

The Competition Law in the UAE

Waldo Steyn

w.steyn@tamimi.com

With the EUR1.47 billion fine issued by the European Commission and considering the lack of a consolidated competition law in the UAE, businesses here may have been excused for being tempted to focus only on their competitive activities related to operations in Europe. However, with the publication on 23 October 2012 of UAE Federal Law No. 4 of 2012 Concerning Regulation of Competition (the “Law”) all businesses with operations in the UAE or supplying goods and services to the UAE market will have to ensure that they focus on and comply with the provisions of this new law.

On 23 February 2013 the Law will come into force in the UAE regulating specifically competition in the form of restrictive agreements, the abuse of dominant position and economic concentration. With significant new penalties now being imposed for the contravention of the Law, it must be a priority for businesses operating in the UAE to consider the compliance of their local, and wider, operations with this new legislative framework.

This article is an introduction to the new Law and aims to provide a general overview of the Law only.

Objectives of the Law

A very interesting and unorthodox legislative style from the UAE legislator was to introduce an opening provision clarifying the policy behind the Law. No doubt this approach will help the Courts, Competition Regulation Committee and practitioners to place the provisions of the law into perspective.

The objectives of the new law are set forth in Article 2 as being twofold:

1. Providing a stimulating environment for establishments in order to enhance efficiency, competitiveness and the interest of consumers and to achieve sustainable development in the UAE; and
2. Keeping a competitive market governed by the market mechanisms in accordance with the economic freedom principle through banning restrictive agreements, business and actions that lead to the abuse of a dominant position, controlling the operations of economic concentration and avoiding all that may prejudice, limit or prevent competition.

Structure of the Law

The Law is arranged into a number of chapters, which include definitions and the objectives of the Law, as well as:

- Application of the Law (dealing with some exclusions);
- Anti-Competitive Practices;
 - o Restrictive Agreements; and
 - o Abuse of Dominant Position;
- Economic Concentration;
- Penalties;
- Competition Regulation Committee; and
- Responsibilities of the Ministry of Economy.

“New” Concepts

It will be noted from the stated objectives of the Law that the Law introduces two important new concepts to the regulation of competition in the UAE in the form of the terms “Dominant Position ”and “Economic

Concentration". These terms are defined as follows:

Dominant Position: The position that enables any establishment, by itself or in participation with some other establishments, from dominating or affecting the relevant market.

Economic Concentration: Any behavior from which a total or partial alienation (merger or acquisition) of a property or usufruct of the properties, rights, stocks, shares or liabilities of an establishment to another establishment shall result and that may enable one establishment or a consortium of establishments from controlling, directly or indirectly, another establishment or a consortium of other establishments.

Application of the Law

The Law provides that the provisions of the Law shall be enforced on all businesses in relation to their economic activities in the UAE. The Law further applies to the exploitation of intellectual property rights whether in the UAE and abroad. Interestingly, the Law may also be enforced against economic activities outside of the country that impact competition in the UAE.

As a result of the scope of the application of the Law, individuals, corporates and syndicates will have to consider their activities carefully whether in respect of franchising rights, intellectual property licensing, mergers and acquisitions or other commercial activities to ensure proper compliance with the Law, and to consider how their business practices in other jurisdictions may impact competition in the UAE in light of this new Law.

The Law provides for specific exclusions in respect of regulated sectors that have specific competition rules including Telecoms, Financial and Transport sectors.

Anti-Competitive Practices - Restrictive Agreements

The restrictive agreements which are considered prohibited are mentioned as a non-exclusive list of examples, and include agreements that have the objective or effect of:

- Price Fixing;
- Determining conditions for sale or supply of services;
- Colluding in bids, practices and supplying offers;
- Market Sharing/Division and allocation; and
- Limiting the free flow of goods/ services to lead trade therein subject to artificial prices.

The provisions of the Law related to restrictive agreements accordingly appear to restate at least some existing provisions contained in the Executive Regulations to the Consumer Protection Law with more detail and with significantly more severe penalties.

Anti-Competitive Practices - Abuse of Dominant Position

The Law introduces the "dominant position" concept into the regulation of competition in the UAE. Article 6 of the Law provides that a business with a dominant position in a market sector, or in a main and effective part thereof, shall be prohibited from performing actions that lead to the abuse of such position in order to prejudice, limit or prevent competition. The Law lists a number of non-exclusive actions that are prohibited, including those with the following objectives:

- Imposing the prices or conditions of reselling of commodities or services directly or indirectly.
- Selling a commodity or performing a service with a price less than the actual cost thereof with the aim of hindering competitive establishments from entering the relevant market, excluding them from such market or causing them losses that prevent them from continuing their activities.
- Discriminating with no justification among clients in identical contracts in relation to the prices of commodities and services or the conditions of buying and selling contracts.

