Changing of the guard

New competition law rules in the UAE come into force this month

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In recent years, the United Arab Emirates (the UAE) has been taking steps to align its business environment with internationally recognised best practices. As part of this approach, on 23 October 2012, the UAE enacted the Federal Competition Law (the FCL), which lays down new rules on anticompetitive agreements, abuse of dominance and merger control.

The FCL represents the UAE's first attempt to regulate anticompetitive behaviour (including private enforcement) comprehensively and additional detailed regulations are expected concerning its implementation. Until now, the UAE partially addressed competition regulation through the Commercial Code, the Consumer Protection Law and other industry regulation; further, the UAE did not have a merger control regime.

Although the FCL will come into force on 23 February 2013, it provides companies with a six-month grace period to comply. Therefore, businesses active in the UAE should review their business practices in order to adapt to the FCL.

New structures

The UAE Ministry of Economy is likely to constitute the principal competition regulator, and a Competition Regulation Committee (the Committee, chaired by the deputy minister of economy) is to be created and assigned with specific duties (for example, proposing legislative and policy oriented initiatives, and reviewing and making recommendations on the approval of exemption requests). A future Cabinet resolution should set out the Committee's role and responsibilities in more detail.

Scope of the FCL

The FCL will apply to businesses present or affecting competition in the UAE. However, it will not apply to federal or Emirate level governments; companies owned, controlled or supervised by or acting pursuant to an authorisation from federal or Emirate level governments; or to SMEs (in accordance with rules to be established by the UAE Cabinet).

The FCL also lists several sectors to which the FCL will not apply, including the financial, telecommunications, cultural (written, audio, visual), petroleum and gas, pharmaceutical, postal, electricity and water, sanitation and waste disposal, and transportation sectors.

It should be noted that some of these sectors are already subject to industry-specific competition regulation. For example, in the telecommunications sector, the Telecommunications Regulatory Authority (TRA) adopted competition safeguards in 2010 which impose rules similar to those found in the FCL regarding restrictive agreements, abuse of dominance and requests for exemption from the application of competition rules.

Anticompetitive agreements and abuse of dominance

The FCL bans restrictive agreements, defined as those that prejudice, limit or prevent competition. The FCL sets out a series of agreements that particularly restrict competition – for example, those concerning prices or conditions for buying or selling commodities and services, collusive arrangements, geographic market sharing and collusion to hinder market access. However, in order to foster a proportionate application of this prohibition, the FCL establishes a de minimis "weak-impact" rule, which excludes the application of the FCL to agreements where the combined market share of the relevant parties does not exceed a specific threshold. Although this de minimis threshold is still to be determined by the UAE Cabinet, its level might be influenced by the 15% combined market share threshold defined in the TRA's competition safeguards regarding the telecoms sector.

The FCL also prohibits abuses of dominance, which are addressed in a similar manner to other jurisdictions – ie by determining the existence of a dominant position, and assessing whether the conduct has been abusive. As regards the holding of a dominant position, the UAE Cabinet will set the market share threshold which, if exceeded, may determine its existence. The setting of the dominance threshold applicable in the context of the FCL might be inspired by the 40% threshold found in the competition safeguards in force in the telecoms sector. As regards the establishing of abusive conduct, dominant firms may not take advantage of their position to prejudice, limit or prevent competition, such as by imposing prices or conditions for the resale of goods and services, selling at a loss to hinder market entry by competitors or artificially deflating or inflating supply. Similarly to the provisions on restrictive agreements, the prohibition on abuse of dominance sets out a number of detailed circumstances where the existence of abusive conduct may be found.

As indicated above, businesses will benefit from a six-month grace period after the coming into force of the FCL. Following this period, the FCL will be enforceable by the Ministry of Economy through the opening of proceedings, either on its own initiative or on the basis of complaints submitted by third parties. The breach of the provisions prohibiting restrictive agreements and abuse of dominance may lead to fines ranging from AED500,000 (approximately US$137,000) to AED5m (roughly US$1.37m). While economic penalties are not likely to reach the considerable amounts imposed for similar infringements in other jurisdictions, such as the EU, companies should bear in mind that fines may be doubled for repeat offenders, and private enforcement may add to the costs incurred by companies.

Exemption from the FCL

Businesses may apply to the Ministry of Economy for an exemption from the application of the FCL, provided that (1) a notification is made prior to the implementation of the agreement or practice in question, and (2) the affected parties demonstrate that such agreements or practices enhance economic development and improve competition.

The FCL does not, however, provide any further detail as to

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what the Ministry of Economy would consider as enhancing economic development and improving competition, nor does it clarify whether an exemption may be obtained following the opening of proceedings by the Ministry of Economy.

