

UAE Competition Law – Executive Regulations now published

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The Executive Regulations in relation to the UAE Competition Law came into force on 27 October 2014.

Introduction

Previous Clyde & Co legal updates (*'The New Federal Competition Law in the UAE'*, 3 December 2012; and *'The new UAE competition law: merger and acquisition control: stay ahead of the competition!'* 11 February 2013) summarised the main provisions of the United Arab Emirates (UAE) Federal Competition Law (Federal Law No. (4) of 2012) which came into force on 23 February 2013 (UAE Competition Law). As discussed in those updates, the legislation regulates certain anti-competitive practices and M&A activity.

The UAE Competition Law envisaged the publication of regulations setting out in detail the processes to be followed by parties seeking exemptions from the rules and the notification and clearance procedures in respect of 'economic concentrations'. Council of Ministers' Resolution No. 37 of 2014 on the Executive Regulation of the Federal Law No. 4 of 2012 relating to Competition Regulation (Regulations) came into force on 27 October 2014.

In this article we focus on the merger control provisions. While the Regulations clarify a number of areas, they do not set out the market share percentage which will trigger notification; this is to be specified at a later date by the Council of Ministers. When fully implemented, the requirement to pre-notify mergers and acquisitions creating potentially anti-competitive 'economic concentrations' will be a new step in corporate regulatory control in the UAE.

Scope of the regulations

The Regulations deal with procedures relating to: exemptions from the rules on restrictive agreements and dominant position (Chapter 1); economic concentrations (Chapter 2); and the examination of complaints (Chapter 3).

In each case, the relevant party should apply to the Competition Department of the UAE Ministry of the Economy (Department). The Department will consider the application and make recommendations to the Minister of Economy who issues a resolution on the relevant matter.

Economic concentrations

The concept of 'economic concentration' is widely drafted to capture not only traditional share acquisitions but also transfers of assets and liabilities from one entity to another.

Where a proposed economic concentration may affect competition in a 'relevant market', particularly to create or enhance a dominant position, an application for pre-approval should be submitted to the Department at least 30 days prior to 'the date of concluding the contract or the agreement concerning the economic concentration'.

An application must be made where the market share of the parties participating in the economic concentration exceeds a specific percentage of the total transactions undertaken in the relevant market. As noted above, the Regulations state that such percentage is to be specified by the Council of Ministers.

Various supporting documents must be submitted with the application, including in particular a report on the economic effects of the economic concentration, stating the advantages thereof on the relevant market, and including suggested obligations and procedures to eliminate any potential disadvantages. Note also that any information submitted which the parties wish to be treated as confidential must be clearly marked as such, and the applicant should also submit a non-confidential summary of such information.

The parties to the transaction must authorise one of their number to submit the application. We expect that in most cases, the buyer will wish to run the process. The authorised party must act under a notarised special power of attorney.

When considering any application, the Department will consider:

- The level of actual and potential competition in the relevant market
- The ease with which new participants can enter the relevant market
- The potential impact on prices of the relevant commodities/services
- The extent to which regulatory impediments may affect access to the relevant market
- The potential for the creation of a dominant position in the relevant market
- The potential effect on creativity, innovation and technical efficiency
- The extent of contribution to investment promotion, export promotion or supporting the capacity of national Establishments to compete on an international level. Note that this factor may have particular significance where the strategic importance of the business to the economy outweighs competition concerns, particularly in relation to locally important industries and sectors
- The effect on consumers' interests

The Department may request additional information from the applicants and also consult with any third parties which it considers may be affected.

The Department prepares a report on the proposed economic concentration, evaluating in particular the impact on competition in the relevant market, and makes a recommendation on the proposed resolution. The Minister must issue his resolution within 90 days of receipt of the application, although he may extend this for an additional 45 days if he sees fit. He must issue a reasoned decision and can issue an approval, a rejection or an approval subject to conditions. If he fails to issue a resolution within this time frame, the economic

concentration shall be deemed to have been approved. The approval of an economic concentration may be revoked in certain circumstances e.g. for non-compliance by the parties with any stipulated conditions.

