Mergers & Acquisitions: A healthy approach

As the UAE healthcare sector continues to grow it is becoming a target for investors. Carlo Pianese, Maria Mourad and Tala Azar of Tribonian Law Advisors explain the specific points to check when purchasing a UAE business in this sector.

Despite a general slowdown in the regional economy, the UAE healthcare sector has not shown any sign of recession but instead has grown in 2016 and the first quarter of 2017.

However, there are numerous aspects which must be taken into account by investors who wish to undertake mergers and acquisitions in this industry. In particular, they need to make sure they have considered the transaction structure, due diligence of the target and its operations and the process which is required to complete the share transfer.

DEFINING THE TRANSACTION STRUCTURE

One of the first issues to be addressed when looking at an investment in the UAE healthcare sector is in common with other industries the statutory restrictions on foreign ownership which could potentially impact the target's shareholding.

If the relevant healthcare facilities are located in mainland UAE and are operated by a limited liability company, under Federal Law No. 2/2015, UAE nationals (either directly or through a corporate entity) must own at least 51% of the issued share capital.

However, if the healthcare facilities are in mainland UAE but are operated by a sole establishment, the position is different, and ownership restrictions will depend on the type of activity being carried out.

For example, non-UAE doctors can set up an establishment through which they operate a clinic and carry out their medical practice in the UAE. However, sole establishments operating pharmacies or drug stores cannot be owned by non-UAE or GCC nationals. Another key issue can be ownership restrictions on the land on which the facility is located. In healthcare businesses land can be a key asset. However, generally, in the UAE the land and buildings on which healthcare businesses operate are not owned by the company operating the facility, so on transfer of the target's shares, ownership of the real estate often will not also be transferred. In addition, even in those infrequent cases where the target business does own the property and it is part of the perimeter of the sale, there can still be restrictions on real estate ownership and the applicable rules will depend on the Emirate where the facility is located.

TARGET'S CORPORATE STRUCTURE

While a limited liability company is the most common form of company in the UAE, it is not always used in the UAE healthcare sector. Many health facilities are sole establishments legally owned by an individual who is personally liable for the sole establishment's liabilities.

In addition, groups operating in the UAE healthcare sector are rarely organised under one holding company in which investors can buy shares. This means investors who wish to acquire an interest in all the group entities, may have to purchase shares in each entity separately which may be costly.

As a result in this industry it can be important to consider the possible reorganisation of the target company or group before completion.

This may include converting the target entity from a sole establishment to a limited liability company and/or transfering all group entities under one holding company. In addition, if a healthcare group also has operations outside the UAE, it is important to seek tax advice regarding any reorganisation.

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LICENSING

Carrying out any economic activity in the UAE is subject to comprehensive regulations. It is not possible to carry out any activity in the UAE without being duly licensed to undertake the specific activity by the relevant authorities. It is necessary to obtain a license from the economic department of any Emirate the individual wishes to operate in. Therefore, an Abu Dhabi company providing homecare services in Dubai would be in breach of its license and Dubai regulations if it carried out those services in Dubai without a Dubai Department of Economic Development license. It is also necessary to obtain a license from the licensing authority of any relevant freezone where economic activity is to be carried out. As a result, legal due diligence generally includes ascertaining the target is not carrying out activity in any Emirate or freezone for which it does not have the appropriate licenses. In addition, the activity will need to be carried out by the person explicitly set out in the license, and within the scope of the activity in that particular license. Therefore, a Dubai based company authorised by the Dubai Department of Economic Development to run an 'orthopaedic clinic' cannot carry out any surgical treatment unless it is also licensed as an 'orthopaedic surgery hospital'. This means when carrying out due diligence careful checks are needed to ensure none of the services the facility currently provides fall outside its license. This can be a delicate exercise given the way activities are categorised by the Emirate's economic departments and Freezone licensing authorities. For instance, the Dubai Department of Economic Development recognises over 90 types of medical related activity and also has specific service descriptions under each activity.

Healthcare facilities operating in the UAE also need a health license issued by the relevant health authority. These licenses must be held before providing any service in the UAE. They must explicitly and specifically include all healthcare and healthcare related services the facility provides.

