

Cartels

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United Arab Emirates

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Overview of the law and enforcement regime relating to cartels

The United Arab Emirates (“UAE”) competition law and enforcement regime is relatively young with just over eight years since Federal Law Number 4 of 2012 (“Competition Law”) was enacted on October 23, 2012 and took effect on February 23, 2013. The Competition Law regulates “restrictive agreements” such as price-fixing, collusion on bids, market allocation arrangements, and agreements to suppress production. In the years since its enactment, the Competition Law has been followed by several implementing resolutions. Despite this, there is no publicly available data confirming enforcement of the Competition Law in connection with alleged or suspected cartel conduct.

Laws on cartels

The stated purpose of the Competition Law, as discussed in Article 2, is to “protect and promote competition and anti-monopoly practices” by:

1. Providing a stimulating environment for Organizations (defined in Article 1 as “any natural or legal person practicing an economic activity, any person associated therewith, or any combination of these persons, regardless of its legal form”) to enhance efficiency, competitiveness and consumer interest and achieve sustainable development in the UAE.
2. Maintaining a competitive market governed by market mechanisms, in accordance with the principle of economic freedom, by prohibiting restrictive Agreements, prohibiting the acts and behaviours that lead to the abuse of a Dominant Position (defined in Article 1), controlling Economic Concentration (defined in Article 1) operations, and avoiding anything that would endanger, limit or prevent Competition (defined in Article 1 as “practicing economic activities according to the market mechanisms without such mechanisms having any adverse impact on or limitation to commerce and development”).

The Competition Law defines “Agreement” expansively, covering “[a]greements, contracts, arrangements, joint ventures, or practices between two or more organizations, or any cooperation among organizations, or the decisions made by a syndicate of organizations, whether orally or in writing, expressly or implicitly, secretly or in public”. Article 1, Competition Law.

Article 5 of the Competition Law prohibits “restrictive agreements”, defined as those that “have as their subject or objective the abuse, restriction or prevention of competition”.

Clause 1 of Article 5 lists various restrictive agreements including those with the aim of:

- a. fixing, directly or indirectly, purchase or sale prices of goods or services by causing increase, reduction, or fixing of prices, thereby adversely affecting Competition;
- b. determining the terms and conditions of sale, purchase, or performance of services, or any similar transaction;
- c. collusion in bids or proposals in tenders, practices, and other supply offers;

- d. freezing or limiting production, development, distribution, or marketing, and other investment aspects;
- e. conspiracy not to purchase from a certain organisation or organisations, limiting sale or supply to certain organisation or organisations, and preventing or obstructing its/their ability to carry out its/their business; or
- f. restricting the freedom of supply of goods or services to the Relevant Market, or removing goods or services from the Relevant Market, including hiding or unlawfully storing goods or services, abstaining from dealing in goods and services, or creating a sudden oversupply that leads to circulating the goods and services at fake prices.

In addition, Clause 2 of Article 5 notes that “restrictive Agreements among Organizations, which prejudice, restrict, or prevent competition, shall be prohibited”, including such agreements that aim at:

- a. market sharing, or allocation of clients on the basis of geographical areas, distribution centers, customer quality, seasons, periods of time, or any other basis that adversely affects competition; or
- b. taking any measures to obstruct the entry of any Organizations to the market, excluding any Organizations from the market, or obstruction of accession to any existing agreements or joint ventures.

However, Article 5 explicitly states in Clause 3 that “save for” sub-clause (a) within Clause 1 and sub-clause (a) within Clause 2 (listed above), the “provisions of this Article shall not apply to low-impact agreements in which the total share of the Organizations which are parties to these agreements do not exceed the percentage set by the Council of Ministers of the total transactions in the Relevant Market” (Article 5, Competition Law). Thus, certain agreements that could otherwise be deemed “restrictive” under Article 5 may be exempted because they are deemed “weak-impact” agreements when entered into by organisations with market share below certain thresholds.

