Competing in the UAE

The competition law regime in the United Arab Emirates is changing

*by **Rebecca Kelly****

The UAE has developed at a rapid pace and, over the course of its development, there has been a need to improve the legal and regulatory framework to encourage foreign investment and promote economic stability. An integral part in the development is the recent implementation of a competition law framework.

The UAE's Federal Competition Law (Federal Law (4) of 2012) has been in force since late February 2013. In October 2014, the UAE cabinet issued implementing regulations to provide necessary guidance and additional clarity on how competition law is to be enforced by the Ministry of Economy, and how the mandatory requirements of the Federal Competition Law are to be met by entities operating within the UAE.

The Federal Ministry of Economy is the supervisory and regulatory authority tasked with and responsible for implementing, monitoring and enforcing the Competition Law. A new authority of the Ministry of Economy – known as the Competition Department – is to be established to assist the ministry to perform its regulatory functions, and it will work with the Competition Regulation Committee. While the implementing regulations clarify a number of areas, they do not prescribe the market share percentage that will trigger notification to the ministry (as outlined below); and we understand this is to be specified at a later date by the Council of Ministers. Once the percentage is issued, the requirement to prenotify mergers and acquisitions creating potentially anticompetitive economic concentrations will be mandatory and will allow the Competition Department to obtain empirical data on mergers and acquisitions within the jurisdiction. To date, this information has not been collated by any government authority and it welcomes a significant and positive change within the UAE government in respect of access to information.

This article outlines some of the key effects that we expect the implementation of the Federal Competition Law and the implementing regulations will have in the market, and identifies some gaps where companies still await clarity.

Scope of the law

The Federal Competition Law and the implementing regulations apply to all entities operating in the UAE. However, there are some sectors exempt from its application. In addition, it applies to any entity whose activities outside the UAE may affect competition in the UAE. This may extend its jurisdictional reach into the economic and trade free zones in the UAE.

The sectors and activities exempt from the application of the Competition Law include the telecommunications sector; financial sector; cultural activities (written, audio, visual); oil and gas; the distribution and production of pharmaceutical products; the provision of postal services; activities relating to the production, distribution and transport of electricity and water; activities relating to waste management; and land, sea, rail and air transport sectors. This list of excluded sectors may be amended at any time. So regular updates should be sought prior to any merger and acquisition in these areas. Any entities operated or owned by the UAE federal government or the local government of an emirate are also exempt from the application of the law.

The Federal Competition Law introduces international competition law principles to the UAE with a focus on three main areas: merger controls; restrictive agreements; and abuse of market dominance. As of now, there has been little enforcement (if at all) of the provisions of the Competition Law. However, despite this, all those companies governed by the application of the law must comply with the provisions.

Merger control

The Competition Law covers a range of commercial transactions, all of which are referred to in the law as "economic concentrations". This term captures not only traditional share acquisitions but also transfers of assets and liabilities from one entity to another. New merger control rules will be introduced by the Competition Law, following which an economic concentration must be approved by the ministry. In making its assessment, the ministry will consider whether (1) the parties to the economic concentration transaction are likely to exceed a given percentage of total transactions in the relevant market, and (2) the economic concentration would affect competition in that market or create or enhance a dominant position.

Any transaction falling into the category of an economic concentration must be notified in writing to the ministry at least 30 days prior to the completion of the proposed economic concentration. There is no clarification in the Competition Law or the implementing regulations as to whether the pre-approval is to be sought by the buyer or the seller but, in our experience, the buyer would normally be the party who would seek approval. Upon receipt of the application, the ministry is given a review period of up to 90 days from the date of the application, which, in certain circumstances, may be extended by a further 45 days. During the review period, the parties cannot take any actions with a view to completing the transaction.

The ministry has the right to approve or reject the application for the transaction, and their assessment is largely based on whether the economic concentration may adversely affect existing competition, or if it may otherwise have a positive impact or economic benefit that exceeds any adverse competitive effects.

An economic concentration transaction may only be completed by the parties either (1) on receipt of the ministry's written approval; or (2) upon the expiration of 90 days from the initial filing seeking the approval (in circumstances where the ministry has not provided a notice in writing of its decision within the 90 days).

The Department may request additional information from the applicants and also consult with any affected third parties.

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Importantly, parties are expressly prohibited from completing the economic concentration until the minister has issued a decision approving the transaction.

