

Competitive Edge? Competition and Anti-Monopoly Law in Oman

Richard Baxter - Senior Associate - Corporate / Mergers and Acquisitions / Commercial / Capital Markets / Projects

- Muscat

June – July 2016

The Law

In Oman the Consumer Protection Authority (the 'Authority'), amongst its other significant powers and duties, regulates the recently promulgated anti-trust and competition law. The law was brought in to force by publication, in the Official Gazette, of the Competition Protection and Anti-Monopoly Law, issued by Sultani Decree number 67/2014 (the 'Law').

As we see more clients with significant market power acquire business assets in the territory, we find ourselves having to advise that transactions must be notified to the Authority for clearance before consummation.

Key concepts

For the purpose of this article we set out the Law's definitions of "Dominance" and "Economic Concentration":

- 'Dominance' means the ability of a person or group of persons acting together to 'directly or indirectly' co-engage in control over the concerned market, and hence, acquiring a rate exceeding (35%) thirty-five percent of the volume of this particular market.
- 'Economic Concentration' means any act which leads to partial or full transfer of the assets, shares, interests, benefits or liabilities from one person to another or establishment of unions or mergers or combination of two managements or more under one common management which results in a person or groups of persons being in a dominant position in direct or indirect way.

Notification of prospective transactions

Pursuant to Article 11 of the Law the persons who wish to carry out any act which would result in an economic concentration must submit a written request to the Authority informing the Authority about the proposed arrangements. The Law is entirely clear that this requirement is mandatory.

The Law is clear that notifiable transactions include: (a) share acquisitions; (b) asset sale and purchase transactions; (c) joint ventures; and (d) contractual arrangements that have the effect of establishing market dominance in the hands of an entity or entities acting in concert. Minority share acquisitions are not caught and only full function joint ventures are caught, although attempts to circumvent are unlikely to succeed given the way the economic concentration definition, cited above, has been drawn.

The Law is silent on the point of who is responsible for notification but the presumption is that the acquirer is responsible for this.

The Authority has to consider the application and issue a decision within a period not exceeding 90 days from the date of receipt. If this period lapses without considering the application this should mean an

implied consent. The acts or subject matter of the application, cannot be completed without the issuance of the Authority's decision or lapse of the period mentioned.

Penalties and appeals

Failure to notify is currently punishable by imprisonment (between one month and three years) and/or a fine between RO10,000.00 (circa USD\$26,000) and RO100,000.00.

The applicant may appeal against any decision of the president of the Authority within 60 days in case of rejection of the application. The appeal shall be considered within 30 days from the date of submission. The lapse of the cited period without a response from the Authority shall be construed as an acceptance of the appeal.

The Authority may cancel any approval if it becomes aware that the information provided by the applicant(s) is not accurate or is fraudulent.

The 50% threshold

The Law provides that no transaction will be approved which leads to economic concentration through acquisition of more than 50% of the relevant market. Despite this, in certain cases it can be argued that a party, or the parties, to a proposed transaction are already in control of the relevant market and therefore unconditional clearance should be granted. The force of that argument cannot be guaranteed, however, and it is open to the Authority to impose conditions to any approval it grants (such as a prohibition on price rises for a period, for example). A thorough analysis of each specific set of circumstances and their merits should always be undertaken in any relevant situation.

Conclusions

The current practice at the Authority is still evolving and there is some lack of clarity as to how and when the relevant provisions will be meaningfully enforced. Despite the lack of enforcement action to date, acquirers are advised to comply with the Law even where it is tending to be 'more observed in the breach' at present. While this is, of course, our advice in all areas, we consider it particularly prudent in these matters. We say such given the sanctions mention above and the scope for future measures which could well be applied retrospectively. It is maybe not too cynical to think that significant market players, who choose not to exercise such prudence, may well look like attractive and legitimate candidates for fines, as governmental bodies look to increase revenues while oil prices are depressed.

From the analysis above we can confirm our opinion that any well advised acquirer should seek clearance from the Authority in respect of any qualifying transaction. Further, it must follow that it is best to err on the side of caution when analysing whether a transaction should or should not be notified.

Our experiences of these matters indicate that the Authority tends to make a determination well ahead of the 90 day time limit. We have seen decisions returned within two weeks of application where any request for further information from the parties is delivered promptly. Applications must, of course, always be handled sensitively, with due deference to the prevailing business interests of all parties involved.