King & Spalding

Client Alert

APRIL 29, 2020

For more information, contact:

Simon Rahimzada
Partner
srahimzada@kslaw.com

Marcus Young
Partner
myoung@kslaw.com

Macky O'Sullivan
Senior Associate
mosullivan@kslaw.com

Layla D'Monte
Associate
ldmonte@alammarlaw.com

King & Spalding

Dubai
Al Fattan Currency House
Tower 2, Level 24
DIFC | Dubai International Financial Centre
P.O. Box 506547
Dubai, UAE
Tel: +971 4 377 9900

kslaw.com

Voluntary Delisting of Equity Securities in the GCC

RECENT ANNOUNCEMENTS

The proposed delisting of DP World, the global ports operator, from Nasdaq Dubai in an US$11 billion move by state-backed Port & Free Zone World is the latest announcement in what appears to be a developing trend of large corporates withdrawing from certain equity markets in the region. News of DP World's pull-out was preceded by ENBD REIT's announcement, in late 2019, of its intent to delist from Nasdaq Dubai. In 2018, Union Cement Company, a leading UAE cement producer based in Ras Al Khaimah, delisted from the Abu Dhabi Securities Exchange.

Over the past several years, a notable uptick in delistings has also been observed in Kuwait. Between 2012 and 2018, some 40 companies were reported to have delisted from Boursa Kuwait, including companies in the traditionally well-performing real estate and oil sectors.

WHAT IS DRIVING THESE DELISTINGS, AND WHAT ARE THE LEGAL CONSIDERATIONS FOR TAKING A PUBLIC COMPANY PRIVATE?

Below, we explore some of the potential commercial reasons for delisting and some of the legal considerations to be mindful of when proposing to undertake such a process.

Commercial Rationale

An analysis of the motives, both in the public headlines and behind the scenes, reveals many consistent themes behind these recent voluntary delistings:

- **Sluggish markets and a lack of liquidity**: Many listed companies in the Gulf Cooperation Council (**GCC**) region have been forced to contend with a slump in local markets due to reduced international investment in the region. The principal reasons for this include concerns over oil prices and geopolitical risks. The previously booming UAE real estate sector, which in January 2020 shrank for the first time

since 2009, is a prime example of a sector which has contracted due to a reduction in international investment. Traditionally, a driving factor to going public has been the additional liquidity which would then be available to a company for its future growth plans. That additional liquidity outweighed the additional administrative burdens placed on public companies. However, now that liquidity has slowed in certain markets, it is becoming increasingly apparent that listed status may not be providing a competitive advantage to a company and, as discussed further below, the additional administrative burden of being listed is slowly becoming a bigger, and more apparent, financial impediment.

- **Weak stock prices**: The share price of many listed companies has been trading below projected valuations, even before the recent unprecedented COVID-19 pandemic. For example, as of February 2020, ENBD REIT was reported to have had a total market value of only c. US$105 million, as against a net asset value of c. US$246 million. However, this is not confined only to the GCC. DP World had a dual listing on the London Stock Exchange in 2011, from which it delisted in 2015, citing weak trading volumes. It is apparent that boards of listed companies are coming under increased pressure to find ways to strengthen stock prices and counteract external market influences.
- **Inflexibility of permitted debt levels in a listed company:** DP World is increasing its leverage to take its shares private. Shareholders in a public company pay close attention to its debt-to-equity ratio. If perceived debt levels are too high, it can negatively impact share price. Private companies have far greater flexibility in how they are leveraged, which may in fact create a competitive advantage.
- **Onerous regulation:** The additional regulatory requirements imposed on listed companies are conventionally perceived by management teams as a burden both administratively and financially. As mentioned above, with a reduction in liquidity and during times when public markets are weak, this burden can feel more onerous and certainly costly in terms of continuing to maintain business functions which are required to meet the usual checks and control requirements from a listing authority. Notwithstanding this, it should be noted that DP World's board issued a statement that it has no intention to change the existing governance model of DP World, suggesting that public company governance burdens were not a driving factor. Maintaining a similar governance model does allow a company to consider relisting during better economic times.
- **Strategic conflict:** Companies such as DP World have suggested that the status of being listed is becoming increasingly incompatible with effective, long-term management strategies. DP World stated that a long-term focus on growth requires the pursuit of different priorities from those which apply to a short-term focus on share price. However, this should be viewed against the fact that DP World had only approximately 19.5 per cent free float, and so it would be surprising if the free float shareholders were able to drive a short-term agenda.
- **Re-listing on another exchange**: Delisting from one exchange and re-listing on another exchange is a move which some companies explore for many different reasons, some of which ultimately provide a competitive advantage. These include (i) the company having expanded operations within certain other geographies which may have led to greater demand from investors in other markets; (ii) the company wanting to lower the regulatory and administrative burdens mentioned above by re-listing on an exchange with lower controls; (iii) political reasons for certain public interest assets; and (iv) the company moving to a more liquid market generally.
- **Increasing number of take-privates**: Public companies are increasingly being taken private by private equity for a number of reasons, including: depressed share prices, low interest rates and the massive firepower of private equity, coupled with attractive valuations, which have enabled private equity funds to acquire companies with strong fundamentals at competitive prices. In the UK, in 2019, there was a 40 per cent. rise in the number of public-to-private deals. The COVID-19 epidemic has put a temporary hold on these deals, but we expect them to return once the pandemic has stabilised.

