

Market Forces in Oman: The New Competition Law

Ahmed Al Barwani - Partner, Head of Office - Oman - Corporate / Mergers and Acquisitions / Commercial
a.albarwani@tamimi.com - Muscat

Arif Mawany - Head of Corporate Commercial - Oman - Commercial / Corporate / Mergers and Acquisitions / Capital Markets
a.mawany@tamimi.com - Muscat

May 2015

The purpose of the Competition Law is clear: to open up markets in Oman to growing players and reduce the effect that larger market players have on prices and flow of products and services. Its aim is also clear: to reduce the exploitative forces on consumers occasionally imposed by holders of significant market power.

Key areas addressed by the Law

Readers of the Competition Law will draw similarities with equivalent legislation adopted by other members of the Gulf Co-operation Council and with Articles 81 and 82 of the EC Treaty Establishing the European Community. The Competition Law governs the following practices:

- Monopolies: arrangements that seek to control the quantity and prices of products or services are banned.
- Dominant market practices: simply being dominant is not unlawful but, dominance combined with participating in practices that aim to eliminate or restrict other market players is. The threshold above which dominance is established is set at 35% of the relevant market.
- Joint venture / merger notification: acquisitions, mergers or arrangements that would lead to a person or group of persons becoming dominant require advance clearance from the Consumer Protection Authority ("CPA").

Effect of the Competition Law on the Omani Market

Monopolistic Arrangements

Experience from around the world highlights that not all monopolies have the effect of restricting or damaging competition and the legislation recognises this by outlawing only those arrangements which have the effect of harming competition.

The legislation has additional bite through its claim of extra-territorial effect so that if, for example, a contract is made in Japan, between a Japanese car producer and its Omani distributors, which has the effect of limiting the monthly supply of spare car parts into Oman and thereby keeping the price of those spare parts artificially high, the contract would likely be deemed unlawful by a court in Oman.

Anti-competitive Arrangements

The legislation bans arrangements that restrict competition in Oman regardless of the market share of the wrongdoer. The following are expressly prohibited:

- Requiring resellers to sell at a particular price or offer a particular discount
- Limiting the supply and flow of products by “warehousing”
- Carving up the market into distinct territories or by reference to specific clients
- Acting in a way which prevents or obstructs other market players
- Refusing to deal with particular persons
- Collusion on bids and tenders

Again, the legislation claims extra-territorial effect and arrangements (whether written or not) concluded outside the Sultanate that contain any of the above are likely to be deemed unlawful.

A curious situation arises under this category of prohibited actions. If, for example, a German supplier of state-of-the-art air conditioning units approaches an Omani distributor, the distributor may only be willing to take on the risk of marketing the product if it is given incentives and protection which could take the form of an exclusive arrangement. Would such an arrangement be deemed anti-competitive on the grounds that other distributors are excluded from the market? Or could the Court be persuaded that the agreement was in fact pro-competition on the grounds that a key new product was being marketed in Oman to the benefit of inhabitants?

Abuse of a dominant position

As outlined above, dominant market players are not being asked to dispose of businesses and assets in order to fall outside the definition of “dominance”. It is abuse of that dominant position which is targeted and the matters listed below are considered abusive practices if conducted by dominant market players:

- Predatory pricing: selling products or providing services at depressed prices for a prolonged period of time to wipe out or otherwise damage competitors.
- Imposing import restrictions: for example, using market power to limit the quantity of competing products passing through the sea port.
- Creating high barriers to entry: imposing special conditions on a purchaser of products or dealing with them in a way that places them at a competitive disadvantage, for example where a manufacturer imposes an obligation on smaller distributors to make investments in expensive retail premises to market the products.
- Refusing to deal: for example, a principal imposing an obligation on its distributor of premium writing instruments not to deal with a supplier of generic refills. The purpose of this is to promote the principal’s higher priced refills.
- Price reselling: fixing resale prices of products in a territory without reference to whether the market can sustain those prices.
- Warehousing / creating shortages: for example, by withholding products from the market place to keep prices of products already in the market place at an artificially high level.
- Creating product surplus or deficit: flooding the market with a product to lower the prices and drive out weaker competitors or sucking up supply to create a shortage to increase the price.

Creation of Economic Concentrations

Clearance from the CPA must be obtained before creating an economic concentration. Economic concentrations in Oman are likely to be created by merger, acquisition or joint venture between two or more companies. The threshold above which clearance would be required for the concentration is a 35% share of the relevant market. Creation of an economic concentration with a relevant market share of greater than 50% is prohibited.