1. Cabinet Resolution No. 37

Cabinet Resolution Number 37 of 2014 (“Cabinet Resolution No. 37”) gives effect to the Competition Law by providing steps and procedures for how the Competition Law treats various types of restrictive agreements, abuses of dominance, and merger control. For example, together with Articles 7 and 8 of the Competition Law, Cabinet Resolution No. 37 sets forth procedures for how “obtain exclusion for restrictive Agreements or practices relevant to a dominant position, set out in Articles (5) and (6) of the Law”. Article 2, Cabinet Res. No. 37. That is, companies “that wish to obtain exclusion for restrictive Agreements or practices relevant to a dominant position, set out in Articles 5 and 6 of this Law, shall notify the Competent Authority in advance”. *Id.* The Competent Authority (defined in Article 1 of Cabinet Resolution No. 37 as the “Ministry department concerned with competition”), upon receipt of the entity’s submission, “shall consider the exclusion” and “prepare a detailed report” that includes an evaluation of “the application from legal and economic aspects, particularly in respect of its impact on the competition level in the Relevant Market”. *Id.* at Article 3. Additionally, Articles 11 and 12 within Cabinet Resolution No. 37, concern investigations of violations and complaints of violations of the law made to the Minister of Economy. Importantly, there are two ways to begin an investigation. First, the Competent Authority “may, on its own motion, commence investigation” into violations of the Competition Law, “if it has plausible reasons and adequate information”. *See* Article 11, Competition Law. Second, the Competent Authority may accept and investigate a complaint provided that it notifies “the parties against whom the complaint is filed, and all concerned parties, of the subject of the complaint within ten (10) days”. *See* Article 12, Competition Law.

2. Cabinet Resolution No. 13

In 2016, the UAE issued Cabinet Resolution Number 13 of 2016 (“Cabinet Resolution No. 13”), which sets out the percentages and thresholds related to the implementation of the Competition Law and Cabinet Resolution No. 37. Importantly, Cabinet Resolution No. 13 directly ties to Article 5 of the Competition Law, which, as discussed above, allows for certain “low impact” agreements from being deemed “restrictive”. Cabinet Resolution No. 13 sets the low-impact agreement threshold at 10% of the overall transactions in the Relevant Market. Article 1 of the Competition Law defines “Relevant Market” as a “[c]ommodity or service, or a combination of commodities or services, which, based on their price, characteristics, and methods of use, may be replaced with any other goods or services, or the alternatives of which may be chosen, to meet a specific requirement of consumers in a certain geographical area”. In addition, Cabinet Resolution No. 13 specifies the market share threshold that would suggest dominance (and thus trigger Article 6 of the Competition Law) at 40% of the overall transactions in the Relevant Market.

3. Cabinet Resolution No. 22

In Article 4, the Competition Law notes in part that the law shall not apply to “small and medium-sized Organizations in accordance with the controls prescribed by the Council of Ministers”. Cabinet Resolution Number 22 of 2016 (“Cabinet Resolution No. 22”) defines small and medium establishments (“SME”) and provides financial thresholds for falling into this SME or “micro enterprise” definition and thus falling outside the Competition Law. Interestingly, the appendix to the Competition Law and Cabinet Resolution No. 22 both contemplate that various sectors, activities, and businesses may be excluded from the provisions of the UAE Competition Law.

Overview of investigative powers in UAE

Article 12 of the Competition Law provides for the establishment of a Competition Regulation Committee (“CRC”) to be chaired by the “Undersecretary of the Ministry of the Economy”. It was not until 2018, five years following the enactment of the Competition Law, that the CRC was established with the role of overseeing the work of the Department of Competition of the Ministry. Day-to-day operations remain the Ministry of Economy’s responsibility through its Department of Competition. The CRC organised its first meeting at the Ministry of Economy’s headquarters in Dubai in 2018.

