

Saudi Arabia: The Competition law regime

Grahame Nelson - Partner, Head of Office - Al Khobar - Corporate / Mergers and Acquisitions / Projects
g.nelson@tamimi.com - Al Khobar

November 2013

Some states have laws that deal with particular areas of competition law, such as telecommunications, and a number have ambitions to adopt comprehensive competition law regimes. However, viewed as a region, the development of functioning competition laws is largely aspirational.

What is the position in Saudi Arabia?

Saudi Arabia adopted a Competition Law in 2004 and it came into effect in January 2005. The Competition Law and the associated Regulations and Competition Rules make up Saudi Arabia's competition law regime and they are enforced by a Competition Council.

Who does the Competition Law apply to?

It applies to all firms, i.e. any corporation or company and business doing business in Saudi Arabia. A non-Saudi entity can be a firm. The Competition Law does not apply to public (i.e. government) corporations and fully-owned state enterprises.

What does the KSA Competition Law do?

The broad aim of the Competition Law is to protect and encourage fair competition and combat monopolistic practices that affect competition. It seeks to achieve this by:

- Prohibiting agreements and arrangements between firms if their objective or effect is to restrict commerce or competition.
- Restricting the ability of a firm to acquire a dominant position in the market.
- Making abuses of dominant market position by a firm illegal.

What sort of practices and agreements are prohibited?

The provisions relating to anti-competitive practices and agreements are broadly drafted and would catch a wide variety of anti-competitive practices and agreements. As with the competition laws of many other jurisdictions, certain agreements and behaviour are singled out for special attention and effectively presumed to be ant-competitive (for example, price fixing or complicity in tenders) without any further enquiry. In other cases, it is the effect of the conduct or the agreement that needs to be considered. This appears to leave scope for the argument that a restriction which might be prohibited in certain situations may not be prohibited in other because (for example) it is required to establish a market for products or services.

Article 4 of the Competition Law says that practices, agreements or contracts among current or potential competing firms, whether the contracts are written or verbal, expressed or implied are prohibited, if the objective of such practices, agreements or contracts or their effect is the restriction of commerce or the violation of competition between firms.

Any practices, alliances or agreements, explicit or implicit, between competing entities which violate, restrict or prevent competition shall be prohibited, in particular those whose subject matter or purpose is:

- Fixing prices, service charges or terms of sale and the like.
- Setting a limit for production of goods or the rendering of services.
- Dividing markets on the basis of geographical areas, sale or purchase quantities, customers or any other basis adversely affecting competition.
- Discrimination among clients in prices, facilities and services.
- Taking measures to hinder the entry of an entity into the market or forcing it out of the market.
- Complicity in tenders.
- Setting different prices on a certain commodity according to its place of sale.
- Selling at less than cost price in order to force competitors out of the market.

The conduct and practices referred to above are presumed to be anti-competitive without the need to demonstrate that they actually have an anti-competitive effect. This would seem to negate the opportunity to argue that a restraint is required in order to develop the market for products and services.

In some countries anti-trust provisions distinguish between vertical (e.g. distribution) and horizontal (e.g. cartel) relationships when determining if the relationship has an anti-competitive effect with exemptions allowed for certain kinds of vertical contractual relationship. That is not the case with the Saudi provisions. They may need to be borne in mind in the case of certain kinds of business relationships which would generally be regarded as being beyond of anti-trust provisions such as franchise and distribution agreements.

The Competition Council may decide not to apply the prohibitions contained in Article 4 of the Competition Law to practices and agreements in violation of the Competition Law which are deemed to improve efficiency and realise benefits to consumers which outweigh their anti-competitive effect.

Dominating Position

“Domination” may arise through:

1. Sales of at least 40% of total sales in the market for a period of 12 months; or
2. An entity or group of entities being in a position to influence the prevailing price in the market.

It follows that a firm could still have a dominant position in the Saudi market even though it is not directly engaged in the market through the sale of products and services, if it is in a position to influence the price of those products or services in the Saudi market.

Also, whilst domination in terms of sales must continue for a period of 12 months, there is no requirement for domination through an ability to influence the prevailing price in the market to exist for a defined period. Applied literally, there seems to be potential for certain types of conduct to be caught which would not be equated with domination. For example, price cutting which has the effect of influencing (i.e. reducing) the level of prices in the market would not typically be regarded as domination in the sense of substantial market power.

Whilst limb (a) of the test of domination is seller specific, there is potential for limb (b) to apply to buyers as well.

The Competition Law requires firms to notify the Competition Council in writing about mergers and acquisitions which may result in the acquisition of a dominating position on the market. The Competition Council will review all relevant information before deciding whether to clear the merger.

