

NEWSLETTER 5/2016 (20. July 2016)

The Ministry of Economy has recently issued a ministerial resolution (Ministerial Resolution No. 272 of 2016) to clarify certain ambiguous provisions of the new Commercial Companies Law (Federal Law No. 2 of 2015) with regard to Limited Liability Companies (“LLCs”).

In this Newsletter, we would like to provide you with an overview of the Resolution and its legal implications on LLCs.

I. Ministerial Resolution No. 272 of 2016

According to Article 104 of the new UAE Commercial Companies Law (“CCL”), the provisions relating to Joint Stock Companies (“JSC”) also apply to Limited Liability Companies. Article 104 has created uncertainty in the market, as there are numerous JSC provisions that are unsuitable to be applied to LLCs.

Ministerial Resolution No. 272 of 2016 (the “Resolution”), which came into effect on April 29, 2016, clarifies – at least to some extent – which provisions relating to JSCs are applicable mutatis mutandis to LLCs by virtue of Article 104 CCL and which provisions shall not apply to LLCs.

II. Key Provisions that apply to LLCs

In the following, we will inform you of some key provisions relating to JSC, which are applicable to LLCs as per the Resolution.

1. Liability of the Company and its Directors

Articles 162 and 163 of the CCL contain provisions regarding the liability of directors and JVCs for acts of their directors and partially contain the same concepts as the respective provisions in the CCL relating to LLCs. However, it should be noted that the liability of a JSC director in accordance with Article 162 CCL also includes “errors in management”, whereas the respective provision relating to LLC managers (Article 84) stipulates his liability for “gross errors”. Since the Resolution does not specify which standard of liability shall apply to the management of LLCs, it remains to be seen, how the UAE courts will apply Articles 162 / 163 of the CCL to LLCs.

2. Invitations to a General Assembly

Provisions regulating invitations to attend General Assemblies of JSCs are mentioned in Articles 174 to 176 CCL and shall also apply to LLCs. These provisions regulate when shareholders, auditors or authorities may request the General Assembly to convene. This includes shareholders holding at

least 20% of the share capital in the LLC. Article 12 of the Resolution explicitly confirms that this threshold shall be applicable to LLCs. Hence, the threshold of 25 % stipulated in Article 92 of the new CCL is reduced by the Resolution.

3. Suspension of Resolutions of the General Assembly, Art. 191 CCL

Shareholders holding at least 5 % of the capital in LLCs may now request the suspension of the execution of a resolutions of the General Assembly with the DED provided that the applicant follows a specific procedure and argues that the resolution is contrary to the interest of the shareholders, favors a class of shareholders or gives special benefits to directors or others. The DED may only suspend a resolution if the grounds for the suspension are serious and valid.

4. DED may appoint boards, Art. 192 CCL

Shareholders of LLCs have to appoint a manager or a board of directors. In case shareholders fail to comply with this provision, the DED may appoint a temporary management for the LLC for a period of one year.

In case the shareholders fail to appoint a manager or a board for the second year, the DED may furthermore dissolve the company.

5. Auditor, Art. 243, 245, 247 – 254 CCL

Auditors may not be appointed for more than 3 consecutive years, shall be independent and are not allowed to own shares in the company. The LLC is required to invite the Auditor to its Annual General Assemblies where he shall read out his report. Within 7 days after approval of the auditor's report, the company shall submit the report to the DED. However, it remains to be seen whether the DED will simplify the filing of the auditor's report in the future.

III. Key Provisions that do not apply to LLC's

1. Financial assistance prohibition

According to article 222 CCL, it is prohibited for JSCs to provide financial assistance to shareholders (for example in the form of a loan) for the acquisition of shares issued by the respective JSC. This restriction does not apply to LLCs. However, it is likely that financial assistance given by LLCs for the acquisition of a parent JSCs shares will still be prohibited. The Resolution remains silent on this point and it remains to be seen which stance the authorities will take in such cases.

2. Board composition

The Resolution takes several Articles relating to the formation, election and number of members of the board of directors out of the scope of LLCs. Furthermore, the nationality restrictions and the remuneration limits set out for the management of JSCs shall not apply to board members of LLCs as these provisions do not fit in well with the nature of LLCs.

3. Related Party Transactions

The CCL restricts directors and other related parties of JSCs from dealing in securities. Furthermore, shareholder's approval is required for transactions with related parties, which exceed a value of more than 5 % of the capital of the company. The Resolution excludes these restrictions on related party transactions from application to LLCs.

4. Limitation of the director's power

According to Article 154 of the CCL, directors of JSCs may not enter into loan agreements for periods exceeding three years, mortgages or arbitration agreements, unless these powers are explicitly granted to the directors in the Memorandum of Association of the company or through a separate shareholder's resolution.

This restriction does not apply to directors of LLCs. Therefore, LLC directors have full powers in accordance with Art. 83 (2) to enter into such agreements, unless otherwise stipulated in the Memorandum of Association or by special agreement or shareholders' resolution of an LLC.

5. Sweep-up provisions

In addition to the exclusions mentioned above, the Resolution contains sweep-up provisions providing that regulations regarding JSCs shall not apply to LLCs in case the application of the respective provision would contradict the nature of LLCs or where the CCL already regulates the matter with regard to LLCs. The Ministry of Economy or the DED may also exclude further JSCs provisions from application to LLCs.

IV. Additional provisions for LLCs

Apart from the provisions mentioned above, the Resolution provides the following rules, which shall also apply to LLCs:

1. In case the LLC is managed by a board of directors, the chairman must be officially appointed by the general meeting.
2. Shareholders holding at least 10 % of the capital in an LLC are now entitled to ask the DED to call for a general meeting in urgent cases.
3. A shareholders' resolution is now also required for the sale of 51 % or more of the LLC's assets during a period of one year or for contributions for community services, e.g. charity.

V. Some uncertainties remain

The Resolution provides some needed clarification with regard to the application of several provisions of the CCL to LLCs. Nevertheless, some uncertainties remain. For example, whether Article 153 of the CCL (which prohibits the JSC to offer loans to its directors) also applies to LLCs, which frequently used such arrangements in the past, has not been clarified by the Resolution.

VI. Deadline for amending the Memorandum of Association

The new Commercial Companies Law stipulates a transitional period of one year to amend the Memorandum of Association of the companies in accordance with the new Commercial Companies Law, which expired on June 30, 2016. In case of non-compliance with this requirement, companies may face penalties or even dissolution.

As reported in newspapers, the UAE Cabinet has recently extended this period for an additional year until June 30, 2017.

However, it should be noted that the Cabinet's decision so far has only been published in the media and not in the Official Gazette. In any case, we recommend implementing the changes in a timely manner.

This article only constitutes a simplified and shortened description of some legal developments and can in no way replace legal consultation. The team at SCHLÜTER GRAF will gladly support you in case of any questions.

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