

## A Federal Competition Law in the UAE

A new UAE Federal Competition Law (Federal Law No. (4) of 2012) has been published in the UAE Federal Official Gazette (the "**Competition Law**").

The Competition Law aims to protect and enhance competition and combat monopolistic practices by prohibiting activity constituting an abuse of dominant market position, prohibiting restrictive agreements above a certain de minimis and regulating economic activity (including mergers and acquisitions) which will result in an enterprise attaining a dominant market position.

Prior to the Competition Law there were no specific laws or provisions in existing laws that dealt comprehensively with the issue of anti-competitive behaviour in the UAE, although certain provisions are contained in Federal Law No. 18 of 1993 ("**Commercial Code**") and Federal Law No. 4 of 1979 ("**Suppression of Fraud in Commercial Transactions Law**").

In addition, Federal Law No. 24 of 2006 (as amended) and its executive regulations ("**Consumer Protection Law and Regulations**") grant the Consumer Protection Department the power to take appropriate action against monopolistic practices where such practices have a distorting effect on the fair prices of goods. The Consumer Law and Regulations do not attempt to regulate enterprises attaining a dominant market position, through acquisition or otherwise, leaving this issue to be addressed in the Competition Law.

### What firms need to know about the Competition Law

The Competition Law comes into force on 23 February 2013, four months after being published in the

Official Gazette. Enterprises subject to the Competition Law benefit from a six month transition period.

Presumably this transition period has been put in place to enable affected persons to review their current trade practices and agreements to ensure they do not constitute anti-competitive practices as set out in the Competition Law. Where as a result of such a due diligence exercise such practices or agreements are identified, enterprises will either have to modify these or apply to the Minister of Economy for a resolution exempting the relevant practice or agreement.

Enterprises may wish to undertake the following analysis when determining the application of the Competition Law to their business practices and the extent of any actions required to ensure compliance following the transition period.

#### Does the Competition Law apply to my enterprise?

The Competition Law applies to enterprises, being any natural or legal person or consortium of such persons, engaging in economic activity or holding intellectual property rights in the UAE. Where economic activity occurs outside the UAE but has the ability to affect competition in the UAE,

these practices and agreements will also be subject to the Competition Law.

Federal and local government entities are not subject to the provisions of the Competition Law. This exception is broad and encompasses any entities acting upon the authority of Federal or local government as well as entities owned or controlled by Federal or local government .

It is also anticipated that all or some of the provisions of the Competition Law will not apply to small and medium enterprises; however, we will have to wait for the Regulations to understand the exact scope of these exceptions.

Enterprises operating in certain sectors, including telecommunications, financial services, petroleum and gas, production and distribution of pharmaceuticals, land, sea and air transport, sanitation and waste disposal services are exempt from the provisions of the Competition Law. Activities relating to the production, distribution and transportation of electricity and water and cultural activities are also exempt from the provisions of the Competition Law. The Ministry of Economy is

empowered to add further sectors, activities and services.

### Does my enterprise have a dominant market position?

An enterprise will be considered to have a dominant position in a market where its total number of transactions in that market exceed a certain percentage of all transactions undertaken in that market. The Competition Law does not indicate what that percentage threshold is and this is expected to be communicated by the Cabinet in due course. The Cabinet is also empowered to reduce or increase this percentage threshold depending on prevailing economic circumstances.

The key point is that the Competition Law does not prohibit an enterprise from occupying a dominant market position – this may be achieved legitimately by having a superior product or providing a superior service. What is prohibited is using market dominance to act independently of competitors, customers, suppliers and, ultimately, the final consumer in a way that prejudices, limits or prevents competition.

### Is my enterprise using its dominant position in a manner that restricts competition?

Where a firm having a dominant position in the market acts in a manner which is anti-competitive to maintain or increase its market share, then it will be considered abusing its dominant market position. The Competition Law prohibits such behaviour as it damages true competition between firms, exploits consumers, and makes it unnecessary for the dominant firm to compete with other firms on merit. Activity that may be considered abuse

of a dominant market position can include:

**Predatory pricing** – where a firm deliberately drives down the prices of products and services to below market costs to drive competitors out of the market or restrict competitors from entering a market. Where prices are set below average variable costs, this is likely to indicate predatory pricing.

**Indirect resale price maintenance** – where a firm indirectly fixes the resale price of products and services to the dealer's consumers including, for example, by setting a fixed distribution margin or maximum level of rebate. The supplier is imposing conditions on the buying and selling of products and services.