Legal and Tactical Considerations

For any company actively considering going private, or for any outside investor or consortium that may have spotted potential value in instigating a takeover of a public company, certain key legal and tactical considerations are likely to include:

- **Structure**: In a takeover scenario, the most common structures for effecting a takeover are by way of a general offer or a compromise and arrangement scheme (in the UK known as a 'scheme of arrangement'). Takeovers are generally regulated by takeover codes which have strict investor protection requirements to be met, set timetables, disclosure requirements and a body overseeing the process (often with powers of intervention or influence). However, there are also circumstances where no takeover code would apply to a take-private; for example, companies incorporated outside the UK but listed on the London Stock Exchange are not subject to the UK Takeover Code.
- **Form of consideration**: Cash, securities or a combination of the two? This will depend on the overall strategy for the take-private. Generally, offering securities in exchange will result in more regulatory issues which will need to be dealt with, such as public financial promotion restrictions in the jurisdiction in which the securities are being offered.
- **Involvement of the existing shareholders and target board**: In circumstances where a delisting is being driven by a takeover, it is essential to identify when, and how, to approach the existing shareholders and target board. In the first instance, the potential purchaser should seek legal advice on its ability to hold discussions with any stakeholders, as there are various restrictions on the number of potential approaches and extent of canvassing which is permitted before a public announcement.
- **Timing**: The period between initial talks and making a formal offer should be handled sensitively. Any indication in the market of a potential takeover and consequential delisting can distract from the day-to-day operations of a business, which in turn could negatively impact shareholder sentiment. Any applicable takeover code will prescribe a set timeline, often with periods of extension permissible. Non-takeover code deals can be executed relatively swiftly.
- **Due diligence:** As a starting point, an outside purchaser's deal team would review certain publicly available documents in relation to the listed company, for example, organisational documents (certificate of incorporation, articles of association or equivalent); any shareholder or voting agreements; the latest annual report and any subsequent periodic and current reports; any noteworthy press releases or other regulatory reports; share price information; and analyst or other financial reports, if available. An analysis as to whether any third-party consents (either governmental or contractual counterparties) are necessary should be conducted. Due diligence by a potential purchaser is often limited (at least in part because the theory of public markets is that all material information has already been made public), but practice has changed in the past 10 years and potential purchasers typically conduct more diligence than before. However, caution must be exercised by both potential purchasers and targets to protect non-public price sensitive information.
- **Restructuring for re-listing:** Where a listed company is to be re-listed on another exchange, it might be essential to amend the corporate structure of the group to achieve such listing. Many jurisdictions, such as those in the GCC, require a trading history before an entity can be listed on a local exchange, which can be challenging if a new holding company structure is established. If the company has operations in such jurisdictions, there may be scope to ride off the back of such operations to show a trading history for the group, subject to some corporate reorganisation and the obtaining of certain applicable regulatory consents. It should be noted that certain jurisdictions, such as the UAE, have foreign ownership restrictions which need to be kept in mind and dealt with through the restructuring. It is worth noting that there are tried and tested structures available in certain jurisdictions to allow this to be appropriately managed.

- **Shareholder arrangements post-delisting:** Where a target company is de-listed by a consortium takeover, there will likely be a negotiated shareholders' agreement between the shareholders. However, in such event, certain minority shareholders may still remain and would not be parties to such agreement. An assessment of minority shareholder rights would be essential to determine what, if any, rights such shareholders might have which may not be regulated in a shareholders' agreement. In most GCC-based jurisdictions, shareholders holding less than 10 per cent of the share capital of a private company have limited rights to influence how the day-to-day business of the company is managed and operated. However, there remain certain protections for minority shareholders of which a potential purchaser should be mindful. In circumstances where a company, through relevant voting of its shareholders, elects to delist from a stock exchange, consideration should be given to whether or not the continuing shareholder base needs to enter into a shareholders' agreement or whether matters should be regulated under the company's articles of association and the relevant local companies law.
- **Restrictions on financial promotion:** Under the laws of certain GCC states and English law, there are restrictions on communicating investment opportunities to the public which also need to be managed.
- **Confidentiality and market abuse:** During this process all parties should be alive to 'inside information', i.e. information that is not known to the public and which may, if known, have an impact on the price of the company's shares. In most jurisdictions, it is a criminal offence to deal, or encourage another person to deal, in the shares of a public company on the basis of information that is not public and which, if made public, would significantly affect the price. In addition, any takeovers falling within the remit of EU legislation will need to abide by the Market Abuse Regulation (EU) 596/2014 (MAR), which provides that the following types of behaviours are market abuse: (i) engaging or attempting to engage in insider dealing; (ii) recommending doing so to another person; (iii) unlawfully disclosing inside information; and (iv) engaging or attempting to engage in market manipulation. Therefore, it is essential for all advisors and stakeholders involved in the process to be bound by confidentiality obligations, whether contractually or by virtue of being a regulated entity, and for key parties to agree to a joint leak announcement strategy at the commencement of this process.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,100 lawyers in 21 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our Privacy Notice.

ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.