- Obliging a client not to deal with a competitive establishment.
- The total or partial rejection to deal in accordance with the usual commercial conditions.
- Unjustified abstinence from dealing in commodities and services through buying or selling or limiting or hindering such dealing that may lead into imposing an unreal price thereof.
- Suspending the concluding of a buying or selling contract on the condition of accepting obligations concerning other commodities or services unrelated to the original contract.
- Purposely publish incorrect information about the commodities or its prices.
- Decrease or increase the available supply of the commodity so as to create an artificial scarcity or abundance of the commodity.

The threshold for what percentage of a market share shall be deemed to establish a Dominant Position shall be determined by Cabinet decision.

It is of interest to note that both restrictive agreements and instances of the abuse of a dominant position can be exempted from prohibition subject to approval of the Minister of Economy and provided the agreement or activity will actually result in enhancing economic development and competitiveness in the market.

Economic Concentration

Articles 9 to 11 of the Law deal with economic concentration, the threshold for which is also to be determined by Cabinet decision. The Law requires a 30 day advance application to be filed with the Ministry for approving an acquisition or merger transaction, providing as follows:.

- The Ministry of Economy may approve an economic concentration transaction if it would not have a negative impact on competition, or if it would have a positive economic impact that outweighs any negative impact on competition.

Penalties and Court Proceedings

The new Law provides for harsh penalties that are unprecedented in UAE legislation which range from AED500,000 up to AED5 million. The penalties may also be imposed based on the percentage of annual sales in the cases of non compliant economic concentration transactions.

Furthermore, upon conviction, the court may order a business to be closed for a period of no less than three months and no more than six months.

All competition court cases have been granted the advantage of expedited cases and the Law allows for interim relief and temporary injunctions pending final court judgment.

With respect to criminal proceedings, the Law stipulates that the Minister's approval is required for initiating any criminal prosecution of acts contrary to the Law. The Law also authorizes the Minister of Economy to reconcile any contravention of the Law before a criminal case is transferred to the Criminal Court in return for a settlement amount equivalent to no less than double the minimum fine.

It is important to note that the Law specifically provides that no penalty issued against a party will prejudice the right of an aggrieved party to seek compensation from that offending party for damages resulting from its unlawful actions. The financial risk to businesses contravening the Law is accordingly not limited to the penalties provided for, but extends to possible civil claims for damages.

Competition Regulation Committee and the Ministry of Economy

The Law provides that a Competition Regulation Committee shall be established and shall be chaired by the Under Secretary of the Ministry of Economy. This would probably be a factor that may impact the application of the Law in a smooth and timely manner. It is no secret that Government committees

struggle to convene when their composition is made up of very busy public sector officials and prominent businessmen. In most cases, the Committee Chair is engaged in multiple committees and attending to various matters, all of which are important, which renders the possibility to convene hostage to the work load of the chairperson.

Gaps

The Law has not provided a clear exemption or a specific treatment to family businesses. Obviously a family business acquisition of another business in the same group which may raise dominant position concerns may still qualify and enjoy exemptions to be approved by the Minister. However the importance of family businesses to the economy makes it worthy to address separately provisions regulating this valuable constituent of UAE businesses.

Transactions occurring in the stock market demand speed which would also require specific treatment and not subject to the timelines requiring compliance in respect of economic concentration transactions.

Regional arrangements with competition regulatory bodies would seem to be a sensible approach for corporations having to comply with rules in a neighboring state. If the plan is to accomplish harmony between GCC states, regulating competition should no doubt also be at the top of the list of matters for harmonization of laws and practices.

Conclusion

The enactment of UAE Federal Law No. 4 of 2012 Concerning Regulation of Competition is an important step in the evolution of competition law in the UAE. The Executive Regulations to the Law and the thresholds determining market power will add the necessary details to this Law.

At this time, it is critical for businesses with operations in the UAE or supplying goods and services in the UAE to ensure that their operations (in the UAE and beyond its borders) comply with the new Law, prior to it coming into force in February 2013.

if you would like further information or have any questions regarding this new law, please contact Omar Obeidat, Partner & Head of IP (o.obeidat@tamimi.com) or Marcus Wallman, Partner and Head of Commercial Advisory (m.wallman@tamimi.com).

Al Tamimi & Company's [Competition team](#) regularly advises businesses regarding competition law in the UAE.