**Trade restraints** – obliging a dealer or customer not to deal with a competitor, denying a dealer or customer access to products and services or not permitting access on standard commercial terms and discriminating between different types of clients as to the prices of products and services.

**Ancillary restraints** – restraints imposed on a legitimate trade activity. An ancillary restraint does not constitute the primary obligations of an agreement (e.g., exclusive geographical distribution) but are directly related to the functioning of the objectives of the agreement (e.g., conditions of sale in those exclusive geographical territories).

**Price manipulation** – removing, decreasing or increasing the supply of products and services or disseminating incorrect price information to maintain an artificial price for products and services.

### Is my enterprise a party to a 'restrictive agreement'?

The Competition Law provides examples of what may be considered a restrictive agreement. Enterprises should review their current trade agreements and identify if the enterprise is engaging in any of the following practices.

**Direct resale price maintenance** – agreements between the supplier and dealer which directly fix the resale price of products and services to the dealer's consumers.

**Collusion in bids** – agreements with other firms which can prejudice the outcome of a process whereby bids are submitted. This may include agreeing in advance the value of bids to be submitted, or the lowest bid to be submitted. Agreements between firms as to which tenders are bid for with a view to allocating value contracts between them will also fall under this head.

**Essential facilities** – agreements which limit the availability of a facility or infrastructure which is necessary to reach customers and/or required to enable competitors to carry on their business. Where such facilities are difficult or prohibitively costly to reproduce and agreements limit the availability of such facilities and infrastructure such agreements are likely to be considered anti-competitive.

**Exclusive distribution** – agreements whereby one firm grants exclusive rights to another firm in respect of its products and services. This may include exclusive geographical distribution rights. Typically, competition in this regard is maintained by inter-product competition as opposed to competition between suppliers.

However, it may be worth reviewing these agreements to ensure they do not contain any ancillary restraints.

**Other distribution agreements** – agreements which prescribe the level of products and services offered in a particular market. Where the oversupply or undersupply of products or services to a market is done with a view to affecting the price of the products or services then this is likely to be considered anti-competitive.

**Barriers to entry** – factors which prevent or hinder companies from entering a specific market. Entry barriers may result for instance from a particular market structure or the behaviour of incumbent firms (e.g., prohibiting new entrants from engaging in existing trade organisations or coalitions).

The prohibition on using restrictive agreements is subject to the provisions of Federal Law No. 18 of 1981 ("**Commercial Agencies Law**"). The Commercial Agencies Law considers commercial agency to encompass representation of a principal by an agent for the purpose of distribution, selling, offering or rendering of a commodity or service in the UAE against a commission or profit. The Commercial Agencies Law prohibits a person from importing any commodities, products, manufactured goods, materials or other merchandise subject to an existing (registered) commercial agency agreement for the purposes of trading through channels other than the registered commercial agent. These arrangements continue to be protected under the Commercial Agencies Law notwithstanding whether they could constitute anti-competitive agreements for the purposes of the Competition Law.

Under the Commercial Agencies Law, a foreign principal is not entitled to terminate or refuse to renew a commercial agreement without demonstrating "material reason" for the termination or non-renewal. It remains to be seen whether the potential anti-competitive nature of the commercial agreement will be deemed to constitute a material reason for termination.

Furthermore, the prohibition on using restrictive agreements will not apply to what is termed "weak-impact" agreements. Restrictive agreements will therefore only be considered to be anti-competitive in nature where the parties to the agreement collectively occupy a dominant position in that market. Again, the Cabinet is yet to publish the percentage threshold for dominance as it relates to restrictive agreements and has the power to increase or decrease this threshold depending on prevailing economic circumstances.

### What should we do next?

Where, after any due diligence exercise, potentially restrictive agreements or anti-competitive activity has been identified, an enterprise has two options. The first is to change its behaviour or amend/terminate restrictive agreements so as to comply with the requirements of the Competition Law. The second is to approach the Ministry of Economy with a waiver application.

If an enterprise continues to engage in anti-competitive activity or be a party to restrictive agreements then it may be subject to a fine of between AED5,000 and AED5 million. Where an enterprise continues to violate the provisions of the Competition Law then the fine can be doubled. In the severest cases, the court may order

the enterprise to shut down operations for a period of between three and six months and cause notice of such to be published in two local newspapers. The penalties are therefore severe and have the potential to inflict severe reputational damage.

