

Client Alert

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New Competition Regulation in the United Arab Emirates *Considerations for Commercial Practices and Transactions*

This briefing identifies the types of practices and transactions in which domestic competition law might be relevant to doing business in the United Arab Emirates (the UAE) in light of the new federal competition law set to take effect on 23 February 2013. Of particular note, certain commercial practices such as cartels and bid rigging, which up to now have escaped competition law sanctions, will be subject to potential criminal penalties (through substantial fines). Mergers and other forms of business combination, meeting certain thresholds, will be subject to mandatory notification and suspension prior to approval.

Introducing the UAE's New Competition Law

In the UAE, competition legislation was historically contained in a series of consumer protection related regulations which fell short of creating a significant regulatory framework to encourage and safeguard competition within the state. On 10 October 2012 that changed, as the UAE passed Federal Law No. 4/2012 on the regulation of competition (the **Competition Law**) which aims to protect and enhance competition within the state. The Competition Law is a significant piece of legislation and will have an impact on commercial practice and transactions in the UAE, both for local and international companies.

What does the Competition Law regulate?

As with most competition regimes internationally, the Competition Law in the UAE regulates market behaviour with particular emphasis on:

- regulating restrictive agreements and abuse of market power; and
- merger control.

Who is affected by the Competition Law and are there any exceptions?

The Competition Law applies to all entities operating in the UAE and entities whose activities outside the UAE may affect competition in the UAE. There are, however, certain sectors and activities which are specifically excluded from the law.

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The Competition Law states that any agreement, practice or work related to a specific product or service, which is regulated by another regulatory authority, is exempt from the law unless the Ministry agrees to review the matter, following a request from any other regulatory authority. The following sectors and activities are specifically referred to in the Competition Law as exempt:

- telecommunication sector;
- financial sector;
- cultural activities (readable, audible and visual);
- oil & gas sector;
- production and distribution of pharmaceutical products;
- postal services including the express mail service;
- activities related to the production, distribution and transportation of electricity and water;
- activities on the treatment of sewerage, garbage disposal, hygiene and the like, in addition to supportive environmental services; and
- land, marine, air or railway transport and related services.

In addition to the above sectors and activities, the Competition Law also exempts small and medium sized establishments according to controls to be specified by the UAE Cabinet. As yet, it is unclear how the UAE Cabinet will determine what constitutes a small and medium sized establishment for purposes of the legislation but we would envisage it to be based on, amongst other factors, revenue. There is also a specific exemption for conduct initiated by the Federal Government or a local government of an Emirate and acts carried out based on a decision or authorization granted by those entities. It remains to be seen how wide this exemption will be construed and how it will apply to the conduct of state-owned entities.

Who regulates competition in the UAE?

Pursuant to the Competition Law, the Ministry of Economy (the **Ministry**) is the regulatory authority responsible for implementing, monitoring and enforcing the Competition Law in the UAE. This is different from the position, for example, in some member states of the EU, where the competition authority is independent of government.

It should be noted that, although the Ministry can investigate practices violating competition, the Minister of Economy has discretion to determine measures that should be taken against any persons violating the law. To assist the Minister of Economy, the Competition Law provides that a committee, to be known as the Committee of Competition Regulation, will be established to act in an advisory capacity to the Minister of Economy by, for example, studying issues relating to the implementation of the Competition Law and suggesting special legislation and procedures to protect competition in the UAE.

What are restrictive agreements?

The typical type of restrictive agreement is a cartel to fix prices or share markets or customers. Specifically, the Competition Law prohibits all agreements, arrangements, alliances or practices between establishments that aim to violate, reduce or prevent competition.

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There are many examples of commercial agreements, such as distribution agreements and joint ventures, which do not amount to a merger (see below on merger control) but could potentially violate, reduce or prevent competition and run the risk of being unlawful under the Competition Law as a restrictive agreement. It is, however, possible that, on a detailed examination, certain commercial arrangements, such as exclusive supply or distribution arrangements, do not operate to restrict competition because they are required to ensure the necessary levels of investment. However, such arrangements will need to be examined for potential competition law issues.