The CRC has these mandates, as discussed in Article 13:

1. Proposing the policy for the protection of Competition in the UAE.
2. Considering the issues related to the implementation of the provisions of this Law, and raising recommendations thereon to the Ministry.
3. Proposing legislation and procedures related to the protection of Competition and presenting such legislation and procedures to the Minister.
4. Examining the applications presented to the Committee for reconsideration of the decisions made by the Minister within no more than 10 days from the date of being notified of the decision.
5. Making recommendations to the Minister on the exclusion of restrictive Agreements or the practices relevant to a Dominant Position.
6. Preparing an annual report on the Committee activities to be presented to the Minister.
7. Any other matters related to the protection of Competition which are referred to the Committee by the Federal authorities or the competent authorities in the UAE.

The Competition Law sets out these mandates for the Ministry of the Economy’s Competition Department, as discussed in Article 14:

1. Implementing the Competition policy in cooperation with the competent authorities in the UAE.
2. Coordinating with the competent authorities in the UAE to address any form of activities or practices violating the provisions of this Law.
3. Preparing the forms and applications related to the performance of its duties and designating a record for notifications and complaints.
4. Soliciting information and investigating the practices violating Competition, based on complaints or on its own motion, addressing these practices in cooperation with the Competent Authorities, and making recommendations to the Minister on the decisions to be taken in this regard to take the appropriate action.
5. Receiving applications for reconsideration of the decisions made under this Law and taking the appropriate actions concerning these applications.
6. Conducting studies related to Competition in the markets, preparing reports, and providing information to the public.
7. Receiving and following-up the notifications of restrictive Agreements or the practices relevant to a Dominant Position, as amended, and Economic Concentration applications.
8. Retaining experts or consultants from outside the Ministry to perform any works that fall within its mandates.
9. Promoting the exchange of information with the authorities concerned with Competition in other countries in order to fulfil the purposes of and implement this Law.
10. Taking measures and procedures to disseminate the culture of Competition and free market principles.
11. Conducting the Executive Secretariat works of the Competition Regulation Committee.
12. Any other tasks relates to Competition referred to the Committee by the Council of Ministries.

Investigatory powers and procedures

As noted above, Cabinet Resolution No. 37 provides procedures by which the Competent Authority can start an investigation either on its own initiative or following a complaint. Articles 10–11, Cabinet Res. No. 37. Article 12 of Cabinet Resolution No. 37 provides the steps of an investigation including notifying “the parties against whom the complaint is filed” and “all concerned parties subject to the complaint” within 10 days and including within the notification a summary of the important items of the complaint among other things. *Id.* at Article 12. Among other things, targets of the investigation must be provided with notice of: (a) the practice which is claimed to violate, prevent, or restrict competition and violated provisions of the law; (b) the defendant’s right to defend itself and reply to the allegations against it; and (c) the period of time given to the defendant to submit its reply in writing concerning the allegations. The Competent Authority’s investigatory tools are described broadly, including “any action it deems necessary to investigate the complaint”, including requesting information, documents, or statements by the parties (or other parties) and holding meetings with parties relevant to the complaint. Article 12.

The Competent Authority is then tasked with preparing a “detailed report” to the Minister with a statement of all facts and procedures taken in service of the investigation such that the Minister may make a “reasoned decision on the complaint within 30 (thirty) days from the date of submitting the report”. *Id.* at Article 13. The parties may seek reconsideration of the Minister’s decision no later than 14 days following issuance of the Minister’s decision. *Id.* at Article 14. Importantly, and likely a reason for the relative lack of information about ongoing investigations pertaining to UAE cartel enforcement, the Competition Law specifically states

that the Ministry shall in essence guarantee confidentiality when an investigation is under way. *See* Article 15 (noting in part that the Ministry shall “take adequate procedures to ensure the confidentiality of the information to which to which the Ministry have access or which are provided to the Ministry by business incorporations, the disclosure of which may cause substantial damage to the commercial interests of the business enterprises or their owners, or which may conflict with the public interest”).

Search warrants or dawn raids

The UAE Competition Law and its regulations do not specifically describe authority or procedures for dawn raids, but they also do not foreclose this investigatory tool.

