

# Does the New Competition Law Ensure Fair Competition in the UAE?

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*To my Parents and Family*

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## **Author's Declaration**

I declare that the work of this thesis was carried out in accordance with Regulation of Southampton Solent University. The work is original, except where indicated by special references in the text, and no part of the thesis has been submitted for any other academic award. Any views expressed in the thesis are those of the author.

Signed: Saif Al Badwawi

Date: ...../...../.....

## ABSTRACT

Competition law has become an important legal tool as it plays a significant role in preventing different forms of anti-competitive behaviour and ensures fair competition in the market. For this purpose, the United Arab Emirates has adopted its first comprehensive competition law, named “*UAE Federal Law No. 4 of 2012 Concerning Regulating Competition*”, to be enforced from 23<sup>rd</sup> February 2013. The law contains 33 Articles regulating competition in all commercial sectors.

This research aims to investigate the UAE competition law in order to answer the main question, which is to what extent does the new law ensure fair competition in the commercial field of the country. It examines the flaws and drawbacks in the competition law and the enforcement mechanism. The research suggests the reforms required to improve the law and the way this could be accomplished. In order to answer the main question, the research applies two main methods, which are the black letter approach and the socio-legal approach. In addition, the research will employ the interview approach.

Different issues were found in the UAE competition law in the areas of anti-competitive agreements, abuse of dominant position, mergers and acquisitions, state aid, and enforcement. The findings demonstrate that evidence exists of anti-competitive behaviour in the market, such as monopolistic practices and abuse of dominant position. Furthermore, there is evidence of inadequate implementation of the law against many market players, such as state-owned undertakings. From the findings, the role of the Competition Regulation Committee seems to be weak and inadequate, and there are some conflicts with the role and the Ministry of Economy. Some recommendations have been suggested for policy reform and enhancement of the law and its upcoming regulations.

It is hoped that the findings of this research will provide a framework for the UAE and the countries in the region that seek to have more competitive markets. This study is the first to address the competition law of the UAE, thus this study contributes to the understanding of the law and its application, and it is hoped it will add to knowledge in the field of competition law. Furthermore, based on the evidence, the research concludes by suggesting a number of implications and potential future research avenues.

## **ABBREVIATIONS**

ECHR	The European Convention for Human Rights in Europe
ECJ	The European Court of Justice
ECSC	The establishment of European Coal and Steel Community
ECtHR	The European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EGC	The General Court of the EU
EU	The European Union
FDI	Foreign direct investment
FTC	The Federal Trade Commission
GCC	Gulf Cooperation Council
MNCs	Multinational Corporations
NCA	National competition Authorities
OECD	The Organisation for Economic Co-operation and Development
OFT	The Office of Fair Trading
OGJ	Oil and Gas Journal
OPEC	Organisation of Petroleum Exporting Countries
SCA	The Securities and Commodities Authority
S-C-P	The structure-conduct-performance paradigm
SME	Social Market Economy
SMEs	Small and Medium Enterprises

TEC	The Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UAE	United Arab Emirates
UK	The United Kingdom
USA	The United States of America
WTO	World Trade Organisation

# Chapter One: Introduction and Methodology

## 1.1 United Arab Emirates Economy - Overview

The economy of the United Arab Emirates is the second largest in the Arab world (after Saudi Arabia), with gross (GDP) of \$377 billion (AED1.38 trillion) in 2012. The United Arab Emirates (UAE) has successfully diversified their economy, as 71 per cent of the UAE's total GDP comes from non-oil sectors.

The economy was expected to grow between 4-4.5% in 2013, compared to 2.3-3.5% over the past five years. Since independence in 1971, the UAE's economy has grown by nearly 231 times to AED1.45 trillion in 2013. The non-oil trade has grown to AED1.2 trillion, representing growth of around 28 times from 1981 to 2012.

Tourism is one of the main sources of revenue in the UAE, with some of the world's most luxurious hotels being based in the UAE. Although the UAE is now less dependent on natural resources as a source of revenue, petroleum and natural gas exports still play an important role in the economy, especially in Abu Dhabi. A massive construction boom, an expanding manufacturing base, and a thriving services sector are helping the UAE diversify its economy. Nationwide, there is currently \$350 billion worth of active construction projects. Chapter 3, section 3.2 goes into relevant detail of the economic development in the UAE.

The UAE is a member of the World Trade Organization and OPEC. Based on the above statistical summary and financial figures it is imperative that UAE government maintain such wealth and economic growth. This can only be achieved with investment, worldwide economic confidence of the UAE economy that enhance, support, encourage and allow freedom for foreign investment and trade. For all this to happen the UAE government and institutions need a good, fair and balance competition law to serve all of these objectives.

## 1.2 Introduction to Competition Law

Competition law has become an important legal tool in the developed states and some of the developing economies and is considered a major instrument of market reform

worldwide.<sup>1</sup> During the last few decades, competition law has gone through an important process of expansion. Mostly it was known in developed states, while most of the developing economies, including the United Arab Emirates, did not have any proper competition laws.<sup>2</sup> It has been claimed that competition law is a primary legal tool which aims to operate market-oriented economies. Nearly a century after the first modern competition statute was passed in 1889 in Canada,<sup>3</sup> it may be noticed that there has been a rapid increase in the number of states which have adopted competition laws. It has been claimed that approximately 90 states have adopted competition policies among their laws, whereas only a few countries had competition laws in the past.<sup>4</sup> However, since then that number has increased and more than a hundred states have adopted competition laws, whereas some of the developing economies are in the stage of law drafting.<sup>5</sup>

