

inBrief



The UAE Competition Law Clarified

By James Bowden and Emma Girot | November 2016

In an earlier inBrief dated 9 December 2014 we wrote about Federal Law No. 4/2012 on the regulation of competition (the “**Competition Law**”), which introduced the means by which the United Arab Emirates could regulate anti-competitive practices. The Competition Law comprises three key elements: a restriction on anti-competitive agreements, restrictions as to the behaviours of entities holding dominant market positions, and a requirement that mergers between entities with a sufficiently large combined market share obtain clearance in advance from the Ministry of Economy (the “**Ministry**”).

Although the Competition Law took effect on 23 February 2013, it has had minimal impact as it provided insufficient detail to enable compliance or enforcement. In particular, the Competition Law failed to establish the market share thresholds at which its restrictions become applicable, and to define the small and medium establishments to which it does not apply.

This year, two Cabinet Decisions have been issued, which provide much needed guidance on these outstanding aspects: Cabinet Decision No. 13/2016 (the “**Ratios Decision**”) in respect of market share thresholds and Cabinet Decision No. 22/2016 (the “**SME Decision**”) in respect of small and medium establishments. The uncertainty that remains at this stage relates to how the Competition Law will be applied and enforced by the Ministry as a matter of practice.

In this inBrief we highlight the main functions of the Competition Law and how the Ratios Decision and SME Decision have added clarity.

The Cartel Restriction

The Competition Law prohibits agreements between entities whose subject or aim is violating, reducing or preventing competition, specifically including price-fixing, market-sharing and bid-collusion agreements, among others.

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Price-fixing and market-sharing, considered the most egregious of all anti-competitive behaviours by many jurisdictions, are always prohibited, but other restrictive practices may be acceptable if they are ‘weak agreements’, meaning that they are entered into by parties with a combined market share below a certain threshold. The Ratios Decision provides that this threshold, below which such agreements do not raise concerns, is set at 10% of the concerned market.

The Dominant Position Restriction

Although the Competition Law prohibits entities holding a dominant position from taking certain actions, such as imposing resale prices on retailers, price discrimination or artificially cutting prices to force competitors out of the market, it does not specify which entities are regarded as dominant. The Ratios Decision confirms that an entity is considered dominant when its share of the concerned market exceeds 40%.

Exemptions

All is not lost for entities which, although they exceed the relevant thresholds, wish to enter into restrictive agreements or carry out prohibited activities. An application may be made to the Ministry for exemption from the cartel or dominant position restriction, requiring submission of an application with supporting documents and an explanation as to why exemption is required, among others. It is as yet unclear how generous the Ministry will be, and for what reasons, in granting such exemptions.

Merger Clearance

Finally, the Competition Law provides that clearance from the Ministry is required in advance of any merger, acquisition or other consolidation of two or more entities, such as would create an entity with a market share above a certain threshold, and which may affect competition in that market. Although the Competition Law provides that clearance is “*particularly*” required when a dominant position is being created, it states that merger control does not apply solely in such circumstances. The Ratios Decision set the threshold at 40% of the concerned market, the same level at which a dominant position is stated to exist.

Concerned Market

In each case – cartels, monopolies and mergers – the Ratios Decision sets the relevant threshold as a percentage of the ‘concerned market’. This is defined broadly to comprise markets in which commodities or services are replaceable or may be substituted to meet specific needs, according to price, properties and use.

Whilst it is difficult to define the relevant market in legislation and, oftentimes, markets are only identifiable on a case-by-case basis, the effect of the Ratios Decision is to prevent entities from easily identifying themselves as restricted by the Competition Law – for example, would the relevant market be ‘luxury cars’ or ‘Lamborghinis’? It would be helpful for the Ministry of Economy to issue guidance as to how widely or narrowly it intends to apply the definition of ‘concerned market’ in practice. The practice in the UAE will undoubtedly be driven by how pro-actively the Ministry chooses to enforce the Competition Law, which remains an open issue.

Small and Medium Establishments

In addition to the thresholds provided in respect of the individual restrictions, the Competition Law in its entirety is stated not to apply to ‘small and medium establishments’. The SME Decision defines what such term means, such definition varying depending on whether the relevant entity operates in the trade, industry or services sector. Unlike the definition of concerned market, small and medium establishments are identifiable by turnover and number of employees, thus providing comfort to such entities that they are excluded.

Implications

The Ratios and SME Decisions have provided welcome clarity as to the application of the Competition Law. The Ministry has sufficient guidance to begin actively enforcing. Companies entering into transactions that are arguably within the specified thresholds should seriously consider the Competition Law and whether they need to file for merger clearance or an exemption. With significant consequences for breach – criminal sanctions and fines up to AED 5 million, or 5% of the relevant entity’s turnover – it will be important to keep a close eye on any enforcement actions taken by the Ministry that may give a signal to the market. ■

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