It should be noted that, subject to certain exceptions, the prohibition on restrictive agreements, under the Competition Law, does not apply to certain agreements (referred to as weak agreements) entered into between establishments whose overall share of the market does not exceed a certain percentage of the overall transactions in the relevant market (the **De minimis Threshold**). The De minimis Threshold is not set out in the law but will be determined by the UAE Cabinet. The EU has selected a de minimis threshold of 10% below which agreements between competitors (apart from price fixing) will not violate competition law. It remains to be seen what De minimis Threshold will be set by the UAE Cabinet.

What amounts to an abuse of a dominant position?

In common with most international regimes, under the Competition Law it is not the holding of a dominant position that is unlawful but the Competition Law prohibits companies who have acquired a dominant position in the relevant market from abusing that position. A dominant position is achieved if the share of any establishment surpasses the proportion of the overall transactions in the market as determined by the UAE Cabinet. It should be noted that the UAE Cabinet is yet to give guidance on such threshold.

The law further defines a dominant position as a position whereby any establishment can, by itself or in collaboration with other establishments, control or affect the relevant market. It remains to be clarified whether dominance is purely an issue of market share or whether other factors are to be taken into account in determining dominance. The provisions of the Competition Law suggest that the dominance threshold may be increased or decreased, according to economic conditions, at the discretion of the UAE Cabinet based on proposals from the Minister of Economy. In highly concentrated markets (for example, in the mining sector) there is scope for companies to find themselves dominant and such risk may increase through industry consolidation.

The Competition Law prohibits any entity that is dominant from abusing that position by engaging in, for example, the following practices:

- (a) fixing or setting prices or terms of resale of products or services;
- (b) selling a product or service for a price that is lower than its real cost in order to obstruct or exclude other entrants to the market or expose them to big losses that make it difficult for them to carry on with their activities;
- (c) discriminating between customers of similar contracts without any justification;
- (d) forcing customers to refrain from dealing with competing entities;
- (e) refusing to deal according to common trading conditions.

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The category of potential abuses listed in the Competition Law is illustrative rather than exhaustive.

What exemptions exist for alleged restrictive agreements or practices related to a dominant position?

The Competition Law does provide a procedure for obtaining an individual exemption from the prohibition contained in the law. Interestingly, this procedure applies to both restrictive agreements and abuse of dominance.

The Minister of Economy can issue a decision to exclude a restrictive agreement or practice related to a dominant position from violating the Competition Law provided that:

- (a) the relevant establishment notifies the Ministry, in writing, through a standard form document;
- (b) the relevant establishment proves that such restrictive agreement or practice related to a dominant position will reinforce the economic development, improve the performance and competitiveness of the establishment, develop the production and distribution systems or realise specific benefit for consumers; and
- (c) the Ministry is notified of any modifications to the restrictive agreement or practice related to a dominant position, which were previously excluded from the application.

How does the Competition Law deal with merger control?

Merger, under the Competition Law, is referred to as an Economic Concentration which covers a range of commercial transactions whereby entities are involved in a merger, or acquisition of assets, proprietary rights, usufruct or shares which enable one entity to control, whether directly or indirectly, the other entity. Also covered is a combination of two or more management into joint management.

Where a merger will exceed the proportion of transactions in the market (a level to be determined by the UAE Cabinet) and may affect competition in the relevant market, particularly through the creation or promotion of a dominant market position, a notification must be made to the Ministry of Economy in writing at least 30 days prior to completion.

Where such a notification is necessary, the notifying company may only complete the transaction:

- (a) upon receipt of the Ministry's written approval; or
- (b) upon the expiration of 90 days from the date of notification being provided to the Ministry (which period may be increased to 45 more days), if the Minister of Economy does not provide notice in writing of its decision.

The timetable for clearance (90 days at Phase I) is comparatively long by international standards which may present challenges for multi-jurisdictional transactions which are subject to UAE merger control.

It is not yet clear if there will be published guidance on the numbers of deals reviewed, actual decisions or the analytical approach adopted or to be adopted by the Ministry. Discussions with the Ministry are confidential. It will also need to

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be determined if pre-notification discussions (for example, on whether the transaction needs to be notified at all and what information is required to support a notification) will be possible.

