

INSIGHTS

Overhaul of the UAE's Competition Law: Key Changes and Next Steps

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On 29 December, 2023, Federal Decree-Law No. 36 of 2023 on the Regulation of Competition (the New Law) was issued, replacing Federal Decree-Law No. 4 of 2012 (the Old Law) and introducing a new merger control regime, including a number of new concepts which will potentially lead to parties in M&A transactions having to file merger control filings.

This article sets out the key points to note in the New Law. However, it is important to note that the New Law remains subject to the provisions of Implementing Regulations, which at the date of this article have not been published. Consequently, Article 39 of the New Law provides that the decisions, decrees and regulations issued pursuant to the Old Law shall continue to be effective until replaced. Once the Implementing Regulations have been published, we will provide an update to this article.

Turnover and Market Share Thresholds

The New Law applies to economic activities conducted both inside the UAE and outside of the UAE, encompassing situations where such activities may impact competition within the UAE. Notably, Article 1 of the New Law expands the geographical scope of the definition of “relevant market” recognising that competition may occur within a “digital place” and “where competition conditions are similar or homogeneous.”

Under Article 1 of the New Law, the term “economic concentration” is defined as any “action that leads to the full or partial transfer (merger or acquisition) of ownership or usage rights in properties, rights, stocks, shares or obligations of an establishment of another” and which, when completed, results in direct or indirect control of such establishment.

Article 12 of the New Law pivots away from the previous position under the Old Law whereby parties were only required to file transactions with the UAE Ministry of Economy (the MOE) if the combined market share of the parties exceeded 40 percent. In practice, this threshold was high and very few filings were made with the MOE. Article 12 provides that in the event that one of the conditions (set out below) are met, the New Law imposes a requirement for parties “intending” to participate in an economic concentration to notify the MOE to obtain clearance before participating in the transaction proposed:

1. **Turnover Threshold:** total annual sales of the parties in the market during the preceding fiscal year exceeds an amount to be determined by the UAE Council of Ministers (the

Ministers); or

2. **Market Share Threshold:** combined share of the parties' transactions as compared to the total transactions in the relevant market during the preceding fiscal year exceeds the percentage which is to be determined by the Ministers.

Whilst the relevant amounts and percentages are to be determined by the Ministers and published in the upcoming Implementing Regulations, we anticipate that the thresholds will be such that it will lead to increased filings with the MOE.

Merger Filing and Review

Under Article 12 of the New Law, filings made to the MOE must be made at least 90 days prior to completion of the transaction proposed, which marks a notable extension from the requirement under the Old Law of a 30-day notice period (the Filing). Under Article 13 of the New Law, the MOE must also issue a decision (further to the Competition Regulatory Committees' completion of market research to evaluate the transaction's potential impact on the UAE market) within 90 days of completion of the Filing, subject to a 45-day extension and further extensions as may be requested by the MOE (the Review).

Upon completion of the Review, the MOE shall issue one of the following decisions on the proposed transaction:

1. **Unconditional Approval:** where the proposed transaction does not have an adverse impact on competition or where it would generate positive economic benefits outweighing any adverse impact;
2. **Conditional Approval:** where the MOE recommends the parties implement remedies to mitigate potential adverse effects;
3. **Rejection:** the proposed transaction is prohibited from taking place; or
4. **Declining to Exercise Jurisdiction:** the MOE considers that the proposed transaction does not meet the conditions for filing, and therefore does not issue a decision due to lack of jurisdiction.

The Old Law provided that if the by the MOE failed to issue a decision within the Review period, the proposed transaction would be deemed approved. Under Article 13, in these circumstances, it will be considered rejected.

Exemptions

Article 4 of the New Law provides that UAE federal or local government owned entities are exempt from the requirements of the New Law. The New Law also provides an exemption for any agreement or conduct related to a specific good or service regulated by another law, provided such other law governs the antitrust aspects of that specific sector, including with respect to approving transactions. Under the Old Law, entire sectors were automatically exempt from the law. This is an important change to be aware of as companies will now need to ensure they review other laws which may be applicable to its sector to determine whether such laws include antitrust provisions which would therefore exempt the company from the New Law. In practice, we expect this to mean that the wide sector exemptions under the Old

Law will bring a wider number of transactions within the scope of the New Law.

Another significant change imposed by Article 4 of the New Law is the removal of the previous exemption for small and medium sized enterprises.

Fines

In the event that a potential transaction meets the filing conditions under the New Law but the parties do not make the relevant Filing, the violating party may be subject to a fine of no less than 2 percent and no more than 10 percent of the total annual revenues achieved by the party from the relevant product or service in the UAE during the previous fiscal year. Where the relevant revenue cannot be determined, the fine shall be set between AED 500,000 to AED 5,000,000 (approximately USD 136,000 to USD 1,300,000).

Given the relatively few filings made with the MOE under the Old Law, the UAE's total overhaul of the regime signifies a clear intention to introduce a system with a wider scope and permit. Consequently, businesses need to be aware of these requirements when looking at transactional work in the UAE. The publication of Implementing Regulations is keenly anticipated and should provide welcome guidance on the relevant thresholds and percentages businesses need to be aware of when determining if filings should be made.