

# UAE Competition Law Framework Now Complete

October 25, 2016

On February 23, 2013, the United Arab Emirates (“UAE”) competition law (the “Law”) entered into force. Companies benefited from a six month transition period after the Law entered into force, presumably to enable them to review their current trade practices and ensure that the latter did not constitute anti-competitive practices. However, in practice, due to the delay in issuing implementing regulations, the Law has never been applied so far and, thus, companies have had significantly longer to prepare for the impact of the Law. The UAE competition law and merger control framework is now in place. Although some details of how the rules will be implemented are yet to be clarified, all UAE-based companies and potential bidders for them should now consider carefully how the Law impacts them.

On October 27, 2014, the Cabinet of the UAE (the “Cabinet”) adopted implementing regulations of the Law (Cabinet Decision No. 37/2014, the “Implementing Regulations”). The Implementing Regulations set forth additional substantive and procedural provisions. Finally, on April 25 and July 10, 2016, the Cabinet issued two more decisions (Cabinet Decision No. 13/2016 and Cabinet Decision No. 22/2016, the “Thresholds Regulations”) that set out the market share thresholds for the application of (i) the *de minimis* exception (to the prohibition on restrictive agreements and abuse of dominant position) and (ii) merger control rules, as well as the criteria for identifying small and medium undertakings which are exempted from the Law. However, the competition regulator is not yet fully operational and the forms to be employed for the purpose of individual exemption applications and merger control notifications and complaints still need to be released.

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This memorandum briefly analyses the main features of the Law, the Implementing Regulations and the Thresholds Regulations.

## **I. The Competition Authorities**

The Law established a new body called the Competition Regulation Committee (the “Committee”), to be chaired by the undersecretary of the Ministry of Economy. The Committee will have general oversight of competition law policy in the UAE. Its role is, *inter alia*, to issue recommendations and put forward legislation proposals regarding competition matters to the Minister of Economy (the “Minister”), suggest competition policies, analyze requests for review of decisions adopted by the Minister filed by interested parties (see below, *Review And Appeal Of A Decision*), and prepare an annual report to be submitted to the Minister.<sup>1</sup>

The Committee is not responsible for day-to-day implementation of the Law. This task falls to the Ministry of Economy (the “Ministry”), acting through its competition department (the “Department”). The Ministry’s responsibilities include investigating possible anticompetitive conduct and analyzing requests for exemption, carrying out studies on competition matters and coordinating its activities with other national public bodies and foreign authorities. The Ministry also acts as executive secretariat of the Committee.<sup>2</sup>

## **II. Aim And Scope Of Application Of The Law**

The Law is designed to *protect* and *enhance* competition in the UAE. Consumer protection and the sustainable development of the UAE are also mentioned among its objectives.<sup>3</sup>

The Law applies to all undertakings active in the UAE and, consistently with the so-called “effects doctrine”, also to conduct occurring outside the UAE that may have an impact within the UAE,<sup>4</sup> but subject to certain exceptions. In particular, the Law does not apply to:<sup>5</sup>

- undertakings operating in certain sectors that are already subject to sector-specific regulations, including telecommunications, financial services, cultural activities, oil and gas, production and distribution of pharmaceuticals, postal services, production, distribution and transportation of electricity and water, sanitation and waste disposal services, land, sea and air transport;
- federal or local government entities, undertakings owned or controlled by a federal or local government entity and undertakings whose conduct is carried out on the basis of a decision or authorization issued by a federal or local government entity (Cabinet Decision No. 13/2016 clarified that undertakings owned at least 50% by federal or Emirate governments will fall within this exemption); and
- small and medium undertakings (“SMEs”). Cabinet Decision No. 22/2016 set out the criteria for an undertaking to be considered an SME, dividing undertakings into three defined sectors: trade; industry; and services. For the trade and services sectors, an undertaking will be considered an SME if it has 200 or fewer employees and annual revenues do not exceed AED 200 m (c. USD

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<sup>1</sup> Article 13 of the Law.

<sup>2</sup> Article 14 of the Law.

<sup>3</sup> Article 2 of the Law.

<sup>4</sup> Article 3 of the Law. For instance, a price fixing cartel implemented in State X may still generate effects in the UAE when the relevant product, originally sold in State X, is then imported and re-sold by the acquirer in the UAE.

<sup>5</sup> Article 4 of the Law and Appendix to the Law.

