

# UAE Competition Law Update: Implications for M&A Transactions

This briefing provides an update on developments in the UAE competition law regime since publication of Cabinet Resolution 13 of 2016 (2016 Regulations). It also contains an analysis on the implications of the regime in the context of M&A transactions.

## Overview of the UAE's competition law regime legislative framework

The Competition Law (Federal Law No. 4 of 2012), which came into force in February 2013, established a specific competition law regime in the UAE. Federal Cabinet Resolution No. 37 of 2014 was subsequently issued to supplement the Competition Law (2014 Regulations). The 2014 Regulations set out, amongst other things, procedural requirements for:

- applying for exclusions for restrictive agreements or dominant market practices
- seeking approvals under the merger control regime
- filing of complaints by concerned parties alleging violation of the Competition Law.

The issue of the 2016 Regulations, which came into force on 31 July 2016, completes the legislative framework. The 2016 Regulations provide the relevant market share thresholds for establishing a restrictive practice

or agreement, a dominant position or an "economic concentration". There are certain sectoral and ownership exemptions and exemptions relating to small and medium size enterprises.

## Operational Competition Authority

In addition to the enactment of the 2016 Regulations, the Ministry of Economy (MoE) has also established the UAE's Competition Authority (Authority). Now, with an operational Authority ready to accept filings and the establishment of the relevant market share thresholds, parties will need to consider the competition law regime from the initial stages of their UAE M&A transactions.

## What are the relevant market share thresholds?

The relevant market share thresholds under the 2016 Resolutions are as follows:

- **Restrictive practice or agreement:** deemed to have limited impact if the total share of the parties to such

an agreement does not exceed 10% of the total transactions in the Relevant Market (see further comments below in respect of i) the use of the term "total transactions" and ii) the definition of Relevant Market).

- **Dominant position:** established when the total share of any company is in excess of 40% of the total transactions in the Relevant Market.
- **Economic concentration:** established when the total share of the parties to the transaction exceeds 40% of the total transactions in the Relevant Market and the transaction may have an effect on competition within that market.

We note that the term "total transactions" used to determine relevant market share thresholds is a slightly unusual expression of the market share test (which, in other jurisdictions, is often stated by reference to total value or volume of sales). In our view, absent any further guidance from the MoE at this stage, a

reasonable proxy for "total transactions" is total revenue.

### What is a Relevant Market?

The 2016 Regulations provide a definition of what constitutes a Relevant Market. Each Relevant Market includes only those products which, based on price and other relevant features, consumers would consider interchangeable with one another, ie each product falling within the market definition would enable the customer to meet a particular need in a particular geographic area. No further guidance is available as to how narrowly the Authority will apply this concept and as such practical application of this definition is unclear at this stage.

Broad definitions of relevant or concerned markets are not, however, uncommon in other jurisdictions operating a competition regime. For instance, the definition of the relevant market in the EU is relatively similar to that of the UAE. Under EU rules, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. More specifically however, a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which

the conditions of competition are sufficiently homogeneous.

Therefore, absent further guidance from the Ministry, it would be reasonable to look to the EU, and other jurisdictions with a similar approach to market definition, for initial guidance as to the application of the UAE's Relevant Market definition to particular sectors. However, the Authority is likely to enjoy a broad discretion when determining the scope of the Relevant Market. Parties may, therefore, prefer to adopt a conservative approach, eg by calculating market share on the basis of the narrowest plausible set of products that might be considered substitutable.

### Implications for M&A transactions

With the UAE's competition law regime now "live", the requirements need to be considered in relation to M&A transactions involving enterprises "engaging in economic activity or holding intellectual property rights in the UAE".

#### Filing

The Competition Law requires any activity which will result in an economic concentration (such as a merger or acquisition) to obtain prior approval from the Authority. The Authority has issued a filing form for this purpose. From discussions with the Authority, we understand that the Authority is mindful that such applications contain highly sensitive

information and that the current intention is for the publication of any deal information to occur post-closing of the relevant transaction. Nevertheless, the transaction parties should confirm with the Authority the proposed content and timing for any public disclosures (particularly any sensitive terms such as purchase price).

#### Deal timetable and documentation

If it is likely that the transaction parties will need to file with the Authority for approval of the relevant transaction, early consideration will need to be given to how this will impact the deal timetable.

The 2014 Regulations provide that an application will need to be submitted within 30 days of entry into a "draft agreement" resulting in an economic concentration. The "draft agreement" may for example be a signed, conditional SPA (sale and purchase agreement) where closing is pending or a more preliminary agreement, such as a memorandum of understanding or letter of intent (a similar approach has been adopted under Saudi Arabia's competition law regime). Basing the filing timetable on the submission of a preliminary agreement (rather than waiting to sign the SPA) may be beneficial to the parties in helping to truncate, or re-align, the approval process within the deal timetable. It should be noted, however, that

the legislation is unclear as to what will constitute a "draft agreement".

Once the filing is submitted (and accepted), the Authority has 90 days under the Competition Law (which is extendable by a further 45 days) to approve the transaction. If approval of the Minister is not provided within this period, the application for the economic concentration is deemed to have been approved. As the merger control regime is suspensory, transaction parties will be subject to standstill obligations until the earlier of the expiry of this period and the date approval is granted. These obligations will need to be factored into the SPA, eg by way of appropriate conditions precedent and separately ensuring that obligations on the parties set out in the SPA for the period between signing and completion (and the conduct of the parties in practice) do not give rise to a risk of 'gun jumping', ie conduct which suggests that the parties have ceased to act as independent entities in the relevant market prior to receiving a merger clearance decision from the Authority.

### Penalties

If approval is not sought, the violating enterprise may be subject to a fine representing between 2% and 5% of the annual revenues of the business that is the subject of the violation in the state. The full reach of this penalty is unclear as the law is drafted widely enough to potentially capture the seller, buyer or resultant economic concentration. If annual revenues cannot be determined, a financial penalty of between AED500,000 and AED5 million may be imposed. Continued violation of the provisions of the Competition Law may result in fines being doubled. In the severest cases, the court may order the violating enterprise to shut down operations for a period of between three and six months. The penalties are therefore severe, wide in scope and have the potential to inflict considerable reputational damage.

### Conclusion

The competition law regime, although now more comprehensive in terms of its legislative framework, remains in a nascent phase in terms of practical implementation and interpretation. As such, a number

of areas within the legislation remain to be worked through. For instance, given the breadth of the definition of Relevant Market provided in the 2016 Regulations, it is likely that clarity on the application of this definition will only be obtained once a body of judgments develops or guidance on this point is issued by the MoE. The Authority itself will need to compile relevant market data in order to examine potential anti-competitive behaviours properly in the Relevant Market. Additionally, the application procedures (which, with the need to provide extensive supporting documentation to the Authority in Arabic, are somewhat cumbersome for foreign market participants) will likely evolve as they become more established.

Encouragingly, we understand from discussions with the Authority that they are seeking to expedite the timetable for providing approval for a transaction. This should, therefore, assist with maintaining a balance between the stated objectives of the Competition Law (to protect and enhance competition in the UAE) and the general economic benefits of an active M&A market.

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