Overview of cartel enforcement activity during the last 12 months

There are no public records or reports reflecting cartel enforcement in the UAE during the last 12 months. But this does not mean that the Competition Committee has not engaged in investigations or enforcement action. Rather, such developments would be kept confidential. *See* Article 15, Competition Law (requiring that the Ministry ensure the confidentiality of the information to which it has access because disclosure “may cause substantial damage to commercial interests of the business enterprises or their owners, or which may conflict with the public interest” and no disclosure of information to which the Ministry has access shall be made except to the concerned parties or upon the request of competent authorities). Thus, the CRC may receive complaints, investigate alleged conduct, counsel subjects of investigation on corrective measures, and settle disputes all without referring criminal charges to public prosecution or otherwise disclosing the enforcement action publicly.

Leniency/amnesty regime

There appears to be no special leniency programme available for violations of Competition Law after such violation has occurred. As discussed above, however, entities are expressly allowed to seek a prospective exemption from the Competition Law. *See* Chapter 1, Cabinet Res. No. 37.

Administrative settlement of cases

The Minister of the Economy “may effect reconciliation ... before referring the criminal case to trial in consideration for payment of any amount that is not less than double the minimum penalty”. Article 26, Competition Law; *Id.* at Article 15. The reconciliation must be made (1) before starting the criminal case, and (2) the payment must be no less than double the minimum limit of the penalty. *Id.* at Article 15. The settlement is binding on all those signed and effective once there is evidence of the payment. *Id.*

Civil penalties and sanctions

The Competition Law contemplates various sanctions for violations ranging from AED 500,000 and AED 5,000,000 for violating Articles 5 and 6, and other fines for violating other provisions of the Competition Law. *See* Chapter VIII, Competition Law. The Competition Law also notes that “penalties . . . shall be aggravated in the event of recurrence”. Article 21, Competition Law. The Competition Law also provides that, upon conviction, a business could be closed down by a court for a period of three and six months and the court may “order the publication of its decision once or more in at least two local newspapers at the expense of the violating Organization”. *See* Article 22, Competition Law.

Right of appeal against civil liability and penalties

There is a right of appeal against civil liability and penalties. Article 27 of the Competition Law notes that “decisions made by the Minister under the provisions of this Law may be appealed to the competent court within sixty days from the date of notifying the concerned parties of such decisions”.

Criminal sanctions

The Competition Law treats antitrust violations as potentially criminal, but a criminal case will be brought “only by a written request by the Minister or his authorized deputy”. Article 26, Competition Law. A settlement or “reconciliation” of a criminal case can occur for any of the alleged criminal acts if it is carried out before the case is referred to trial and after payment of “any amount that is not less than double the minimum payment”. *Id.* Such settlement must be an amount of no less than double the minimum penalty. *Id.*; Article 15. To date, no criminal cases or settlements have been made public.

Cooperation with other antitrust agencies

Among the “mandates of the Ministry in the Competition Field”, the Competition Law charges the Ministry with “promoting exchange of information with the authorities concerned with Competition in other countries in order to fulfil the purposes of and implement this Law”. Article 14, Competition Law. Although no cooperation with other antitrust agencies during the last 12 months is apparent, the UAE Competition Committee’s attendance at the International Competition Network’s annual meeting in 2018 suggests that the UAE competition authorities are beginning to engage the international enforcement community. The CRC also organised its first meeting for 2018 in Dubai in which the committee members, led by the Undersecretary of Economic Affairs, showed interest in joining the global antitrust enforcement community.

Cross-border issues

Article 3 of the Competition Law states that the law “shall apply to the economic activities carried out by the Organizations in the UAE and to the exploitation of intellectual property rights inside and abroad the UAE” and “shall also apply to the economic activities which are practiced abroad the UAE and affect competition in the UAE”. Thus, the scope of the Competition Law contemplates conduct outside the UAE with enforcement in UAE. To date, there is no public record of cross-border cartel enforcement in the UAE.

Developments in private enforcement of antitrust laws

While there is no publicly available information about any recent developments in private enforcement of antitrust laws within the UAE, the Competition Law contemplates the possibility of private recourse against on offending party. Article 23 notes that the “penalties set out in this Law shall not prejudice the right of the harmed party to have recourse to the court to claim compensation for the damage arising from violating any provision of this Law”.

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