Enforcing restrictive agreements

BonelliErede talks about the identification of compliance priorities for vertical agreements under UAE Competition Law.

The competition law regime in the United Arab Emirates (the UAE) has been fully established following the enactment of the UAE Federal Law No. 4 of 2012 regulating competition in the UAE; the issuance of Cabinet Resolution No. 37 of 2014 concerning the executive regulation of Law No. 4 of 2012; and Cabinet Resolution No. 13 of 2016 concerning the ratios and controls related to the application of Law No. 4 of 2012 (the UAE Competition Law). The main purpose of the UAE Competition Law is to prohibit anti-competitive practices, one of which being the entry into restrictive agreements where the effect or the object of such agreement is the restriction or prevention of competition. As awareness of competition law increases over time, the incentive for market operators to ensure compliance also increases. This article will focus on the application of the prohibition of restrictive agreements under the UAE Competition Law to vertical agreements and identify compliance priorities. Given that the UAE Competition Law is broadly based on the European Union (the EU) competition law, the latter is expected to serve as guidance to interpret UAE Competition Law until a domestic decisional practice is developed through guidelines or enforcement action.

The UAE Competition Law provides a non-exhaustive list of prohibited restrictive agreements such as those agreements that fix prices, terms of sale or purchase, divide markets, allocate customers, restrict the free movement of services and products, prohibit or limit production, development, distribution, marketing or investments. Such a broad definition of restrictive agreements creates compliance risks for vertical agreements between parties operating at different levels of the supply chain. This type of agreements is commonly used by foreign players to distribute goods and services in the UAE market, notably through supply, distribution, and agency agreements. For example, a vertical agreement between a

brand owner and a local distributor may be considered as restrictive if it contains clauses imposing resell prices and discounts, allocating customers, or limiting distribution channels.

The UAE Competition Law provides for various exceptions to the general prohibition of restrictive agreements based on the identity of the parties involved, their sector of activity and their market shares. State-owned enterprises and small and medium-sized enterprises are excluded from the scope of application of the UAE Competition Law. Agreements in the telecom, finance, and the oil and gas sector are also exempt from the provisions of the UAE Competition Law. In addition, registered commercial agency agreements remain subject to the provisions of the Federal Law No. 18 of 1981 concerning the organization of trade agencies, and hence they are not subject to the UAE Competition Law. It is generally understood amongst practitioners in the UAE that if agency or distribution agreements are not registered with the UAE Ministry of Economy, they will be subject to the UAE Competition Law. This formal approach for exempting agency agreements based on a registration system differs from the one under EU law which only excludes from the prohibition genuine agency relationship that do not transfer financial and commercial risks to the agent. A compliance priority following the introduction of the UAE Competition Law is therefore ensuring that necessary registrations formalities have been complied with for all relevant agreements (although this could raise different sorts of issues for a foreign brand owner, considering the special protection granted to agents in case of registered agency agreements).

Another significant exception provided under the UAE Competition Law is the de minimis exception which provides that restrictive agreements will only be anti-competitive in nature when the combined market share of the parties exceeds 10 per cent of the total transactions in a relevant market. Therefore, agreements that qualify as "weak impact" agreements are not subject to the prohibition of restrictive agreements set out in the UAE Competition Law. Assuming that the notion of "weak impact" agreements can be applied to vertical agreements, the safer approach would be to verify that the 10 per cent threshold is not exceeded in all affected markets, upstream (where the seller is active) and downstream (where the buyer is active) for the exemption to apply. By comparison, the de minimis exemption under EU law applies different thresholds to agreements between non-competitors (15 per cent) and competitors (10 per cent). Foreign players that screen their vertical agreements relying on the 15 per cent threshold under EU law may need to reassess compliance risks in view of the lower threshold under UAE Competition Law. Although the application of the de minimis exemption is not expressly excluded under UAE Competition Law, in case of agreements that contain restriction "by object", for example clauses that impose minimum resale prices or market partitioning, market operators should consider removing such restrictions from their agreements. At least as a precautionary step, given that the UAE Ministry of Economy and its appointed competition regulation committee and/or the relevant local courts could potentially exclude the application of the de minimis exemption under said circumstances in line with EU law principles.

If none of the aforementioned exceptions apply, then the parties to existing vertical agreements will have to assess compliance risks and depending on the level of exposure, decide whether to negotiate an amendment to their current contractual relationships in order to mitigate the risk of penalties and sanctions provided under the UAE Competition Law. There is also the possibility, at least in relation to new agreements, as provided under the UAE Competition Law, for the parties to submit a prior notification to the UAE Ministry of Economy requesting an individual exemption from the application of the UAE Competition Law. If the Ministry assesses that the restrictive agreements will enhance economic development and improve the performance and competitive ability of the parties involved, then it might grant, pursuant to a ministerial resolution, an exemption to the requesting parties. While a similar notification system was applicable in the EU, this no longer exists in Europe and compliance with antitrust rules is subject to a self-assessment exercise by the parties to the agreement. In order to assist

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parties to carry out this self-assessment, guidelines issued to interpret EU law provide detailed interpretative criteria in relation to several vertical agreements, including single branding, exclusive distribution and exclusive customer allocation, selective distribution, franchising, exclusive supply, tying and resale price restrictions.

As more entities become aware of such a notification system in the UAE, it is only natural that entities will increasingly start notifying the competition authority at the Ministry of Economy as part of their compliance strategy. In this regard, the effective operation of the notification system will largely depend on the ability of the competition authority to equip itself to handle an increased number of notifications within business relevant deadlines. The silver lining of the notification system is, that if the authority does not revert within 135 days from the date of notification, the absence of response from the authority can be considered as implicit clearance of the restrictive agreement. However, in practice, it is expected that in complex cases the review period could be extended by the authorities by issuing requests for information.

Although the current provisions do not introduce the risk of unlimited financial penalties calculated as a percentage of worldwide revenues of the companies involved, as contemplated in the EU and other jurisdictions, the UAE Competition Law provides a comprehensive set of sanctions that an entity could face if it is party to a restrictive agreement, e.g. an exclusive distribution agreement that excludes rivals from the market. If an entity is in breach of the prohibitions imposed by the Competition Law on restrictive agreements, it will be subject to fines of no less than AED500,000 and no more than AED5,000,000, amounts that can be doubled for repeat offenders. In addition to providing for fines, the UAE Competition Law states that a court may order the closure of an entity found in breach of the UAE Competition Law for a period of no less than three months and no more than six months. Additionally, the court may order, at the expense of the convicted entity, the publication in at least two local newspapers of the court's decision regarding the suspension of the entity. These fines and sanctions are in addition and without prejudice to any claim that an aggrieved party may have as a result of an entity entering into a restrictive agreement. The UAE Competition Law is silent on the validity and enforceability of vertical agreements that are considered as restrictive agreements. While both the UAE Competition Law and EU law prohibit agreements that restrict, distort or prevent competition, only the latter specifically provides that such agreements are automatically void. Until the matter is clarified by UAE courts, it remains to be seen if, based on Federal Law No.5 of 1985 concerning the issuance of the civil transactions laws in the UAE, agreements that qualify as restrictive agreements without being possible to apply any of the exceptions provided under the UAE Competition Law, could be found to be void ab initio. If that interpretation is upheld by UAE courts, any person (e.g. a third-party competitor or harmed consumers in the relevant market) could commence a proceeding before UAE courts for the declaration of voidness of the relevant restrictive agreement.

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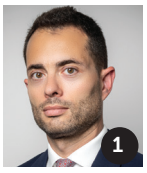

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