Enforcement and Criminal Sanctions

Powers of the CPA

It is noteworthy that the CPA has been given heightened powers allowing it to monitor infringements and

enforce the Competition Law in a way that would be expected by a regulator in Western jurisdictions. CPA inspectors, who are treated as officers of the court, have authority to conduct inspection of commercial premises – without notice – and report findings of wrongdoing including the right to bring court claims against the wrongdoers. Obstructing or misleading these inspectors – and destroying information pertinent to the investigation – is a criminal offence which will attract a prison sentence and a fine of up to USD250,000.

Criminal Sanctions and fines

Creation of monopolistic arrangements, the abuse of a dominant position and entering into anti-competitive agreements are punishable with a prison sentence of up to three years along with a fine equivalent to up to 10% of the total annual sales derived from the wrongdoing.

Failure to obtain clearance from the CPA for an economic concentration attracts a prison sentence and a fine of up to USD250,000.

The extra sting in the tail of the Competition Law comes in the form of corrective sanctions: in addition to the sanctions described above, the court has power to require the contravention to be corrected, for example, by requiring a dominant market player to stop abusive practices or directing an economic concentration to dispose of its assets to reduce its market share. Failure to comply with these corrective sanctions attracts daily fines of up to USD25,000 and repeated contravention can ultimately lead to a total shut down of the offending business.

Sanctions on senior management

The Competition Law makes it clear that the penalties described above will be imposed on members of the board of directors and all officers of the legal entity involved in the wrongdoing.

Those likely to be most affected by the Competition Law

While the legislation applies to the entire private sector, there are a number of sectors which are likely to come under scrutiny in the foreseeable future:

Infrastructure and construction: the CPA will be keen to ensure that bids and tenders are conducted in a transparent manner without collusion or price fixing in any form by private market participants. This dovetails with the Sultanate's recent focus on stamping out bribery and corruption in this sector.

Commercial agencies: there are a number of standard practices in the automobile sector which could become open to challenge. Such practices are reflected in contractual provisions between a supplier and the local distributor and involve some or all of the following:

- requiring spare car parts to be purchased only from the supplier and from no other person, thereby closing off the market for generic spare parts;
- exclusive distribution arrangements which exclude other competitors from entering the market;
- export bans, namely provisions which prohibit a distributor from marketing outside its designated territory; and
- territorial protection for a particular distributor.

Supermarkets: there is a small number of supermarket operators in Oman, only one or two of which have a major presence in the malls of Oman. Given the convenience of having a supermarket within a mall a case could be made that consumer choice has effectively been limited and that major names are in a privileged position and are able to control product prices.

Other areas which could be affected by the legislation include the markets in sanitary materials, pharmaceutical products, oil & gas machinery and products.

Key areas not addressed by the Legislation

Interpretation

While the Competition Law has undoubtedly filled a hole in the legislative framework in Oman, as is the case with any new piece of legislation, the manner in which the courts interpret some of the key provisions will be critical, particularly when ascertaining the share of a market held by a dominant player or establishing the relevant market. The test for dominance has no clear formula and there is little guidance or relevant case law on the meaning of “relevant market”. These are issues that have troubled courts in other jurisdictions and are likely to result in a number of test cases brought before the Omani court.

Exclusivity of Commercial Agents

The other key area that remains unclear has been noted above in relation to automobile commercial agencies but applies to all commercial agencies. Are all exclusive commercial agencies, which appear to limit competition, at least contractually, damaging to the consumer? Is the German supplier of state-of-the-art air conditioning units likely to postpone investing in Oman until clear guidance has been set by the Court?

Many principals have master agency agreements over the MENA region, which allow principals to control pricing and the flow of goods into the region. The legislation applies to practices that affect the Omani market, which means that a UAE-based agent supplying goods into Oman will not, at least in theory, be able to escape the arms of the law simply by virtue of being located outside Oman. In practice however, if the agent is found in breach of the law in Oman, would a court in the UAE enforce the judgment? Would the CPA intervene and block importation of the agent’s activities in Oman?

Future impact of the Competition Law

Much depends on the role of the CPA in policing and enforcing the legislation. It may simply decide to act only on firm complaints where there are clear and indisputable cases of anti-competitive behaviour, in which case it may be some time before the courts of Oman have an opportunity to interpret the legislation. The alternative is to take an aggressively pro-active role by using its powers to investigate specific markets, gather evidence of anti-competitive practices and accelerate the effect of the legislation.

Given Oman’s desire to present its economy as a free market attractive to all investors, it would be sensible to infer that the legislation will be interpreted in a way that highlights the importance to Oman of preserving its economic significance in the GCC and attracting investment from within and outside the GCC.