54.5m).<sup>6</sup> For industry enterprises, the thresholds are slightly higher: 250 employees and AED 250 m (c. USD 68 m).<sup>7</sup>

### III. Restrictive Agreements

The Law prohibits agreements whose *subject or aim* is violating, reducing or preventing competition. Restrictive agreements include agreements fixing prices, rigging bids or auctions, prohibiting or limiting production, development, distribution, marketing or other investments, boycotting other undertakings, limiting the free flow of goods or services in a relevant market, allocating markets and/or customers, or precluding market entry.<sup>8</sup>

Interestingly, the Law provides for a *de minimis* exception to the prohibition of restrictive agreements, where the combined market share of the parties to the relevant agreement does not exceed 10% of the total transactions in the concerned market.<sup>9</sup> However, this exception will not apply to serious infringements such as price fixing and market allocation.<sup>10</sup>

### IV. Abuse Of Dominant Position

The Law does not prohibit an undertaking from holding a dominant market position on a given market. What is prohibited is abusing market power through conduct that may violate, reduce or prevent competition.

While in other jurisdictions with long-established competition/antitrust regimes (including the US and the EU), market power is typically measured case-by-case based on a number of criteria, the Law endorses a more formalistic approach under which “dominance” can be found only when certain statutory (market share) thresholds are met.<sup>11</sup> The Threshold Regulations set the market share threshold for establishing dominance at 40% of the total transactions in the concerned market.<sup>12</sup>

Conduct that may amount to an abuse of dominant position includes predatory pricing, discriminating among customers with no objective justification, refusal to supply, limiting production/failure to satisfy demand, and tying.<sup>13</sup>

### V. Individual Exemption

Undertakings may seek an individual exemption from application of Article 5 (banning restrictive agreements) and Article 6 (prohibiting abuse of a dominant position) of the Law, through notifying the relevant agreement or practice to the Department by means of the relevant notification form. This form is still to be issued. Notification must be filed “*in advance*”, *i.e.*, before implementing the relevant agreement or conduct, and undertakings cannot implement the relevant agreement or practice until an exemption is granted. Along with the form, the applicant must also submit the Articles of Association and register of shareholders of

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<sup>6</sup> Article 3 and Article 5 of Cabinet Decision No. 22/2016.

<sup>7</sup> Article 4 of Cabinet Decision No. 22/2016.

<sup>8</sup> Article 5(1-2) of the Law.

<sup>9</sup> Article 5(3) of the Law and Article 2 of Cabinet Decision No. 13/2016.

<sup>10</sup> Article 5(3) of the Law.

<sup>11</sup> Article 6(2) of the Law.

<sup>12</sup> Article 3 of Cabinet Decision No. 13/2016.

<sup>13</sup> Article 6 of the Law.

the relevant companies, and an economic report, analyzing the positive impact on the market of the requested exemption. The applicant must submit 3 copies of the form in Arabic and a translation into English can also be filed. Three copies of the above-mentioned accompanying documents must also be filed. If not in the Arabic language, a translation of these documents must be submitted. The applicant may identify confidential information, if any, contained in the documents filed, and in this case must also submit a non-confidential summary. Further documents and information can be requested during the proceedings by the Department.<sup>14</sup> The Department can also request third parties that may be affected by the requested exemption to submit their comments in this regard within 15 days from the request (the so-called “*market test*”).<sup>15</sup>

The Department shall carry out an assessment of the requested exemption and submit a report to the Committee. Within 14 days from the receipt of the report, the Committee shall send its recommendation to the Minister, who will decide on the requested exemption.<sup>16</sup>

The Minister shall issue his final decision within 90 days from notification of the request for exemption. This deadline may be extended by an additional 45 days. If the Minister does not issue his decision by the specified deadline, the notified agreement or practice shall be deemed to be exempted.<sup>17</sup> Pending a final decision, the Minister can issue an interim decision allowing, for a temporary period up to 30 days, the notified agreement or practice.<sup>18</sup>

An individual exemption can be granted if it is ascertained that the notified agreement or practice may have a pro-competitive effect, in terms of efficiency, economic development or benefits for consumers.<sup>19</sup> Absent these pro-competitive effects, the Minister can either reject the request for exemption or condition it upon specific requirements to be satisfied by the notifying undertakings.<sup>20</sup>

The Minister can withdraw an exemption already granted if the:

- circumstances in light of which it was issued have changed;
- undertakings did not comply with the conditions and requirements on the basis of which the exemption was granted;
- exemption was granted based on incorrect or misleading information.<sup>21</sup>

The relevant undertakings must notify any change to an exempted agreement or practice within 30 days following agreement of draft amendments. The Minister shall adopt his final decision in this respect within 90 days from notification of the relevant amendment (extendable by 45 days), based on a report compiled by the Department.<sup>22</sup>

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<sup>14</sup> Article 7(1) of the Law; Articles 2 and 3(2) of the Implementing Regulations.