Acquiring a Dominating Position

Firms involved in merger discussions or desiring to acquire assets, shares etc. which will result in them having a dominating position are required to notify the Competition Council at least 60 days in advance.

A similar requirement applies to firms wanting to combine different managements into one if that will result in a dominant position.

The Competition Council will review all necessary information before deciding whether to approve or not allow the proposed merger etc., giving reasons.

The merger etc. may be completed:

1. If the Competition Council gives its written approval.
2. Upon the lapse of 60 days from the date of notification if the Competition Council has not previously given notification of its objection or that it is under review or investigation.
3. Upon the lapse of 90 days from the date of notification that the merger etc is under review or investigation if the Competition Council has not previously given notification of its approval or objection.

Abuse of Dominating Position

The existence of a dominating position in the Saudi market is not of itself prohibited. The abuse of that dominating position is.

“Abuse” of a dominating position requires an act of the kind described in Article 4 of the Competition Law or Article 6 of the Competition Law Regulations.

Broadly speaking those provisions target any practice which restricts competition between firms, in particular:

- Price control.
- Restricting the free flow of goods and services.
- Barriers to entering and leaving markets
- Forcing out competitors.
- Partitioning markets.
- Client Discrimination.
- Compelling or agreeing with a client to refrain from dealing with a competing entity (third line forcing)
- Making the sale of a commodity or offer of service contingent on the purchase of another commodity or service (first line forcing).

The examples of abuse which are listed in Article 4 of the Competition Law or Article 6 of the Competition Law Regulations are just that: they are not the universe of what may fall to be considered as “abuse”.

Intellectual property rights are inherently monopolistic and have the potential to create dominating position opportunities. Anti trust laws would usually allow the legitimate exploitation of those rights is not an abuse of a dominant position but that is not explicitly stated in the Saudi provisions.

It would seem that the abuse (as distinct to its effect) does not need to occur in Saudi Arabia.

Economic Concentration

The Dominating Position provisions of the Competition Law focus on the acquisition and use of substantial market power. These are reinforced by other provisions which focus upon the acquisition of ownership which is referred to in the Regulations as “Economic Concentration”.

Economic Concentration happens where an entity acquires a position of domination of an entity or group of entities through merger, takeover, acquisition or the combination of managements.

An entity intending to achieve Economic Concentration in order to dominate 40% of a commodity's total supply in the market is required to make written application to the Competition Council and provide prescribed information including a report detailing the consequences of the proposed Economic Concentration, in particular its positive effect on the market. The entity can proceed to complete the Economic Concentration if the Council notifies its approval or if the Council doesn't notify its refusal within 60 days of the application date.

Complaints

A party claiming to be affected by conduct which they believe breaches the Competition Law or Regulations may request the Competition Council to conduct an investigation to determine whether breaches of the Competitions Law have occurred. The Competition Council may also initiate investigations even though it has not received any complaint.

The Competition Council's investigation must be completed within 180 days from the date of the request for the investigation. If following its investigation, the Competition Council concludes that any party had been breached of the Competition Law and/or the Competition Regulations it will notify the party concerned and afford it an opportunity to defend its interest at a hearing held 15 days after notification. Within 10 days of the hearing the Competition Council will notify its decision to the parties.

Article 13 of the Competition Law Regulations says that a suspected entity may not under the pretext of confidentiality withhold any information for any reason whenever judicial investigation officers require such information.

Penalties

The Competition Council may require the prohibited conduct to stop, dispose of assets and take other action to remove the effects of the violation. Violators may also become subject to financial penalties:

1. A fine not exceeding 5 million Saudi Riyals, to be multiplied in case of recurrence.
2. A daily fine not less than 1,000 Saudi Riyals and not more than 10,000 Saudi Riyals until the violation is removed.
3. Appeals lie to the Board of Grievances (the relevant Saudi Court) against decisions of the Competition Council.

Compensation

In addition, anyone suffering harm caused by conduct prohibited under the Competition Law may apply to the court for compensation.

Executive Summary

The Competition Law regime of Saudi Arabia seeks to maintain the competitiveness of the Saudi Arabian market by:

- Making illegal certain types of conduct irrespective of the scale upon which that conduct occurs.
- Also making illegal conduct if it is an abuse by an entity of its dominating position in the market.
- Regulating mergers and acquisitions which give rise to a dominating position in the market.
- Making breaches liable to substantial penalties.

These are features of the competition law regimes of many other countries.

These provisions are likely to become increasingly important over time as the Saudi Government steps up its efforts to get private sector participation in key areas of the Saudi Economy.