The terms competition law and competition policy are used synonymously. However; they have different meanings. It should be noted that the domain of competition policy is wider than that of competition law. Competition policy may be defined as the tools of public policy which establish the basis for an open market economy or “facilitate the creation and growth of efficient and competitive firms that can deliver goods and services to [the consumer] and engage in trade and competition in international markets.”<sup>6</sup>

In addition, competition policy determines competition’s conditions that control the market, since it consists of the set of tools and measures practised by governments.<sup>7</sup> The measures of competition policy can include actions to reduce licensing requirements for new investment or entry, the privatising of state-owned enterprises, deregulating activities, trade liberalisation,<sup>8</sup> cutting “firm-specific subsidy programmes” and reducing “the extent of policies that discriminate against foreign products or producers.”<sup>9</sup>

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1 Holmes, P. The World Trade Organization and Competition Policy: Implications for Developing Countries. *Institute for Developing Studies*. 2003. 34, p. 2

2 Singh, A. Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions. *United Nations Center for International Development-Harvard University, G-24 Discussion Paper Series*. [Online] 2002. Available from: <http://www.google.com/url?sa=t&source=web&cd=5&ved=0CEIQFjAE&url=http%3A%2F%2Fciteserx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.167.5828%26rep%3Drep1%26type%3Dpdf&rct=j&q=Competition%20and%20Competition%20Policy%20in%20Emerging%20Markets%3A%20International%20and%20Developmental%20Dimensions.%20&ei=fs-tTdPFLoWXtweO89TVCA&usg=AFQjCNG8yG1deVcInLlysoaMbEez04Ikrq> [Accessed: 12 March 2011].

3 Ross, T. The Evaluation of Competition Law in Canada. *Review of Industrial Organisation*. 1998. 13. 1-2. p. 2.

4 Lianos, L. Collusion in Vertical Relations Under Article 81 EC. *Common Market Law Review*, 2008. 45. 4, pp. 1027-1077.

5 Emmert, F., Kronthaler, F. and Stephan, J. *Analysis of Statements made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies*. [Online]. 2005. Available from: [http://www.iwh-halle.de/projects/competition\\_policy/Claims\\_02.PDF](http://www.iwh-halle.de/projects/competition_policy/Claims_02.PDF) [Accessed: 13 March 2011].

6 Fingelton, J., Fox, E., Neven, D. & Seabright, P. *Competition Policy and the Transformation of Central Europe*. London: CEPR. 1996, pp. 2-3.

7 Hoekman, B. & Mavroidis, P. *Economic Development, Competition Policy, and the World Trade Organisation*, Policy Research Working Paper, No. 2917, Washington, D.C.: World Bank. 2002, p. 4.

8 Jones, A. & Sufrin, B., *EC Competition Law: Text, Cases and Materials*, 3rd ed., Oxford: Oxford University Press. 2007, p. 3.

9 Hoekman, B. & Mavroidis, P. *Op. cit.*

Consequently, competition policy comprises two parts which have a great effect on economic agents in the market place. The first one refers to anti-trust or competition law and the other refers to “micro industrial policies such as tariff and non-tariff policies, foreign direct investment, unnecessary government intervention in the market place and economic regulation designed to prevent anti-competitive business practices by firms.”<sup>10</sup>

On the other hand, competition law has a different meaning to competition policy. There have been some efforts to define competition law. However, in spite of the efforts made by the literature on this topic, it has been claimed that defining competition law, comprehensively and in an uncontroversial manner, is difficult and doubtful. This is because competition law’s objectives and aims are “as fluid and changing as competition law itself.”<sup>11</sup>

Notably, competition law has a broad and a narrow meaning. The broad meaning of competition law refers to the laws that seek the promotion of competition through banning unfair competition conduct and anti-competitive conduct. The broad definition of competition law and policy has only been adopted by a few countries, such as China and Germany. The Chinese competition law covers both unfair competition and anti-competitive practices, while in Germany there are two kinds of legislation that cover both groups (anti-competitive practices and unfair competition practices). The first legal statute is the competition law (known as Wettbewerbsrecht) which covers anti-competitive conduct and unfair practices. The second is cartel law (known as Kartellrecht) which not only covers cartels but all types of anti-competitive practices.<sup>12</sup>

It is worth mentioning that, although both anti-competitive conduct laws and unfair competition conduct laws aims to protect consumer welfare and market competition, there are massive differences between them. Unfair competition practices law aim to protect enterprises from the dishonest practices conducted by other competitors. Frequently, dishonest practices generally include deception, trade secrets misuse, misleading advertising, competitors’ defamation, and commercial bribery. The Organisation for Economic Co-operation and Development (OECD) has defined unfair competition

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10 Khemani, S. & Dutz, M. A., The Instruments of Competition Policy and their Relevance for Economic Development. In: Frischtak, C. (ed.) *Regulatory Policies and Reform in Industrializing Countries: A Comparative Analysis*. Washington D. C: The World Bank. 1995.

11 Dabbah, M. *EC and UK Competition Law: Commentary, Cases and Materials*. Cambridge: Cambridge University Press. 2004, p. 5.

12 Gerber, D. *Law and Competition in Twentieth Century Europe*. Oxford: Oxford University Press. 1998, p. 4.

practices as a “sort of fraudulent behaviour or misappropriation of property rights.”<sup>13</sup> Moreover, the OECD emphasised that in general unfair competition prohibition or unfair trade practices prohibition are not part of competition law.<sup>14</sup>

On the other hand, the narrow meaning of competition law defines it as the legislation which bans anti-competitive conduct only. This meaning has been adopted by major competition regimes in many countries which have different forms of legislation for both anti-competitive practices and unfair competition practices, and use the term ‘competition law’ to refer to the anti-competitive practices. It is worth mentioning that some countries, such as Australia and Russia, which have a single piece of legislation that deals with both unfair competition conduct and anti-competitive conduct, use the term ‘competition law’ to refer to anti-competitive practices only.

