NAVIGATING THE NEW UAE COMPETITION LAW: MOVING TOWARDS EU PRINCIPLES? PART 4—UAE PROHIBITION ON ABUSE OF DOMINANT POSITION AND ARTICLE 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

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Similarly to the Old Law,[1] the New Competition Law[2] prohibits the abuse of a "dominant position" in the relevant market by any undertaking, including acts or conduct aimed at distorting, lessening, restricting, or preventing competition. This mirrors the prohibition outlined in Article 102 TFEU, which forbids undertakings from abusing a dominant market position in a given market, in a manner that could impact trade between European Union member states.

In the United Arab Emirates, establishing a "dominant position" under the New Competition Law is determined by whether:

1. The undertaking's market share exceeds the percentage determined by the United Arab Emirates cabinet (currently set at 40% under Cabinet Resolution No. 13 of 2016); or
2. The undertaking possesses the ability to influence the market in a way that harms competition, as will be defined in the New Competition Law's implementing regulations (Executive Regulations).

Establishing a "dominant position" under the New Competition Law is now determined by way of reference to the undertaking's market share or its ability to influence the market. This is unlike the previous position under the Old Law, which solely relied on the market share threshold.

The EU regime adopts a similar definition of "dominant position." There is established case law providing that a dominant position is very likely to exist if the undertaking has a market share of 50% or more. However, unlike the UAE regime, the EU regime requires a full economic assessment to determine whether the undertaking in question is in a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition in the relevant market, by affording it the power to behave (to an appreciable extent) independently of its competitors and customers.

Under both UAE and EU competition laws, there is no prohibition against the mere holding of a dominant position. What is prohibited is the abuse of a dominant position. Such conduct may involve, amongst others, imposing unfair prices or resale conditions; selling goods or services below cost to hinder competition; unjustifiably

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discriminating between customers; preventing customers from dealing with competitors; or refusing transactions without justification.

INTRODUCTION OF PROHIBITIONS ADDRESSING ECONOMIC DEPENDENCE AND PREDATORY PRICING

The New Competition Law introduced two new prohibitions:

- The first new prohibition addresses the abuse of "economic dependence," aiming to prevent any undertaking from unjustifiably exploiting situations where customers lack alternative options for marketing or supply. This includes prohibiting acts or conduct imposing unfair prices or resale conditions; unjustified discrimination between customers; compelling customers to avoid dealing with competitors; or unreasonably obstructing or refusing transactions without justification. There is no equivalent prohibition at the EU level under the abuse of dominance or other rules, but several EU Member States, including France, Germany, Belgium, and Italy have introduced national laws against abuse of economic dependence that apply regardless of whether there is a dominant position.
- The second new prohibition addresses "predatory pricing" as a standalone offense, prohibiting undertakings from setting prices for consumers significantly below production, manufacturing, and marketing costs with the intent of or resulting in, driving competitors out of the market or preventing their entry. However, general price reductions mandated by consumer protection laws or liquidation events may be exempt from this provision. While this prohibition appears to apply regardless of the existence of a dominant position, it remains to be seen whether the Executive Regulations (which have not yet been published) may set further conditions or a *de minimis* threshold. In the European Union, predatory pricing practices by a dominant undertaking are prohibited by Article 102 TFEU. In addition, there are national consumer protection laws in several European Union member states that prohibit below-cost pricing, regardless of whether the company engaging in such practices has a dominant position or not.

PENALTIES

The New Competition Law enhances coordination among the UAE Ministry of Economy, sector regulators, and other UAE governmental authorities.

It has implemented stricter penalties for those found engaging in anticompetitive behavior, with a fine of not less than AED 100,000. The maximum threshold for fines raised to 10% of an undertaking's annual total sales realized in the United Arab Emirates during the last fiscal year or AED 5,000,000, if the annual total sales cannot be computed. This contrasts with the European Union where the European Commission can impose fines of up to 10% of the undertaking's global annual turnover in the last financial year. The undertaking is composed of the highest parent held liable and all its subsidiaries. The consolidated turnover of that group of companies is relevant.

FOOTNOTES

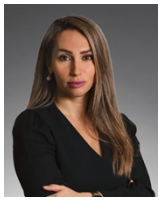
[1] UAE Federal Decree-Law No. 4 of 2012 Concerning the Regulation of Competition, which was repealed by the

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New Competition Law.

[2] Federal Decree-Law No. 36 of 2023 on the Regulation of Competition.

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