The parties are expressly prohibited from carrying out any disposal or procedure concerning completion of the economic concentration until the Minister has issued the resolution. This contrasts with, for example, the competition process in the UK, where the parties may elect to complete the transaction and take the risk of adverse findings should the merger be investigated.

Complaints, appeals and settlement

Chapter 3 sets out the process whereby any 'stakeholder' (which appears to capture any interested third party) can file a complaint with the Department in relation to a violation of the Competition Law. Complaints shall be filed in writing or electronically in accordance with a process to be specified by the Department. The Department may also conduct investigations on its own initiative.

A party subject to a complaint shall have the right to submit a defence and to contest the allegations. The Department may request any data, documents or statements which it deems of assistance in examining the complaint from the parties to the complaint or other parties and may hold meetings and take any other measures it deems necessary. The Department prepares a report for the Minister, who in turn must issue a reasoned resolution on the matter within 30 days of receipt of the report.

The risk of complaints by third parties, potentially leading to lengthy periods of dispute and negotiations, may encourage parties to make a clearance application even if there is doubt around whether such an application is required.

The Regulations allow a party to seek a re-examination of any resolution issued by the Minister. Any such application must be filed within 14 days of the resolution being notified, setting out the grounds for re-examination and supporting documents. The Committee then has 10 days within which to make a recommendation to the Minister, who in turn makes a ruling within 30 days of the application.

The Minister or his deputy may also seek a written settlement with the parties in breach at any time prior to the filing of a penal case. Any party in breach must pay a settlement amount of not less than twice the minimum applicable fine. If a party fails to comply with the settlement terms, the Department may refer the violations to the competent court.

Practical implications

It remains to be seen how the processes described above will work in practice. In particular:

- The Council of Ministers decision on the relevant percentage in relation to market share will be crucial in the practical application of the Competition Law and Regulations. At the time of drafting, there is no set timeframe for this decision to be issued
- No further guidance is set out in the Regulations to explain what will constitute a ‘relevant market’ in any given case. Again, this is important to the practical application of the law and the Regulations. The way in which a market is defined may vary and affects whether any economic concentration is captured. For example, the market in luxury leather goods is significantly more restrictive than the market in leather goods or the market in luxury goods and more likely to trigger a notification requirement
- It is unclear whether the parties to an economic concentration may proceed to sign a sale and purchase agreement which provides that completion is conditional upon clearance. The Regulations seem to require that only a draft agreement should be submitted with the application; but the parties may not wish to commence a formal approval process without a signed agreement in place
- The parties will need to ensure that the requirements to draft the application, in particular the report on economic effects, and to put in place the special power of attorney are factored in to the timetable for the transaction
- The implication of the 30-day notice period in respect of economic concentrations is not entirely clear. The Minister has a maximum of 135 days from the date of submission to issue a decision and until a decision is issued the relevant transaction must not proceed.

However, if he issues a decision earlier than 30 days after the submission date it is unclear whether the parties would be free to complete

- No specific process has been set out to allow for preliminary discussions between parties and their advisers with the Department to help parties to determine whether an approval is needed in relation to a specific transaction. It is unclear whether in practice the Department will issue informal feedback to allow parties to determine whether or not they must make a formal application in any given case. Given the potentially lengthy time periods involved, it would be useful to allow for a fast-track process
- The parties must be careful to mark all information they do not wish to be shared with third parties as confidential; it is also difficult to know how the requirement for a non-confidential summary of confidential information will be applied in practice. This could have potentially unwelcome implications for parties dealing with highly sensitive commercial information
- There do not appear to be any specific sanctions against making a complaint which is later rejected. This may encourage tactical complaints by third parties seeking to derail transactions involving their competitors

Conclusion

Although the further detail set out in the Regulations is to be welcomed, many questions remain as to how and when the provisions will be implemented.

If you would like further information on any issue raised in this update please contact:

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