental problems with the broader duty suggested by Mrs Philipp:

It sought to elevate the Quincecare duty from being subordinate to the primary duty to act in accordance with the mandate, to the other way round. That would require the Bank to second-guess the commercial wisdom of the customer's decisions and instructions.

There is no clear framework of rules which might provide the scope of the broader duty and indicate to banks when they should not act (or not act immediately) on the genuine instructions of its customer. The High Court felt there needed to be a clearly recognised banking code to define the circumstances when further questions would be required.

The High Court concluded:

That that to hold the bank liable for the customer's loss would have been "an unprincipled and impermissible extension" of the so-called 'Quincecare' duty of care that banks owe their customers. The Quincecare duty requires banks to "to observe reasonable care and skill in and about executing the customer's orders". "It is because the Bank cannot be expected to carry out such urgent detective work, or treated as a gatekeeper or guardian in relation to the commercial wisdom of the customer's decision and the payment instructions which result, that the duty cannot in my judgment extend to the obligations alleged by Mrs Philipp. A duty which carried with it the need for the Bank to have had in place in March 2018 procedures aimed at potentially protecting its customer from her own decisions would involve the Bank being under just the type of unduly burdensome obligation eschewed by Steyn J in Quincecare."

There was no proper basis for requiring banks and payment service providers to test that the proposed recipient of funds is genuine. They need only, under their Quincecare duty, ensure the genuineness of the instruction to pay.

The CRM Code

The transactions with which this case was concerned were made prior to the implementation of the Contingent Reimbursement Model Code for APP scams (the "CRM Code"). Introduced in May 2019, the CRM Code is a voluntary industry code for dealing with APP fraud. The CRM Code deals with steps firms should take to detect and prevent APP fraud, and how to respond to APP fraud once perpetrated. This includes, in certain APP fraud circumstances, paying and receiving banks repatriating or reimbursing the funds.

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The High Court noted the implementation of the CRM Code, but rejected the suggestion that it was a reliable indicator of how banks were required to act at the time of the transfers. Where payment service providers have signed up to the CRM Code though, they may be required to take further steps than the Bank in Mrs Philipp's case.

Comment

APP fraud continues to be a major problem for payment services providers and their customers. As customers become more sophisticated in their understanding of fraud, and as firms put in place greater capabilities to prevent and detect fraud, fraudsters will continue to develop their methods. This decision is unlikely to be the last on the topic, particularly as Mrs Philipp has indicated a wish to appeal this decision. However, the Court's unwillingness to impose broader obligations in this case should provide comfort to banks and other payment services providers that they are not underwriting the costs to their customers of APP fraud.

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