The facility must also comply with all conditions specified by the health authority and the license must always be valid and renewed within the necessary deadlines. There are other licenses and certificates which healthcare facilities operating in the UAE typically require, and ascertaining these are in place is also generally part of the due diligence. Such licenses typically include a Chamber of Commerce and Industry certificate; advertising board permits, warehouse permits for non-medical goods, medical warehouse permits for medical goods, civil defense certificates on compliance with security and safety requirements and medical waste management certificates. Authorities issuing these licenses may vary in each Emirate.

HEALTHCARE PERSONNEL

As well as the standard UAE labour law requirements which are found under Federal Law No. 8/1980, there are specific healthcare sector requirements which will also apply to employees in this sector. For example, all medical staff employed by a healthcare facility will need to be licensed to provide healthcare services in the UAE before providing such services.

They will also need to be enrolled under a medical malpractice insurance policy. Although we have come across healthcare group companies which allow medical personnel employed and sponsored by one group company to provide services to patients in another group company, this is subject to the consent of the relevant health authority. hose failing to obtain such consents could potentially be subject to warnings and fines by the licensing health authority, so it is important to check.

AGREEMENTS WITH INSURANCE PROVIDERS

Agreements between a healthcare facility and insurance companies to compensate the facility for healthcare services given to patients insured by the contracting insurance companies (the MSAs) can also be important in the UAE.

When it comes to due diligence, red flags can include control provision changes, the insurance company's unilateral right to amend deductible amounts, co-payments and up-front fees payable by insured patients, as such rights can have an adverse effect on the healthcare facility's profits. n addition, restrictions on the facility's right to amend price lists for services which are to be compensated by the insurance company and the scope and quantum of discounts for healthcare services provided to patients who are members of insurance company plans, also need to be reviewed.

AUTHORITY CONSENT

Ownership changes of UAE corporate entities, particularly those which own a healthcare facility, are subject to a specific administrative process which must be followed in order to complete a merger and acquisition.

The main steps are as follows:

1. Obtaining initial approval from the economic department in the relevant Emirate, e.g. the Dubai Department of Economic Development in Dubai in order to change the target's ownership.
2. Executing and notarizing the share transfer agreement and target's amended constitutional documents before a notary public.
3. Obtaining a no-objection from the relevant health authority to the change of target ownership. In the UAE, the health authority may be at the Emirate level, e.g. the Dubai Health Authority and the Health Authority of Abu Dhabi are the licensing health authorities in Dubai and Abu Dhabi or at the Federal level, e.g. the UAE Ministry of Health and Prevention is the licensing health authority for facilities in Ajman, Fujairah, Ras-Al-Khaimah, Sharjah and Umm Al-Quwain.
4. Obtaining an amended main license of the company from the relevant economic department.
5. Obtaining an amended health license from the relevant health authority.

A thorough assessment of transfer requirements under the laws and regulations of the relevant Emirate must be completed in order to identify the required consents.

TIME OF PAYMENT OF THE SALE CONSIDERATION

Another consideration is the UAE market practice on the time of payment of the sale consideration in a merger and acquisition transaction.

Generally, in the UAE, the consideration is paid by the purchaser to the seller on the date the amended main company license is issued by the relevant Economic department and this date is known as the Transfer Date.

However, the UAE healthcare sector does not always follow this approach.

The reason for this is that healthcare facilities will normally also require consents from the relevant health authorities which are generally provided after the Transfer Date.

herefore, in the healthcare sector sellers typically mention that the sale consideration must be paid on the Transfer Date but purchasers' standard position is usually for the sale consideration to be paid when the amended license is actually issued by the relevant health authority.

Therefore, in order to manage parties' expectations on the payment of the sale consideration this point is normally covered when drafting transaction documents.

Common alternatives are either to transfer the full sale consideration to an escrow agent on the Transfer Date (and release it to the seller when the amended health license is issued), or to transfer part of the sale consideration on the Transfer Date and then transfer the balance when the amended health license is issued. ■

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