

Acquiring and merging Retail Pharmacies in the UAE: Legal Issues

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This article considers the legal framework and some of the challenges associated with acquisitions/disposals within the pharmaceutical sector.

It is important to note that acquisitions of retail pharmacies in the United Arab Emirates (“**UAE**”) are subject to onerous legal licensing restrictions. Information on pharmacy ownership structures in the UAE is not publically available and there are no published policies and practices adopted in this regard by the various local authorities.

Historically, the Ministry of Economy was the primary health/pharmaceutical authority in the UAE responsible for approving change to the ownership of all pharmacies in all the Emirates, with the exception of Abu Dhabi which is under the authority of the Health Authority Abu Dhabi. Recently, Dubai is also no longer under the authority of Ministry of Economy, but rather the Dubai Health Authority. The Department of Economic Development (“**DED**”) in each Emirate, the authority which issues the general business registration license of pharmacies, is also involved in the transfer process for pharmacies. In the event of an acquisition or disposal, an application to transfer the license from the existing owner to the new owner must be completed and ownership may only be transferred with the consent of the relevant DED.

Each authority has its own set of policies and practices, and such policies and practices are not always publically available and change from time to time without public pronouncement. Investors should always seek to obtain updated information from the local and federal authorities at the time they envisage investing, or acquiring an entity or business in the pharmaceutical sector.

UAE Commercial Companies Law no. 8 of 1984 applies to any company established in the UAE (“**Companies Law**”) and UAE Federal Law no. 4 of 1983 is the primary law governing the pharmaceutical professions and institutions in the UAE (“**Pharmacy Law**”). These two laws contain the primary rules and regulations that are applicable to the pharmaceutical industry and include several statutory ownership restrictions.

There are generally two types of ownership restrictions that apply to the pharmaceutical industry and are relevant to any acquisition or disposal, (1) those related to general UAE foreign ownership restrictions; and (2) those that are particular to such industry. The local authorities permit investors to structure their investments in this sector within the limits of these ownership restrictions.

1. General Foreign Ownership Restrictions

Under Article 22 of the Companies Law, foreign investors cannot own more than 49% of the share capital of a UAE company (other than in a free zone). This is commonly referred to as the “UAE Ownership Requirement”. As a result, foreign investors usually enter into an arrangement (usually referred to as nominee arrangement) with a UAE national individual(s) or a wholly owned UAE corporate entity, whereby such UAE partner (referred to as nominee) holds 51% of a company for and on behalf of the foreign investor in a trust-like arrangement.

Such nominee arrangements are commonly used in the UAE; in fact more than half of limited liability

companies in the UAE are held by foreigners in this way to comply with the mandatory UAE Ownership Requirement. It is highly unlikely that such nominee arrangements are brought into question except in the event of a dispute between the shareholders. Case law to date has, in most instances, enforced nominee agreements as between its parties by acknowledging the beneficial ownership of the foreign shareholder. That said, there is also a risk that the Anti-Concealment Law no. 17 for 2004) in force is implemented strictly by the UAE authorities to prohibit nominee agreements in this sector, albeit we consider this unlikely.

As a result, a foreign investor cannot be the registered owner of more than 49% of the shares of a company that owns retail pharmacies in the UAE and will have to hold 51% of the shares through a nominee arrangement if it wishes to own more than 49%, even through a merger or acquisition.

2. Restrictions Under the Pharmacy Law

When anticipating an acquisition or disposal of an entity engaged in pharmaceutical activity, investors must carefully consider the restrictions under the Pharmacy Law for (1) non-UAE nationals and (2) the number of pharmacies an individual may own.

2.1. Foreign Ownership Restrictions

Article 19 of the Pharmacy Law explicitly states that “[...] the applicant for the [pharmacy] license should be a UAE national [...]”. The use of the term ‘applicant’ has led the various health authorities to distinguish between the “applicant of the license” (i.e. the license holder, owner of the license) from the shareholders/owners of the concerned company operating the pharmacy. The ownership of the health license was hence separated from the shareholding in the company operating the business. Moreover, the term “national” has been generally interpreted by the health authorities to mean natural persons rather than corporate entities.

Consequently, in practice, generally UAE health authorities issue the health license of a pharmacy in the name of the individual(s) local partner(s) in the concerned company or to list the said partner(s) as “owner” or “holder” of the license. In other words, the local partner(s) is listed as the “owner” and the legal ownership of the other foreign partner(s) in the concerned company is disregarded for the purposes of the health license. However, this practice is not applied across the board consistently by the various health authorities. We have come across health licenses listing the concerned company as the “owner” or “holder” of the license with the local partner as its representative. That said, the above mentioned practice remains the most common one in use.

The risks with the approach of listing a natural person holding a UAE nationality as the “owner” on the health license, in practical terms, arise from the fact that an entity is operating under a health license they do not technically own, even if they are listed as a beneficiary or covered under the “establishment name” on the said health license. Further, the holder of the health license being a natural person enhances the risk of business operations being interrupted in the event of his incapacity or demise.

As a result, when purchasing or disposing of any company carrying out pharmaceutical activities, whether the foreign investor enters into a real partnership with the existing UAE national partner or engages a new UAE national as its nominee, the health licenses of any of the pharmacies it operates must mention the name of the UAE national who is a direct or indirect partner in the business.

2.2. Restrictions on the Number of Pharmacies

Article 26 of the Pharmacy Law explicitly states that a UAE national is permitted to operate no more than two pharmacies in the UAE. From a strict legal perspective, a person cannot hold more than two health licenses to operate a pharmacy.

The Abu Dhabi Health Authority, strictly enforces this provision. However, the health authorities in other

Emirates are more flexible on this issue, and grant more than two health licenses to the same person. In some instances, an exemption is sought and a “chain” approval is obtained to facilitate the conduct of merged pharmacy business. We have encountered multiple instances where more than two health licenses have been issued to the same individual.

Even though having more than two health licenses issued in the name of the same person is not in strict compliance with Pharmacy Law, the Pharmacy Law does not provide for any explicit sanction for the breach of the above provision. The sanction for a general violation of the said law is limited to a fine of a maximum of AED 5,000. The fact that the health authorities are granting multiple licenses to the same person reduces the risk of such health authorities cancelling the multiple licenses they have granted or applying sanctions. However, there is no guarantee that these authorities will continue to authorize such practice.

Hence, when considering the acquisition of or merging with a company carrying out pharmacy activities, an investor must consider the restrictions set out in the Pharmacy Law concerning the ownership of the health license and the number of health licenses which may be issued to a UAE national.

In conclusion, whilst it is possible for an investor to acquire a retail pharmacy business in the UAE, there are intricate regulatory and legal steps which require careful consideration and planning.