<sup>15</sup> Article 3(3) of the Implementing Regulations.

<sup>16</sup> Article 3(1) and (4-6) of the Implementing Regulations.

<sup>17</sup> Article 8(1) of the Law; Article 4(1-2) of the Implementing Regulations.

<sup>18</sup> Article 8(2) of the Law; Article 4(3) of the Implementing Regulations.

<sup>19</sup> Article 7(1) of the Law; Article 3(1)(b) of the implementing Regulations.

<sup>20</sup> Article 8(4) and (6) of the Law; Article 4(4) of the Implementing Regulations. Exemption can be granted also for a limited period. See Article 8(5) of the Law.

<sup>21</sup> Article 8(7) of the Law; Article 4(5) of the Implementing Regulations.

<sup>22</sup> Article 7(1)(c) of the Law; Article 5 of the Implementing Regulations.

## VI. Merger Control

The Law and the Implementing Regulations require prior notification of “concentrations” which result in a merged entity holding a market share exceeding 40% and which may affect competition, in particular by creating a dominant position.<sup>23</sup> The notion of concentration is broad and encompasses any share or asset sale or other transaction whereby an undertaking acquires direct or indirect control over another undertaking (or part of it).<sup>24</sup> Some uncertainty remains regarding the precise time at which the relevant transaction must be notified. While the Law requires concentrations to be notified to the Ministry at least 30 days before completion of the transaction,<sup>25</sup> the Implementing Regulations require an application for approval to be submitted at least 30 days from conclusion of the draft transaction agreements.<sup>26</sup> These provisions are difficult to reconcile, the first one (in the Law) seems irreconcilable with the timing of the overall merger control process and the standstill obligation (see paragraph below) and with respect to the second (in the Implementing Regulations) it is unclear whether the English translation accurately reflects the intention of the Arabic original (which prevails). Thus, once the Department is fully operational, it would be helpful for it to clarify this point.

In any event, the relevant undertakings cannot implement the concentration before receiving the authorization from the Minister (or expiry of the waiting period without decision) and the Minister’s decision can take up to 90 days (or potentially more, as described below).<sup>27</sup>

Along with the form (which is still to be released by the Department), the applicant must submit the Articles of Association, financial statements and register of shareholders of the relevant companies, and an economic report, analyzing the positive impact of the concentration. The applicant must submit 3 copies of the form in Arabic language and a translation into English can also be filed. Three copies of the accompanying documents must also be submitted. If not in the Arabic language, a translation of these documents must also be filed. The applicant may identify possible confidential information contained in the material filed, and in this case must also submit a non-confidential summary of it. Further documents and information can be requested during the proceedings by the Department.<sup>28</sup> As in the case of notifications for exemption, the Department can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the request.<sup>29</sup> To gather additional information and insight on the possible impact of the notified concentration on the market, the Department can also hold interviews with the relevant undertakings and interested third parties in the course of the proceedings.<sup>30</sup>

<sup>23</sup> Article 4 of Cabinet Decision No. 13/2016. The Cabinet Decision does not clarify whether (i) it is sufficient that the threshold is met by one undertaking (*e.g.*, the target or the acquiring undertaking) only, and (ii) the geographic market against which it shall be assessed. More generally, pure market share and effect-based thresholds may be difficult to apply, particularly when definition of the relevant market is unclear.

<sup>24</sup> Article 1 of the Implementing Regulations, where a concentration is defined as “*any act resulting in a total or partial transfer (merger or acquisition) of a property, usufruct rights, rights, stocks, shares or obligations from an establishment to another, empowering the establishment or a group of establishments to directly or indirectly control another establishment or another group of establishments.*”

<sup>25</sup> Article 9(1) of the Law; Article 7(1-2) of the Implementing Regulations.

<sup>26</sup> Article 7(2) of the Implementing Regulations.

<sup>27</sup> Article 10(2) of the Law; Article 9(6) of the Implementing Regulations.

<sup>28</sup> Article 9(1) of the Law; Articles 7 and Article 8(2) of the Implementing Regulations.