One of the least controversial attempts to define competition law is that it is “concerned with applying legal rules and standards to address market imperfections and to preserve, promote and sometimes restore market conditions conducive to competition. In other words it is law used to protect competition.”<sup>15</sup>

In addition, competition law has been defined by some scholars as the relationship between undertakings that sell the same kind of goods or services “at the same time to an identifiable group of costumers.”<sup>16</sup> In view of that, each firm will be in relationship with the other undertakings in the same market once that firm has taken a decision to operate the production and distribution facilities and place its service or goods on the market.

Moreover, competition law has been defined as a set of rules, judicial decisions and regulations that governments apply in connection with either the agreements set out between firms that restrict competition or the abuse of a dominant position by a firm or firms through mergers.<sup>17</sup>

While the key role of competition policy is the injection of more competition into the market “either through pursuing pro-competition policies like opening the whole economy to international competition, or deregulating certain sectors to permit the entry

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13 OECD. *The Role of Competition Law and Policy*, Paris: OECD. 15. 2001, p. 28. For the EU unfair competition, see MacCulloch, A. & Rodger, B. *Competition Law and Policy in the European Community and United Kingdom*, 2nd ed., London: Cavendish Publishing Limited. 2001, pp. 26-27.

14 *Ibid.* p. 29.

15 *Ibid.* pp 5- 6.

16 Albers-Llorens, A. & Goyder, J. Goyder. *EC Competition Law*. 4th ed. New York: Oxford University Press. 2009, pp. 8-9.

17 For a detailed definition see Amato, G. *Anti-trust and the Bounds of Power*. Hart Publishing. 1997, pp. 2-3.

of private agents,”<sup>18</sup> competition law aims to create and protect competition’s conditions in the market. A firm’s organisation and monitoring in the market is what competition law seeks.<sup>19</sup>

The primary goal of the rules established under competition law is to eliminate hindrances that may affect competitive processes. Competition law is a subset of competition policy and it offers a framework that guides competitive activity with the aim of making markets operate more effectively. Thus, competition law emphasises accomplishing two things: (i) enhancing the achievement of all efficiencies associated with it through implementation of rules that guide competition within a market where competition already exists and (ii) encouraging competition where it does not exist through the adoption of structural remedies within a market that is unduly concentrated.<sup>20</sup>

In addition, according to Singh, “the intensity of competition in some developing countries’ markets is low: it is not easy to access the market and the number of players is limited, with large concentration.”<sup>21</sup> A lot of evidence exists which demonstrates anti-competitive conduct in developing countries’ markets.<sup>22</sup> One of the reasons that the anti-competitive behaviour exists is what we can see from the anti-competitive conduct committed by foreign firms and multinationals and international cartels, which eliminates the progress of competition among small and medium-sized firms. Thus, the purpose of competition law is to protect small and medium-sized enterprises from the dominant firms<sup>23</sup> or to “force a dominant firm to give access to the resources it controls to a smaller firm in order to allow the latter to compete with it.”<sup>24</sup>

In addition, one of the main goals of competition law is to “protect economic freedom and opportunity by promoting competition in the market place” which will result in benefiting consumers through reduced prices, greater choice and better quality.<sup>25</sup>

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18 Shahein, H. The Development of Competition Law and Policy in Egypt: International and National Factors. (Unpublished Ph.D. dissertation, University of The London School of Economics and Political Science). 2010, p. 13.

19 Jones, A. & Sufrin, B. *Op. cit.* p. 35.

20 This is the major philosophy behind the law, see Baquero, C. J. *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*. Hart Publishing. 2002, pp. 31-33.

21 Marcos, F. Do Developing Countries Need Competition Law and Policy? *Instituto de Empresa Business School*. [Online] 2006, p. 6. Available from: [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID930562\\_code242325.pdf?abstractid=930562&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID930562_code242325.pdf?abstractid=930562&mirid=1) [Accessed: 20 April 2011].

22 Jenny, F. Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence. *World Competition*. 2006. 29:1, pp. 109-137.

23 Stenborg, M. Do We Need New Competition Policy in the ‘New Economy’? *The Finnish Economy and Society* [Online] 2002. 49. Available from: [www.etla.fi/files/921\\_FES\\_02\\_2\\_competition\\_policy.pdf](http://www.etla.fi/files/921_FES_02_2_competition_policy.pdf). [Accessed: 20 January 2010].

24 Jones, A. & Sufrin, B. *EC Competition Law: Text, Cases and Materials*. 3rd ed. 2008. Oxford: Oxford University Press, p. 3.

25 Stenborg, M. *Op. cit.* p.4.

Competition is highly regarded since it is usually considered as an approach to inspire international confidence in a given economy. This is because foreign investors are rather cautious of freely committing their capital in a country where they are not too sure of its systems transparency. Thus, enacting competition laws provides an assurance to international investors that a country operates under a true market economy and the participants in that economy, including local and foreign participants, are equally directed by the law responsible for governing the behaviour of players in the market place.<sup>26</sup>

Based on the above, competition law or anti-trust law could be defined as legislation which is enacted by the government: a) to regulate trade and commerce by many ways such as preventing monopolies, unlawful restraints and price-fixing; b) for competition promotion; and c) for the encouragement of lowest price production of quality goods and services, with the aim of protecting public welfare through guaranteeing “that consumer demands will be met by the manufacture and sale of goods at reasonable prices.”<sup>27</sup>

Competition law in general has three main elements, which are:

