

Competition in Kuwait

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“Non-compete” clauses or “Covenants Not to Compete” (“CNC”) are a contractual term wherein one party is prohibited from entering into a similar trade or profession against the other party for a certain period of time.

Such clauses are generally premised on the concern that upon termination of the agreement or an employment relationship, the covenanted party may walk away with company secrets, or work for a competitor, or start a business with a competitive edge gained from the terminated agreement or relationship. However, too broad a non-compete clause or CNC may prohibit a covenanted party from legitimately practising his trade or making a living. Therefore, in order to protect the parties, a non-compete clause or CNC may contain reasonable limitations as to the geographical area and time period in which the covenanted party may not compete. However, under Kuwait law, any non-compete clause or CNC is viewed as a constraint on a person’s right to work or practise their trade and as such is unenforceable both under the law and as a matter of public policy. Such clauses are governed by Law No. 10 for the Year 2007 (the “Competition Law”), which came into effect on 9 August 2009. Generally, the aim of the Competition Law is to protect economic activity from harmful practices that result in unfair competition. Under Article 4 of the Competition Law, the following activities are considered to be harmful to competition and therefore prohibited:

- Manipulating or fixing prices through fictitious transactions contrary to market principles and in a way that harms competitors;
- Totally or partially restricting the flow of goods into and out of the market without justification by concealing them or refraining from dealing in the same;
- Flooding the market with goods leading to an unreasonable price that harms competitors;
- Preventing or hindering a competitor from conducting business in the market;
- Totally or partially concealing available goods in the market from a competitor in accordance with the implementing regulations;
- Selling goods for less than their actual cost with the intention of harming competitors;
- Providing conditions in a tender that name a particular trademark or type of commodity to be purchased;
- Totally or partially ceasing the manufacture, development, distribution, or marketing operations or placing restrictions on the goods’ availability in accordance with the implementing regulations;
- Dividing the market by categorising them according to geographical location, distribution centre, type of customer or commodity or season or time period, with the intent of harming competitors;
- Suspending the signing of a contract or agreement on a condition unrelated to the original place of dealing or agreement; and
- Destroying equal opportunities between competitors by distinguishing some over others in the conditions of the sale or purchase agreements without due reason, or by leaking information for the benefit of one competitor and not from others.

Applicability of the Law

Article 4 of the Competition Law provides that “Preventing or hindering a competitor from conducting business in the market” is a violation of the Competition Law. As such, a strict reading of this article infers that any non-compete clause or CNC will be invalid.

As a general matter, Article 3 of the Competition Law not only applies to unfair competition

violations that take place inside Kuwait, but also those that are committed abroad and harm fair competition in Kuwait.

The Competition Law does not cover all areas of economic activity. The following areas of economic activity are exempted from the scope of the law:

- Government-owned projects
- Projects required by a particular law
- Cooperation between companies aimed at facilitating market activity
- Research and development

Authority for Competition

The Competition Law also establishes an authoritative body, the Authority for the Protection of Competition (the “Authority”), which is tasked with engaging in a review of competitive activities and approving or denying the same. More specifically, the powers of the Authority include the following:

- Endorsement of policies and necessary procedures to protect and support competition;
- Receipt of competition notifications, applications, and complaints;
- Investigations into agreements, contracts and practices;
- Compiling market data, with the cooperation of relevant authorities;
- Requiring disclosure by concerned persons; and
- Ruling on notified agreements, contracts, practices, mergers, combinations of management, unions, and acquisitions of assets.

Furthermore, any person may inform the Authority of unfair practices.

Mergers and Acquisitions

Under the Competition Law, mergers and acquisitions, which lead to an increase in the direct or indirect control of a particular market and that control represents more than 35% of the relevant market, are subject to the review of the Authority.

If the 35% threshold is met, the process for review is as follows:

- A detailed application must be submitted to the Authority at least 60 days before the increased control over the market is to begin;
- The Authority will publish a notice of the proposed transaction in Kuwait’s Official Gazette and four daily Arabic newspapers;
- Concerned parties will have the opportunity to object to the transaction within 15 days of the publishing of the notice;
- The Authority will either approve or reject the transaction and will notify the applicant of its decision;
- Denied applicants have a period of 60 days in which to appeal the Authority’s decision.

Penalties

Penalties for violating the Competition Law are set out at Articles 19 to 22 of the Competition Law. Violators of the Competition Law may be fined KD 100,000 or the amount of the illegally acquired gain, whichever is greater. If the offence is repeated, the fine is doubled. Goods involved in the activity may also be confiscated. Furthermore, the violating activity may also be restricted for a maximum period of three years.

Conclusion

Competition is a key feature of a free market and promotes innovation and growth. The Competition Law expands upon previous Kuwaiti regulations on illegal competition violations and monopoly and further protects economic activity in Kuwait from the harmful effects of unfair competition.