### How does my enterprise apply for a resolution to continue affected trade practices and agreements?

A waiver may be granted in circumstances where an enterprise can demonstrate that restrictive agreements or actions undertaken in a dominant position bring economic benefits to the market. This includes where such practices encourage economic development of the market or increase the inter-brand competition of a market. Another ground is where such practices will lead to the development or production of distribution systems or other concrete benefits to the ultimate consumer.

Should an enterprise wish to apply for such a waiver, it is required to submit an application to the ministry of Economy. The exact forms and information to be provided with the application are expected as a part of the yet to be published Regulations. The Minister has 90 days to grant a waiver (which may be extended by a further 45 days where additional information has been requested). However, if a waiver is not granted in this time period, the enterprise is entitled to assume implicit acceptance of the activity in question. Any waiver granted may or may not be subject to conditions and can be revoked should the circumstances under which the waiver was granted change.

Where an enterprise benefits from a waiver for a particular agreement or activity, the enterprise must notify the Ministry of Economy of any proposed amendment to that agreement or activity at least 30 days prior to such amendment taking effect.

## Merger and acquisition control

Once in force, the Competition Law will require any activity which will result in an enterprise attaining a dominant market position (such as a merger or acquisition) to obtain the prior approval of the Ministry of Economy. Again, what will be considered a dominant market position will be determined by the Cabinet and subject to change. If approval is not sought, an enterprise may be subject to a fine representing between 2% and 5% of annual revenues of the business undertaken in the resultant dominant position. If annual revenues cannot be determined, a financial penalty of between AED5,000 and AED5 million may be imposed.

Applications are to be made at least 30 days prior to the relevant transaction taking place. The form of application, required documentation and information, and any conditions relating to approval for such transactions are not covered in the Competition Law and are anticipated to be included in the Regulations yet to be published. The Ministry has 90 days to approve an application which again may be extended by a further 45 days where additional information has been requested. An enterprise is not permitted to execute transactions which result in a dominant market position being obtained whilst the approval is pending with the Ministry of Economy. A fine of between

AED10,000 and AED50,000 may be imposed for non-compliance.

Where the Ministry of Economy does not respond within this time, the enterprise is entitled to assume implicit acceptance of the transaction resulting in the dominant market position.

The Competition Law is mindful that such applications are likely to contain highly sensitive commercial information and imposes a duty on the Ministry of Economy to implement sufficient procedures to keep confidential all information provided to it. The Competition Law imposes a financial penalty of between AED50,000 and AED200,000 for breach of this obligation and concluding provisions make clear that imposition of such a penalty does not bar an aggrieved party from claiming compensation for damages as a result of any confidential information being disclosed.

## Competition Regulation Committee

In order to administer the Competition Law, a new body called the Competition Regulation Committee is to be established ("**the Committee**"). The Committee is to be chaired by the Deputy Minister of Economy. The role of the Committee is to oversee general policy, including proposing additional legislation in respect of anti-competitive practices. The Committee will also play an advisory role to the Minister of Economy and the Minister in respect of their determinations as to when approvals and waivers will be issued.

## Clifford Chance comment

The Competition Law represents a significant step in fostering a competitive market by prohibiting certain anti-competitive practices. However, the legislation does not apply to government enterprises and excludes certain large sectors. The UAE is an economy characterised by a large number of government or government owned enterprises, many of which occupy dominant positions in key sectors of the economy. In order to achieve the objects of the Competition Law, time may dictate that these exceptions be phased out.

For those enterprises affected by the Competition Law, there is work to do prior to the legislation coming into force. Enterprises should undertake a thorough review of their current trade practices and agreements for compliance. Where potentially restrictive agreements or anti-competitive activity is identified, enterprises will need to take steps to either make changes or secure a waiver. This could prove challenging in a six month transition period.

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If you would like to know more about the subjects covered in this publication or our services, please contact:



**Tim Plews**  
Partner

T: +966 555 156 153  
E: tim.plews  
@cliffordchance.com



**Mike Taylor**  
Partner

T: +971 4 362 0638  
E: mike.taylor  
@cliffordchance.com



**James McCarthy**  
Partner

T: +971 4 362 0628  
E: james.mccarthy  
@cliffordchance.com



**Jodi Griffiths**  
Associate

T: +971 4 362 0687  
E: jodi.griffiths  
@cliffordchance.com

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Clifford Chance, Building 6, Level 2, The Gate Precinct, Dubai International Financial Centre, P.O. Box 9380, Dubai, United Arab Emirates

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