“Prohibiting agreements or practices that restrict free trading and competition between businesses. This includes in particular the repression of cartels; banning abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal, and many others; and supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.”<sup>28</sup>

### **1.3 Research Aims and Question**

The aim of this research is to investigate the United Arab Emirates (UAE) competition law and its rules and regulations. This aim can be achieved through reviewing

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26 For details on its relation to international trade and industrial policy, Baker, J. The Case for Anti-trust Enforcement. *The Journal of Economic Perspectives*. [Online] 2003. 17. 4. pp. 27-50. Available from <http://www.jstor.org/stable/pdfplus/3216930.pdf> [Accessed: 20 February 2010]

27 Jones, A. & Sufrin, B. *Op. cit.* p. 2.

28 Kerber, W. *The Theory of Regulatory Competition and Competition Law*. Munich: Sellier European Law Publishers. 2008.

a selected jurisdiction which has been developed in the competition field. This research is going to examine the legal regimes of the EU and then indicate the difficulties, anomalies and gaps that exist in the laws of the UAE concerning the commercial competition field. The reason that the researcher is going to look at the legal systems in the EU is that the EU system is foremost in adopting competition laws just like the US. However, the researcher selected the EU competition law due to the similarities between the EU and UAE competition laws. The EU competition law and its scope are very similar to the UAE competition law, even though the objectives are different. The EU competition law has proven great implementation within the EU member states through the years; thus, the comparative method aims to find solutions to overcome any difficulty that might face the government when implementing the law within the different Emirates. Then the UAE competition law and other laws regarding the competition area will be studied, and measured and evaluated in the light of the EU regimes. The strengths and weaknesses of these different regimes will be scrutinised and the lessons which the UAE can learn from the EU competition regimes will be indicated.

The review looks into the following research questions:

1. Does the UAE competition law ensure fair competition in the Emirates?
2. What are the defects, if any, in the UAE competition law and the enforcement mechanism?
3. What reforms are required, if any, to advance the UAE competition law and what are the ways to achieve such reforms?

### **1.3.1 Initial Considerations**

The researcher chooses the competition laws of the UAE and the EU for comparison in his research. The purpose of the comparison is to determine the choice of a more comprehensive competition legal system that will benefit the UAE, taking into consideration that it is a developing economy compared to an advanced and developed system of the stature of the EU.

### **1.3.2 Purposes of comparative law in this research**

The following points will illustrate the purpose of this comparative study research:

- An academic discipline and hopefully this will lead to the researcher gaining his PhD.
- An aid to legislation and law reform. This is the ultimate result of this research, as the researcher feels strongly about the lack of competition fairness in the UAE.
- A means of understanding legal rules. This is imperative as it was found when carrying out this research. It goes beyond the common public users and reaches as far as law enforcement authorities in UAE.
- A contribution to the systematic unification and harmonisation of law in the UAE.

### **1.3.3 Types of comparative studies.**

The types of comparative studies used in this research were:

- Comparison of the different stages of the development of the competition law systems in the EU and UAE.
- Comparing the EU and UAE competition laws to ascertain similarities and differences between the two systems.

## **1.4 Research Significance**

It should be noted that competition law is not a new concept in the UAE only but in the Middle East as a whole. It was only recently that many countries in the region adopted their own competition law, for example, Jordan in 2004, Saudi Arabia on 2004, Qatar in 2006 and Egypt in 2006. Prior to the enactment of the new competition law, few articles in the commercial law included rules with regard to competition matters. The new competition law was adopted in order to cover the various unfair practices in the market, such as mergers and acquisitions operations, abuse of dominant position and anti-competitive agreements.

This study is the first of its kind to address competition law in the UAE. The law has been recently implemented, and no in-depth study has been carried out yet. It is hoped that the research outcomes and findings will add to the knowledge in this field, enabling a good understanding and application of the law. Through the findings of the research, not only will practitioners (judges and lawyers) and law researchers benefit, but also consumers and

investors. The research aims to set up a framework for the UAE and the countries in the region that aim to have more competitive markets.

The importance and the significance of this research lie in the achievement of the above-mentioned aims and objectives. The research is important in the sense that it purports to outline the weaknesses in the present UAE competition system. It aims to compare the current (New) competition law of the UAE with the more developed laws of Western countries. It will endeavour to compare and evaluate the current legal regime with a well-established and implemented competition law (the EU competition law) and provide solutions to overcome the existing weaknesses identified. It will recommend reform and will enumerate the steps which the government ought to take regarding competition.

### **1.5 Research Methodology**

Generally, research methodology is described as undertaking research within a framework or set of approaches using techniques and procedures that have been examined for their reliability and validity and designed to achieve an unbiased objective. According to Polkinghorne, research methodology is a process that deals with the investigation of the potential strategies to be carried which leads to obtaining understanding.<sup>29</sup> In this research, three approaches have been used in the process of designing which are: the black letter (Theory) approach, the socio-legal (Practice) and mixing both, theory and practice, approach.

This section shall accordingly cover examination of the three interrelated aspects of legal methodology: comparative legal research, socio-legal research and the pattern of their synthesis in the context of the acquiring of the scientific knowledge on the interaction of national legal systems. Through the elucidation of mentioned methodological layers and their relation, the researcher will quest for the answers on the following questions: Whether strict distinction between comparative and socio-legal research has outlived its utility? Is it possible to efficiently synthesize comparative and socio-legal research in the joint pattern of scientific legal inquiry? If the efficient synthesis of comparative and socio-legal research is possible, how such kind of methodology should be shaped in the context of the research on the interaction of national legal systems?