How is a relevant market defined in the Competition Law?

Whether agreements, commercial practices or merger control rules apply, the way in which the market is defined will be an important issue. For abuse of dominance cases in particular, no case can be made out unless a party has market power. This requires the boundaries of the market to be defined. For example, in the mining sector, various key stages from exploration, mining of ores, production of finished products, transportation through to distribution of end products are likely to constitute separate product markets using an economics approach. From a geographic perspective, in the retail distribution sector there may be national, regional or local markets depending on the extent to which customers may be prepared to travel to purchase the products. Where products are traded on commodities markets the relevant markets may be global.

The Competition Law defines a relevant market through the substitutability of a commodity, service or a group of products or services, based on price, characteristic and use, or whose alternatives may be chosen to meet the consumer's need in any specific geographical area. No further guidance has yet been provided on this definition by the Ministry. It will very likely be up to the parties to convince the Ministry of the correct approach to market definition. For companies operating, or whose activities have an effect in the UAE, a key element of assessing competition issues will be to address the appropriate definition of the market, typically with the assistance of legal counsel based on first principles, previous experience and, in some instances, economics input.

How will the Competition Law affect international companies?

Over 120 countries worldwide have a form of competition law and more countries are adopting or updating their competition laws. The basic concepts tend to be very similar but there can be national law peculiarities. The use of a dominance criterion when determining whether a transaction needs to be notified for merger control purposes as in the UAE is less common. A company's experience of competition laws internationally can be useful to it when seeking to navigate the competition law in a newer regime or where there is limited published guidance or case decisions such as in the UAE.

When assessing any commercial practice or transaction for competition law compliance, a first step will be to identify which rules apply. The laws of the country in which an entity is based (or in the case of a merger where the target is based) will usually be the first consideration. However, it may not be possible to limit the assessment to one country alone. For example, the jurisdictional test for commercial practices is mainly driven by where the effects of an anticompetitive practice take effect, even if the entities operate outside the territory. In mergers, turnover, asset or market share thresholds tend to govern the application of the rules.

This shows that companies based outside the UAE may not be able to disregard the Competition Law. Conversely, companies operating in the UAE are not able to disregard the competition laws in other countries. In particular, foreign competition laws may apply where practices have an effect in the local market or a foreign-to-foreign merger may trigger merger control in markets where the parties have significant sales or presence.

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What are the penalties for violation?

Any violation of any provision of the Competition Law in connection with restrictive agreements and abuse of a dominant position, is punishable by a fine of at least UAE Dirham 500,000 (equivalent to approximately US\$ 136,000 and EUR 103,000 at the time of this briefing) and a maximum of UAE Dirham 5,000,000 (equivalent to approximately US\$ 1,360,000 and EUR 1,030,000 at the time of this briefing). Where a particular transaction is made up of a series of parts which violate the law, it is not yet clear if the fines would apply to each part of the transaction or the transaction as a whole.

Any violation of any provision of the Competition Law in connection with a merger, is punishable by a fine of a minimum of 2% and a maximum of 5% of the overall annual sales of products or service revenues of the violating establishment in the UAE within the last financial year. If an estimation of the overall annual sales or revenues of an establishment is not possible, then a fine of a minimum of UAE Dirham 500,000 and a maximum of UAE Dirham 5,000,000 will be imposed. Fines can also be imposed for violation of certain other procedural provisions of the law. The Competition Law further provides that the penalties provided in the Competition Law will be doubled in the case of recidivism and a court may close the establishment for a period between 3-6 months, which could cause substantial operational losses to the establishment.

Companies should, therefore, seek to identify their potential exposure and take steps to avoid violations including through an ongoing compliance policy.

What is King & Spalding's experience?

The King & Spalding competition team have experience advising companies on the competition law implications of commercial practices and transactions in the UAE and internationally. We have also assisted clients in their assessment and discussions with regulatory and competition authorities in newer competition law jurisdictions where insights of international experience and best practices are relevant.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.