<sup>29</sup> Article 8(3) of the Implementing Regulations.

<sup>30</sup> Article 8(4) of the Implementing Regulations.

In assessing the transaction effects, the Department shall take into account certain criteria listed in the Implementing Regulations.<sup>31</sup> The outcome of this analysis shall be submitted to the Minister in a report.<sup>32</sup> The Minister shall issue the final decision in respect of the concentration within 90 days from notification. This deadline may be extended by an additional 45 days.<sup>33</sup> If the Minister does not issue a decision by the specified deadline, the transaction shall be deemed to be authorized.<sup>34</sup> Following its merger control review, the Minister can:

- clear unconditionally the concentration if it does not adversely affect competition and its pro-competitive effects outweigh the anti-competitive ones;
- subject the clearance of the notified transaction to specific remedies;
- prohibit the concentration.<sup>35</sup>

The Minister can also withdraw a clearance already granted if:

- the conditions and circumstances in light of which the clearance was issued in the meantime have changed;
- the undertakings did not comply with the remedies imposed by the Minister in its decision;
- it is determined that the information whereby the concentration was authorized was incorrect or misleading.<sup>36</sup>

Pending completion of the merger control process, the notified concentration cannot be implemented (so-called “standstill” obligation).<sup>37</sup>

## VII. Investigation

The Department can start an investigation into a possible violation of competition provisions either (i) of its own initiative<sup>38</sup> or (ii) following a complaint.

Any interested party may file a complaint with the Department by means of the relevant form (which is still to be issued).<sup>39</sup> The complaint must identify, *inter alia*, the undertakings submitting the form and those that are alleged to have breached the Law, and provide a description of the relevant conduct and of the provisions which are deemed to be violated, together with all available evidence.<sup>40</sup>

The applicant must submit 3 copies of the form in Arabic and a translation into English can also be filed. Three copies of any document attached to the form as evidence must also be filed and if not in the Arabic language, a translation of these documents must also be submitted. The applicant can identify confidential information, and in this case must also submit a non-confidential summary of the form (and its

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<sup>31</sup> Article 8(1) of the Implementing Regulations.

<sup>32</sup> Article 8(5-7) of the Implementing Regulations

<sup>33</sup> Article 8(1) of the Law; Article 9(1) of the Implementing Regulations.

<sup>34</sup> Article 10(2) of the Law; Article 9(2) of the Implementing Regulations.

<sup>35</sup> Article 11(1) of the Law, Article 9(3) of the Implementing Regulations.

<sup>36</sup> Article 11(2) of the Law and Article 9(4) of the Implementing Regulations.

<sup>37</sup> Article 9(6) of the Implementing Regulations.

<sup>38</sup> Article 11 of the Implementing Regulations.

<sup>39</sup> Article 10(1) of the Implementing Regulations.

<sup>40</sup> Article 10(3) of the Implementing Regulations.

annexes).<sup>41</sup> Within 15 days from the receipt of the complaint, the Department can request additional information and documents from the complainant.<sup>42</sup>

The Department can:

- accept the complaint, if it considers that there are sufficient grounds to open an investigation; or
- reject the complaint, if it considers that there are insufficient grounds to open an investigation.<sup>43</sup>

Within 10 days from acceptance of the complaint, the Department shall deliver to the undertakings that are alleged to have breached the Law as well as to interested third parties a notice, reporting, *inter alia*:

- a description of the relevant conduct;
- the indication of the provisions which were allegedly violated; and
- information on submission of a defensive brief.<sup>44</sup>

In the course of the investigation, the Department can issue requests for information as well as holding interviews.<sup>45</sup>

Following the investigation, the Department shall prepare a report, to be submitted to the Minister within 10 days from its completion. The Minister shall issue a decision as to the investigated conduct within 30 days from receipt of the report. This decision shall be notified to the relevant parties within 10 days from its adoption.<sup>46</sup>

## **VIII. Settlement**

With the exception of conduct in breach of confidential provisions pursuant to Article 15 of the Law (see below, *Confidentiality*), the Minister may enter into a settlement with the undertakings that are deemed to have breached the Law, provided that:

- these undertakings pay a fine whose amount is no less than two times the minimum provided by the Law; and
- the settlement is entered into before the filing of a criminal case.

Settlement becomes effective following the payment of the fine by the relevant undertaking.<sup>47</sup>

## **IX. Confidentiality**

The Law specifically requires the Ministry to take steps to maintain the confidentiality of sensitive information in relation to companies in the context of competition proceedings.<sup>48</sup> As described above,

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<sup>41</sup> Article 10(7-9) of the Implementing Regulations.