Regarding the procedure to apply for an exemption, the UAE Council of Ministers is expected to adopt executive regulations detailing the procedure for making exemption applications. Nonetheless, the FCL already sets out an overview of the procedure, including a time period of 90 days (extendable by 45 days) for the ministry to consider exemption requests. Although the affected undertaking(s) might wish to wait and obtain ministry approval before implementing their restrictive agreements or abusive practices, the Ministry of Economy may temporarily approve the implementation of such agreements or practices for a maximum period of 30 days. In the absence of a final resolution by the Ministry of Economy, the request for an exemption will be deemed approved.

Where the Ministry has approved a restrictive agreement or abusive practice (either unconditionally or with commitments), it may set a timeframe for the validity of the exemption or make it subject to periodic revisions. Further, following the exemption of an agreement or practice, the ministry may revoke an exemption in certain situations (namely, where it finds that the circumstances under which the exemption was issued no longer exist, where the conditions of the exemption have not been met or where it becomes apparent that the information on which the exemption was based was misleading or incorrect). Once an agreement or practice has been exempted, the Ministry must be notified of any potential amendments to the agreement or practice at least 30 days prior to such amendments taking place.

Merger control

The FCL introduces a merger control regime applicable to mergers and acquisitions that affect competition, in particular as a result of agreements or arrangements that create or enhance a dominant position. While the UAE has not yet established the nature and the level of the filing thresholds, it is expected that the obligation to notify will be triggered by the attainment of market share thresholds to be defined by the UAE Cabinet.

Concentrations that would result in companies exceeding the filing thresholds should be notified to the Ministry of Economy at least 30 days prior to the planned closing of the deal. The filing has suspensory effects, meaning that a merger or acquisition should not be implemented until the ministry has approved the deal by ministerial resolution within a period of 90 days (extendable by 45 days). A concentration may be prohibited or approved, either unconditionally (where the transaction does not give rise to competition concerns) or with conditions. If the Ministry of Economy fails to issue a ministerial resolution within the prescribed period, it will be deemed to have approved the transaction and the deal may be completed. The ministry may revoke the approval of a concentration on a similar basis as set out above in relation to restrictive agreements and abusive practices.

Failure of merging firms to notify a concentration, in breach of the FCL, may result in fines of between 2% and 5% of total annual sales or revenues generated in the UAE. If sales and revenue data cannot be determined, fines ranging from AED500,000 (approximately US$137,000) to AED5m (approximately US$1.37m) may be imposed. Although the FCL provides for mandatory notification, it does not indicate whether failure to notify can lead to the concentration being declared void, nor does it appear to confer explicit powers on the Ministry of Economy to separate a merged undertaking (nonetheless, powers of this nature might be included in the executive regulations). In addition to the penalty indicated above, the implementation of a transaction prior to the obtaining of clearance, in breach of the suspensory obligation established in the Federal Competition Law, may result in fines ranging from AED50,000 (approximately US$13,700) to AED500,000 (approximately US$137,000).

Conclusion

The UAE has taken a major step towards the comprehensive regulation of competition. The FCL addresses almost all levels of antitrust enforcement, including merger control, the prohibition of restrictive agreements, abuse of dominance and private enforcement. Given the detailed provisions in the FCL relating to restrictive agreements and abuse of dominance, companies active in the UAE should make use of the six-month grace period to review their business practices and, where appropriate, implement compliance programmes to prevent breaching the FCL.

Despite containing some level of detail, the FCL is in large part a piece of framework legislation and further regulation will be required to flesh out its provisions. In particular, rules are expected in relation to a number of matters, including the exclusion of de minimis arrangements from the provisions relating to restrictive agreements, the market share threshold above which firms will be deemed to hold a dominant position in a market, and the nature and level of the merger control thresholds and filing requirements.

In order to avoid unnecessary risks, businesses should first consider whether they are caught within the scope of the FCL by virtue of their size or their area of activity. If they determine that the FCL does not apply, such businesses should consider whether any industry-specific competition regulation applies to them. If they conclude that the FCL does apply, companies should assess whether their commercial agreements contravene the provisions in the FCL (unless these agreements have a "weak impact" on competition, which, based on our experience, may be initially established in other jurisdictions and on the de minimis threshold set by the competition safeguards applicable to the telecommunications sector), or whether their position in the market (if found to be dominant) precludes them from carrying out certain activities which could be determined as being abusive.

In this regard, the rules provided in the competition safeguards regarding the telecommunications sector – as well as the enforcement guidance applied in other jurisdictions such as the EU – suggest that parties with market shares exceeding 40% will probably need to review their current market practices. Finally, businesses should bear in mind the new merger control rules when considering any potential merger with – or the acquisition of shares or business assets of – another company active in the UAE, given that these rules will affect the timing and, perhaps, the viability of the deal.