Complaints

The implementing regulations outline the process whereby a stakeholder may file a complaint with the Department relating to a potential violation of the Competition Law. Any party that is the subject of a complaint has the right to submit a defence to the Department. Possessing wide investigative powers, the Department may request additional data, documents or statements to investigate and determine the complaint further.

From complaint to resolution is a time-consuming process and may potentially derail the whole transaction. Once the parties are issued with a decision by the Department, they may appeal it. If a settlement is reached, then any party in breach of the settlement can be sued in the respective UAE court for enforcement of the settlement terms. As a precautionary warning, given that there is no concept or penalty for a vexatious litigant in the UAE – and that neither the Competition Law nor the implementing regulations contain any reference to the legal standing required in order to file a complaint – it seems as though a strategic avenue to derail a proposed transaction by an aggrieved competitor would be to file a spurious complaint with the Department, which will delay the transaction.

Restrictive agreements

The Competition Law prohibits restrictive agreements, which are defined as agreements (including arrangements, practices and alliances between entities) that aim to limit or prevent competition – for example, by price-fixing, prohibiting or limiting production, or the free flow of goods and services in the UAE – or that intentionally divide markets (these are referred to as restrictive agreements).

Some agreements that may otherwise be interpreted as restrictive agreements may be exempt from the application of the Competition Law. These are referred to as "weak-impact agreements" and include agreements entered into between entities where their overall market share does not exceed an (as yet undefined) percentage of the total overall transactions in the relevant market. If any entity within the UAE is currently a party to a restrictive agreement, the implementing regulations specifies remedial steps that must be taken in order to seek an exclusion from the application of the law. Failing a successful application for exclusion, the parties will be in breach of the Competition Law and will have to terminate or amend the restrictive agreement in order to comply.

Dominant position

The Federal Competition Law prohibits entities that have acquired a dominant position in the market from abusing their position. A dominant position is defined by reference to an entity's share in a relevant market and includes a position where an entity can, by itself or in collaboration with other entities, control or affect the relevant market. As with restrictive agreements, the dominance threshold of the relevant market share remains to be defined. Once defined, the ministry will have the power to increase or decrease the threshold at any time with reference to prevailing economic conditions.

Some of the activities that may constitute an abuse of a dominant position include price-fixing; discriminating between customers; obliging a customer not to deal with a competing entity; refusing to deal; disseminating false information; or artificially increasing or decreasing quantities in a market.

Penalties

The Federal Competition Law contains a number of penalties in the hope of deterring companies from engaging in anticompetitive behavior. The penalties include both financial and administrative in nature. From an administrative angle, companies' licences and activities may be suspended pending final judgment until it is determined if the company should be closed; and from a financial angle, the fines range from AED500,000 to AED5m for a violation of the Federal Competition Law's prohibition of restrictive agreements or abuse of a dominant position.

Entities that enter into reportable economic concentrations without the ministry's prior approval are subject to a fine of a minimum of 2% and a maximum of 5% of the overall annual sales revenues for the prior year's operations. In a situation where annual revenues are indeterminate, a financial penalty of between AED500,000 and AED5m may be imposed; and for repeat offenders, those fines are doubled.

Conclusion

The Federal Competition Law is expected to have a significant impact on the manner in which mergers and acquisitions in the UAE are conducted, especially given the potential time delay to a transaction pending approval from the ministry. Potentially, this approval could take up to 120 days, and in most transactions this delay could cause potential issues not foreseen at the initial stage of the transaction. As a result of the approval process, any buyers in cross-border acquisitions should include the UAE in the list of jurisdictions from which mandatory approval will be required prior to a closing. In other jurisdictions, any pending approval is a risk that a buyer is willing to take and deal with post completion. However, the parties to a transaction here in the UAE are specifically prohibited from closing the transaction which means "everybody waits".

The main message for all companies operating within the UAE, or potentially selling or acquiring a business within this market, is to be aware of the Competition Law and the significant impact that the law and the implementing regulations may have on existing and potential business opportunities in the market. Although we await further clarity in respect of a range of defined issues in the law, as the law is now in force, ignorance of its application could be detrimental to an entity's operations here.

All entities must be aware of the requirement to seek prior approval from the ministry when an economic concentrated transaction is proposed. In circumstances where a company assumes a dominant position, all service level and supply agreements should be reviewed to ensure they are not restrictive agreements. In circumstances where they could possibly be interpreted as restrictive agreements, an application to the ministry to amend or exclude these from the application of the Competition Law must be made. While the processes involved are time-consuming, given that the potential penalties include suspension of a company's licence, all companies should push forward with a review immediately.