What methodological pattern is the most efficient in order to reveal the interaction of

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<sup>29</sup> Polkinghorne, D. E. *Methodology for the Human Sciences: Systems of Inquiry*, New York: New York Press, 1983, p. 15.

national legal systems? Should such kind of legal research be doctrinal, socio-legal, comparative or should it adopt comprehensive methodological synthesis? The author will quest for the answers on these and related questions by analysing the interconnection between comparative legal research and socio-legal studies.

The main methodology of this research consists of three interrelated sections. The first part is devoted to the discussion of the traditional distance between comparative legal research and socio-legal studies and indented to elucidate the concepts of methodological trends and the reasons of their demarcation. The second section is designed for the examination of history and current tendencies of the methodological synthesis between comparative legal research and socio-legal studies. Finally the possibilities of methodological synthesis in the research on the interaction of national legal systems are presented. The concept ‘comparative legal research’ is most commonly referred as ‘comparative law’ – linguistically imprecise term (nevertheless most widespread one). Instead of ‘comparative law’ the researcher advocates for the usage of more coherent and diverse terminology – ‘comparative legal science’, ‘comparative legal research’, ‘comparative legal method’ (taking into the consideration corresponding context, i.e. whether one is referring to branch of legal science / academic discipline, tool of construction, mean of understanding legal provisions, etc.). In order to elucidate comparative trend of legal research it is essential to mention its methodological scope. In this research this is done to achieve the followings, as conventionally as the researcher can distinguish five possible categories (suggested by Hug and adopted by Cruz):

- 1- Comparison of foreign system(s), in this case the EU with the domestic system (UAE) in order to ascertain similarities and differences;
- 2- Studies which analyse objectively and systematically solutions which the two above systems (EU and UAE) offer for the competition legal problem;
- 3- Studies which investigate the causal relationship between EU and UAE competition law;
- 4- Studies which compare the several stages of the two (EU & UAE) legal systems; and
- 5- Studies which attempt to discover or examine legal evolution of both systems, in this case only the EU will be looked at as the UAE law is in its infancy.

In this research the presence of ‘many points of similarity and overlap’ between

comparative legal research and socio-legal studies is beyond any doubt which makes it very hard for the demarcation between these two fields of scientific legal inquiries, (in this basis all three methods were adopted for this research): ‘In view of its general aims, comparative law needs legal sociology as much as legal history and legal ethnology. Both legal sociology and comparative law are engaged in charting the extent to which law influences and determines man’s behaviour, and the role played by law in the social scheme of things’.<sup>30</sup> Nevertheless they provide more or less sound arguments for the demarcation: ‘One fundamental difference between the two is that sociology covers a much wider field than comparative law, and, as Zweigert and Kotz explain, while sociology of law, through field studies and empirical observation, simply observes how the legal institutions operate, comparative law concerns itself with the question of ‘how the law ought to be’, by studying the rules and institutions of law in relation to each other.’<sup>31</sup> Watson<sup>32</sup> has also emphasised the autonomy of law, legal ideas and legal tradition which transcend purely sociological or socio-historical explanations’.<sup>33</sup> In this research this was looked at in more depth for the EU law and in term of the UAE law the componential institutions of the law as well as mechanisms in ratifying the law were looked at.

### **1.5.1 The Black Letter Law Methodology**

The black letter law methodology is an important approach for carrying out legal research. It refers to the basic standard elements for a specific field of law that are well established and not subject to reasonable dispute.<sup>34</sup> It can also be described as a specific method of understanding what counts as legal research, including the relevant materials.<sup>35</sup> However, this approach does not focus on law in practice; its main focus is on law in theory.<sup>36</sup> Thus, adopting this method allowed the researcher to establish an in-depth understanding of the UAE competition law rules and highlight their advantages and disadvantages. This approach was important for this research and considered appropriate to the aim of analysing the law since the law has not been tested yet.

In this research this was used to draw a distinction, between competition law theory

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30 De Cruz, P. *Comparative law in a changing world*. 2nd ed. London: Cavendish Publishing. 1999. p. 10.

31 Ibid.

32 Watson, A. *Legal Transplants: An Approach to Comparative Law*. Edinburgh: Scottish Academic Press. 1974. p.183

33 De Cruz, P. *Op cit*.

34 Princeton University. Black letter law. Available from:

[http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Black\\_letter\\_law.html](http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Black_letter_law.html) [Accessed: 20 June 2013].

35 Polkinghorne, D. E. *Op. cit.* p. 44.

36 Ibid. p. 118.

and contrast black-letter law as used in the EU and the unsettled legal issues of the UAE competition law. In this research this was mainly carried out as desktop and library research to conclude the main points of this research.

Justification for using black letter methodology:

The Black letter approach/methodology is justifiable and appropriate for use in this research which investigates the UAE Competition Law enforceable from February 2013. The United Arab Emirates has adopted its first comprehensive competition law, which is named “*UAE Federal Law No. 4 of 2012 Concerning Regulating Competition*”, enforceable from 23<sup>rd</sup> February 2013. The Black letter approach is particularly suitable for investigating defects or inconsistencies that might arise during enforcement.<sup>37</sup> One would expect looking at the enforcement mechanism in the UAE that inconsistencies in application of this new law are bound to arise, thereby making the black letter approach to be appropriate.

The reason why the black letter is found to be a suitable methodological approach in this research is that it enables the researcher to use a popular technique among black letter lawyers to carry out *deductive reasoning (sometimes referred to as syllogistic reasoning)*.<sup>38</sup> In so doing, the researcher used the black letter technique of deductive reasoning to examine both the internal consistency (thread of precedents in which judgements so far passed regarding anti-competitive behaviour fits) and external consistency (whether the newly enforceable competition law in the UAE is aligned with the relevant universal principles of fair market competition).<sup>39</sup> The Black letter approach as used in this context enables the researcher to answer one of the research questions “*what are the defects, if any, in the UAE competition law and the enforcement mechanism*”? Following the tradition of black letter lawyers this research was carried out using desktop and library research.

