

How exempt are major industry sectors from the UAE Competition Law?

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However the actual wording of the exemption needs to be properly understood. The “exclusion” may not mean what you think it means.

As previously reported, a specific competition law (Federal Law no. 4 of 2012 Concerning Regulating Competition) (“Competition Law”) came into effect in the UAE on 23 February 2013.

The Competition Law aims to protect and enhance competition and to combat monopolistic practices in the UAE by regulating abuse of dominant position, prohibiting restrictive agreements and providing for merger controls.

The Competition Law has yet to become fully effective, however, as further executive regulations or cabinet decisions are still required to prescribe critical aspects of the law including:

- The market share threshold for the definition of dominant position;
- The market share threshold for the “weak-impact agreement” exception to the restrictive agreement provisions; and
- The controls for excluding small and medium establishments.

Until these key issues are clarified, the full extent of the effect of the Competition Law cannot be completely understood.

Participants in certain major industry sectors may have considered themselves unaffected by this uncertainty. This is because the Competition Law states that the sectors and activities specified in the appendix attached to the Competition Law are excluded from the execution of the provisions of the Competition Law (see Article 4(1) of the Competition Law).

The affected sectors and activities are as follows:

- Telecommunications sector.
- Financial sector.
- Cultural activities (written, audio, visual).
- Gas and petrol sector.
- The production and distribution of pharmaceutical products.
- Postal services, including express mail services.
- Activities related to the production, distribution and transport of electricity and water.
- Activities of drainage, garbage disposal, sanitation and similar activities in addition to the supporting environmental services.
- Land, sea and air transport sectors and transport by railways and related services.

Most of the above-listed industry sectors are prone to the occurrence of “natural” monopolies (i.e. a type of monopoly that exists as a result of the high fixed or start-up costs of operating a business in a particular industry, which creates a barrier for the entry of competitors). At first glance, therefore, exempting these

sectors from regulation under the Competition Law appears odd.

More careful reading of the Competition Law (and its annex in particular) is required.

What the annex to the Competition Law states (in its English translation) is as follows:

Any agreement, practice or business related to a certain commodity or service of which another Law or regulation has granted the responsibility of organising the competition rules thereof to sectoral regulatory bodies shall be exempted from the application of the provisions of this Law

The annex then goes on to state that such exemptions “shall include” the sectors, activities and services that are expressly listed in that annex.

Does this mean that the listed the sectors and activities are exempted outright from the Competition Law? Or does it mean that they are exempted only because another law or regulation has granted the responsibility of regulating competition in that sector to a sectoral regulatory body?

For example, in the UAE’s telecommunications sector, Federal Law no. 3 of 2003 Regarding the Organization of the Telecommunications Sector, as amended (“Telecommunications Law”) established the Telecommunications Regulatory Authority (“TRA”) as the competent authority to oversee the telecommunications sector in the UAE and to issue regulations, instructions, decisions and rules regulating and ensuring competition in the telecommunications sector (Article 14(1) of the Telecommunications Law).

It is, therefore, clear cut that the telecommunications sector is exempt from the provisions of the Competition Law. Yet under the Telecommunications Law the TRA’s competence to regulate and ensure competition in the telecommunications sector is stated to be “without prejudice to the applicable law and regulations”. So arguably the TRA’s regulation of competition still has to be consistent with the Competition Law.

In other sectors the legal position may be less clear.

The Medicines Pricing and Companies Committee, which fixes the price of medicines and pharmaceutical preparations, was established under Federal Law no. 4 of 1983 concerning Pharmaceutical Professions and Institutions (“Pharmacy Law”). In addition, the price for selling imported and local drugs to the public is to be calculated in accordance with Articles 2 and 3 of Federal Ministry of Health Resolution no. 838 of 2008. The Ministry of Health also keeps the price of generic drugs manufactured in the UAE under review, favouring price reductions to assist poorer patients and ensure affordability.

The Pharmacy Law and the Ministry of Health resolutions described above clearly give the Medicines Pricing and Companies Committee and the Ministry of the Health the responsibility to regulate the prices for pharmaceuticals products, but this is not the same as having responsibility for organising the competition rules for the sector.

Accordingly, participants who produce and distribute pharmaceutical products in the UAE may not simply be able to presume that they have a complete exemption from the Competition Law in relation to activities not expressly regulated by Pharmacy Law (e.g. agreeing with competitors to divide territories, allocate customers, to limit production or to boycott customers could be subject to the prohibitions in the Competition Law).

With regard to the rail sector, a draft regulating law (Federal Law Draft no. 999 of 2011) was issued. This expressly gives the National Transport Authority competency for all issues of economics in the railway sector (including regulating competition). As that law has not been enacted, does this mean there is no law or regulation that has granted the responsibility of organising the competition rules for the rail sector to National Transport Authority (and so the exemption of the rail sector from the Competition Law is not effective) or is the National Transport Authority the sectoral regulatory body as it is generally empowered

to manage “the affairs relating to transport” (see Cabinet Decision no. 502 of 2006)?

The point is this: it may not be sufficient to assume that, simply because your sector is listed in the annex to the Competition Law, you are entirely exempt from the provisions of the Competition Law. Your sector could only be exempt due to another law or regulation giving the responsibility of regulating competition in your sector to a sector specific regulatory body. In that case, even though the provisions of the Competition Law do not directly apply, other sector specific competition rules will.