<sup>42</sup> Article 10(10) of the Implementing Regulations.

<sup>43</sup> Article 10(11) of the Implementing Regulations.

<sup>44</sup> Article 12(1-2) of the Implementing Regulations.

<sup>45</sup> Article 12(5-7) of the Implementing Regulations.

<sup>46</sup> Article 13 of the Implementing Regulations.

<sup>47</sup> Article 26 of the Law; Article 15 of the Implementing Regulations.

<sup>48</sup> Article 15 of the Law.



companies submitting documents to the Ministry will need to mark confidential information as “confidential” and also submit non-confidential summaries.

## **X. Sanctions**

The Law provides for a fine between AED 500,000 (c. USD 136,000) and AED 5,000,000 (c. USD 1.36 m) for breach of Article 5 (banning restrictive agreements) or breach of Article 6 (banning abuse of a dominant position).<sup>49</sup>

Failure to notify a reportable concentration may result in a fine between 2% and 5% of the turnover generated by the relevant undertaking in the UAE in the last financial year or, if this data is not available, a fine between AED 500,000 (c. USD 136,000) and AED 5,000,000 (c. USD 1.36 m).<sup>50</sup> Violation of the stand-still obligation in the context of merger control proceedings exposes the relevant undertakings to a fine between AED 50,000 (c. USD 13,600) and AED 500,000 (c. USD 136,000).<sup>51</sup>

The Law also provides for a fine between AED 50,000 (c. USD 13,600) and AED 200,000 (c. USD 54,500) in case of breach of the confidentiality obligations set out in Article 15 of the Law (see above, *Confidentiality*).<sup>52</sup> Other violations of the Law or its Implementing Regulations are sanctioned with a fine between AED 10,000 (c. USD 2,700) and AED 100,000 (c. USD 27,000).<sup>53</sup>

The above fines are doubled in case of recidivism, *i.e.*, when applied to companies which have previously been found responsible for a violation of the UAE competition rules.<sup>54</sup>

The Law also provides that the economic activities of the undertaking that committed the violation may be suspended (*i.e.* the company temporarily closed) by the competent Court for a period between 3 months and 6 months.<sup>55</sup>

The adoption of a sanction against an undertaking is without prejudice to the right of damaged parties to act before the competent judicial authorities for the compensation of the losses suffered as a consequence of the anticompetitive conduct.<sup>56</sup> Judicial proceedings in connection with the Law will be treated as urgent cases. The Court may also adopt interim measures (such as cease and desist orders) before the adoption of its final judgment.<sup>57</sup>

## **XI. Review And Appeal Of A Decision**

Any interested party can request the Minister to review a competition decision adopted by the Minister himself within 14 days from the date in which the applicant becomes aware of this decision. The Committee

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<sup>49</sup> Article 16 of the Law.

<sup>50</sup> Article 17 of the Law.

<sup>51</sup> Article 18 of the Law.

<sup>52</sup> Article 19 of the Law.

<sup>53</sup> Article 20 of the Law.

<sup>54</sup> Article 21 of the Law.

<sup>55</sup> Article 22 of the Law.

<sup>56</sup> Article 23(2) of the Law.

<sup>57</sup> Article 24 of the Law.



will submit its recommendation in this respect to the Minister within 10 days from the date on which the application has been referred to it. The Minister shall adopt a decision within 30 days from filing of the application. If a decision is not adopted within this timeframe, the application is deemed to be rejected.<sup>58</sup>

Decisions issued by the Minister can be appealed before the competent Court within 60 days from notification of the Minister's decision to the relevant parties.<sup>59</sup>

## **XI. Conclusion**

The release of the Implementing Regulations and Threshold Regulations represents an important step forward in the introduction of a modern competition law in the UAE. Now companies operating in the UAE, and investors considering acquisitions here, have a fairly clear picture of the competition regime to which they will be subject. However, some wrinkles remain to be ironed out, such as the timing of submission of a merger control notification and how relevant markets will be defined. Only once the competition department of the Ministry of Economy is fully operational, issues the required application forms and begins to enforce the rules in practice, will these areas of uncertainty disappear, leading to clarity on the practical impact of the UAE Competition Law.

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<sup>58</sup> Article 14 of the Implementing Regulations.

<sup>59</sup> Article 27 of the Law.