### **1.5.2 The Synthesis of Comparative and Socio-Legal Research**

Justification for using a synthesis of comparative & socio-legal research:

A fundamental research question this thesis attempts to answer is “does the UAE

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<sup>37</sup> Morris, C. & Murphy, C. *Getting a PhD in Law*. Oxford and Portland Oregon: Hart Publishing. 2011. p.31.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

competition law ensure fair competition in the Emirates? In order to answer this question an approach based on a synthesis of comparative and socio-legal research is adopted. The reason and usefulness for adopting the above approach is that the main essential argument of this research is that competition law in the UAE appears inconsistent with the wider social values of fairness in the context of UAE market institutions.<sup>40</sup> Abuse of dominant positions, monopolies, and anticompetitive behaviours are a manifested in the UAE market practices. The socio-legal aspect of the methodology is used in this context to enable researcher to examine the socio-cultural contexts of UAE markets in which relevant laws were made and operate. In so doing, it provides the researcher with an approach whose aim is to find lasting solutions to an endemic problem of lack of fairness subjecting a sector of the UAE market to disadvantage and consequently the society at large.

In addition to above, a comparative legal analysis is undertaken by reference to the above particular social phenomenon of lack of fairness in the UAE market system which the researcher is hoping to find a solution to. The main relevance of adopting comparative legal analysis by reference to the social problems arising from market unfairness in the UAE is to draw out of the comparison knowledge that could not be obtained by examining UAE market system separately.<sup>41</sup>

In so doing, the above approach enabled the researcher, despite historical and cultural differences in jurisdiction and regulations of anticompetitive behaviour in the market places of EU on one hand and UAE on the other, to draw useful insights.<sup>42</sup> Since the UAE competition law is relatively new compared to a more established EU competition laws, the researcher is able to draw some knowledge of how EU come up with workable solutions when faced with similar social and market problems. The overall goal is to find something of value therefrom which can be used by UAE towards enforcing the competition laws.<sup>43</sup> Using this methodological synthesis the researcher was able to answer the following research question “What reforms are required, if any, to advance the UAE competition law and what are the ways to achieve such reforms.

Through the comparative approach, the researcher compares the UAE and EU competition laws. Through comparison it has been noticed that the UAE competition rules

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40 Ibid

41 Watkins, D. & Burton, M. (eds.) *Research Methods in Law*. London: Routledge Taylor & Francis Group. 2013. p. 101.

42 Morris, C. & Murphy, C. *Op cit.* p. 38.

43 Ibid.

are very similar to the EU competition rules. It was suggested that the UAE has adopted the EU competition law (specifically Article 101 and 102 of the Treaty of Functioning of the European Union); thus, it was very important, through this approach, to assess the application of the competition law of the EU. The outcomes of this approach are aimed at enhancing the enforcement mechanism for the application and enforcement of the UAE competition law.

The methodological synthesis of comparative and social-legal research is rooted deep in the history of the Western thought. Early attempts to conjoin these two methodological trends can be found in the works of J. J. Rousseau<sup>44</sup> and Ch. Montesquieu<sup>45</sup>, later – M. Weber<sup>46</sup>, K. N. Llewellyn<sup>47</sup>, L. H. Morgan<sup>48</sup> and many others.<sup>49</sup> A good example of the early attempt to build foundation for the fruitful methodological synthesis between comparative legal research and socio-legal studies took place at the Law School of Columbia University in New York in the 1920s. The whole experiment is described in detail by B. Currie<sup>50</sup>:

1-The first difference consisted in the organisation of materials in terms of social and economic problems rather than legal doctrine.

2- Secondly, the proposals proceeded on the assumption that certain non-legal materials were directly and pointedly relevant.

3- Thirdly, courses utilised statutory materials to an extent which was unusual. Each of these features emphasised the role of creative reason, as opposed to deduction from a priori principles in the solution of social and legal problems'.<sup>51</sup> Notwithstanding Columbian experiment in many aspects was a failure<sup>52</sup>, it can be evaluated as a landmark for the future more successfully attempts of synthesising comparative legal research and socio-legal studies.

The traditional distance between comparative legal research ad socio-legal studies

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44 Rousseau, J. *The Social Contract* (orig. 1743) Harmondsworth: Penguin. 1968. pp.81-91.

45 Montesquieu, B. & Louis De Secondat, C. *The complete works of M. de Montesquieu* (orig. 1777) Farmington Hills: Gale ECCO. 2010. p.35.

46 Weber, M. *Max Weber on Law in Economy and Society*. Cambridge, MA: Harvard University Press. 1966. pp.53-55.

47 Llewellyn K. N & Hoebel, E. A. *The Cheyenne Way*. Norman: University of Oklahoma Press. 1941. p.188.

48 Maine, H. S. *International Law: A Series of Lectures Delivered Before the University of Cambridge 1887*. London: John Murray. 1888. pp.206-209.

49 Riles, A. Comparative Law and Socio-legal Studies' In: Reimann, M & Zimmermann, R. (eds.) *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press. 2006. pp.776-777.

50 Currie, B. The Materials of legal Education. *Journal of Legal Education*. 1955-56. 8. pp.1-78.

51 Wilson, G. *Comparative Legal Scholarship' In 'Research Methods for Law*. Edinburgh: Edinburgh University Press. 2007. p.90

52 Ibid. p.90.

began to decrease in the second half the twentieth century concerning ‘two principal subjects—the study of legal institutions other than those of Europe, North America and Latin America on the one hand, and the (often related) study of ‘legal pluralism’ on the other’.<sup>53</sup> Nowadays it is obvious that ‘socio-legal studies has seen a tremendous growth of interest in international and transnational subjects’ and comparative legal research ‘has engaged more with empirical studies and with social theory’.<sup>54</sup> According to A. Riles ‘one finds everywhere today signs of a new rapprochement’<sup>55</sup> between these two methodological trends. Presently rapid synthesis between two mentioned methodological trends is proceeding in research fields under the topics of legal profession, law and development, rule of law, harmonisation projects national and local effects of global legal forms, renewed debates about Legal pluralism, and even more intensively – concerning legal transplants and legal culture.<sup>56</sup>

Summarising contemporary tendencies (and before progressing to the methodological synthesis in the context of the research on the interaction of national legal systems), it is important to finally answer on the utility of strict distinction between comparative and socio-legal research. Is it correct to delimitate socio-legal studies from comparative legal research on the basis of the transnational focus? Whether the autonomy of law, legal ideas and legal tradition transcend purely sociological or socio-historical explanations?<sup>57</sup> Whether sociology of law, through field studies and empirical observation, simply observes how the legal institutions operate and comparative law concerns itself with the question of ‘how the law ought to be’?<sup>58</sup>

Firstly, the transnational focus both in comparative legal research and socio-legal studies is indispensable – both fields are reconfigured around ‘the transnational character of even the most local of regulatory practices’.<sup>59</sup> Secondly, the stark distinction of law and society has already outlived its utility<sup>60</sup> – the autonomy of law, legal ideas and legal tradition from the society is under severe stress and is unable to defend itself. Finally, the distinction between normative and descriptive argument is no longer a fruitful way of delineating boundaries between comparative legal researches and socio-legal studies: ‘it is now generally

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53 Riles. A. Op cit. p.785.

54 Ibid. pp.789.

55 Ibid. pp.777.

56 Ibid. pp.789–799.

57 Watson, A. *Legal Transplants: An Approach to Comparative Law*. Edinburgh: Scottish Academic Press. 1974. p.183.

58 Zweigert K. & Kotz, H. *An introduction to comparative law*. Amsterdam and New York: North-Holland Pub. Co. 1977. pp.9-10.

59 Riles. A. Op cit. 799.

60 Ibid. pp.800-80

agreed that it is needed not choose between ‘theoretical’ and ‘empirical’ work. Although Law and Society scholars have long shown some antipathy towards ‘theory’ and comparative lawyers have shown some antipathy towards empiricism, there is consensus now that scholarship in both fields needs to be both theoretically informed and empirically grounded – and that different mixes of these two elements should be encouraged and appreciated’.<sup>61</sup>

In conclusion of the discussion on the synthesis of comparative and socio-legal research, one more important aspect is to be clarified. In legal literature often, three methodological approaches are distinguished:

1. Doctrinal (black-letter),
2. Socio-legal and
3. Comparative.<sup>62</sup>

However, the author of this research argues that it is methodologically incorrect to classify legal researches into three mentioned groups as *separate* trends of scientific inquiry, i.e. comparative approach is not independent field of legal methodology, but rather specific dimension of both doctrinal and socio- legal approaches as shown in table 1, below.

	Doctrinal (black-letter) approach	Socio-legal approach
	Domestic research of ‘law in books’	Domestic research of ‘law in action’
Comparative approach	Transnational research of ‘law in books’	Transnational research of ‘law in action’
Comparative interdisciplinary approach	Transnational research of EU and UAE Competition Laws. ‘law in books’ and ‘law in action’	

Table 1

The proposed classification, as shown in table 1, may lead some legal scholars to

<sup>61</sup> Ibid. pp.802.

<sup>62</sup> Salter, M. & Mason, J. *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*. Dorchester: Pearson Education Ltd. 2007. pp.385-407.

unexpected conclusion that real dichotomy exists not between comparative legal research and socio-legal studies, but rather lies in comparative legal research itself, i.e. dichotomy between doctrinal and socio-legal approaches in comparative legal research. Yet synthesis of doctrinal and socio-legal approaches within comparative legal methodology is possible and gives birth to the *comparative interdisciplinary approach*, an approach which is able to comprehensively coincide with contemporary trends in legal methodology.

### 1.5.3 Methodological Synthesis in the Context of the Research on the Interaction of National Legal Systems

As it was thoroughly discussed above, the new rapprochement<sup>63</sup> between comparative legal research and socio-legal studies is evident and the ongoing process of methodological synthesis between these two trends is clearly manifest. But how such kind of methodology should be shaped in the context of the research on the interaction of national legal systems? Can (should) the synthesis of comparative and socio-legal research be approached as the essential prerequisite to reveal the interaction of national legal systems?

In order to answer the questions raised above, examining possible pattern of comparative and socio-legal methodological synthesis in this research on the interaction of two<sup>64</sup> national legal systems (EU and UAE), Table 2 below.

(EU)		(UAE)	
<p>¶</p> <p>Domestic research of 'law in books'</p> <p>Example: Article 101, 102 TFEU</p>	<p>¶</p> <p>Domestic research of 'law in action'</p> <p>Example: Legal cases and historical development</p>	<p>¶</p> <p>Domestic research of 'law in books'</p> <p>Example: <i>UAE Federal Law No. 4 of 2012 Concerning Regulating Competition</i></p>	<p>¶</p> <p>Domestic research of 'law in action'</p> <p>Example: Componential institutions and law enforcement structure</p>

63 Riles, A. Op cit. p.789.

64 The pattern discussed in this conference paper is equally applicable in case of research on the interaction between three and more legal systems. see: Levičev, V. The Synthesis of Comparative and Socio-Legal Research as The Essential Prerequisite to Reveal the Interaction of National Legal Systems. In *International Conference of PhD Students and Young Researchers- Integrating Social Sciences into Legal Research*. Vilnius University, Lithuania, 24-25 April 2013. Vilnius: Vilnius University. 2013. pp.163–170.

<p>¶</p> <p>Domestic research of <i>both</i> ‘law in books’ and ‘law in action’</p>	<p>¶</p> <p>Domestic research of <i>both</i> ‘law in books’ and ‘law in action’</p>
<p>¶</p> <p>Transnational comparative research of <i>both</i> ‘law in books’ and ‘law in action’</p>	
<p>¶</p> <p>INTERACTION OF NATIONAL LEGAL SYSTEMS</p>	

Table 2

By presenting the pattern of comparative and socio-legal methodological synthesis, the researcher strives to reveal three methodologically significant points. Firstly, both the doctrinal (‘law in books’) and socio-legal (‘law in action’) dimensions of law must be present in the comprehensive research of the interaction of legal systems. Absence of either will unavoidably prevent approaching actual interaction of selected legal systems – without social context researcher risks to leave behind deeper layers of legal actuality, while depending only on ‘law in action’ one stands the hazard of losing the nature of law itself.

Secondly, in order to reveal the interaction of legal systems it is absolutely insufficient merely to define and collate domestic law of selected legal systems. If one is interested in discovery of the actual interaction – the comprehensive interdisciplinary comparative analysis has to be adopted. In this research this was done and adopted as shown in table 2 above.

Finally, it is crucially important to mention that when one is researching on the *interaction* of national legal systems, it is not enough to merely establish correlations of ‘law in books’ or ‘law in action’ or both between selected legal systems. The golden rule of scientific inquiry – *cum hoc ergo propter hoc* (correlation does not imply causation) – must be kept in mind at all times. A correlation between two variables does not necessarily imply that one causes the other, i.e. established correlations are insufficient of revealing the interaction – true causal relationship between selected legal systems. In order for a correlation to be established as causal, the cause and the effect must be connected through an impact mechanism, i.e. the comprehensive research on the interaction.<sup>65</sup> The pattern

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<sup>65</sup> Ibid.

discussed in this research is equally applicable in case of research on the interaction between three and more legal systems. Between legal systems requires analysing not just causes and effects, but also the related impact mechanisms. The attempts to complete such formidable tasks will require extensive usage of experiments and regression analysis.<sup>66</sup>

Late twentieth century was marked by the beginning of the new conversation between socio-legal scholars and comparative lawyers. Today we can conclude that strict distinction between comparative and socio-legal research has outlived its utility. Moreover, real dichotomy exists in comparative legal research itself (between doctrinal and socio-legal approaches). Comparative interdisciplinary approach – the synthesis of doctrinal and socio-legal approaches within comparative legal methodology – is able to comprehensively coincide with contemporary methodological trends.

The synthesis of comparative and socio-legal research methodologies is the starting point in long demanding voyage of scientific inquiry for the revelation of the interaction of national legal systems. Before embarking on this profound journey one must (1) carefully consider the necessity of inclusion in the research both doctrinal and socio-legal dimensions of law; (2) be prepared for the comprehensive interdisciplinary comparative analysis and (3) pursue to research not only causes and effects of the interaction of national legal systems, but also the related impact mechanisms.

## **1.6 Research Limitation**

Like any research, the present study has certain limitations. The phenomenon of competition law is very new to the UAE, in particular, and in the Middle East in general. This raises some issues for consideration: first, the scarcity of publications (including books, articles and studies) which investigate several competition law aspects in the region and the UAE in particular. Second, the law has not been tested yet because, although it was stated as at 23<sup>rd</sup> February 2013 to be enforced; the enforcement was delayed for a maximum period of six months so that the concerned parties could reconcile their status according to the law.

In addition, owing to the constraints of time and other circumstances beyond the researcher's control (such as that the research was established on a model law and then was adjusted and based on the Competition Bill that was not available until Summer 2012

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<sup>66</sup> The application of such methods in social sciences is especially challenging matter.

due to confidentiality, and later the law was passed and became available by February 2013), the most recent legal developments could not be incorporated in the actual body of the thesis.

However, in order to help minimise the effect of such limitations and ensure an in-depth analysis of both Laws (EU and UAE) as well as providing some insight on the development of the law in UAE based on the historical evolution of the EU competition law.

## **1.7 Thesis Structure**

### **Chapter One: Introduction and Methodology**

This chapter will provide the background of the research and explore the aim and definition of competition law. In addition, it attempts to outline the objectives of the research and highlights the research questions of the study. It illustrates the significance of this study and provides a general statement of the research approach. The methodology that is used in this research is outlined with justification of the reasons why the research used each of them. A brief outline of the research organisation is provided.

### **Chapter Two: Competition law Background, Values, Origins and scope**

This chapter is divided into two main parts. The first part of this chapter of the research constructs an understanding of the area that is of interest in this thesis by giving a general discussion about the modern philosophy of competition law and policy, including the origin and development. Theories on competition law and policy and important trends in competition law and policy are provided to explain why it is an important area to conduct a study in.

The second section of this this chapter is divided into four parts. The first part of this section aims to demonstrate the origins and values of the EU competition law from Ordoliberal thought to the recent developments in the competition field, particularly the economic-based approach. The second part demonstrates the Islamic law origins of the UAE competition law and values. Shari'ah law has influenced UAE law and is embodied in the UAE Civil and Commercial Codes, which is one of the main sources of the laws in the UAE according to Article 7 of the constitution. Although the UAE commercial law is directly influenced by other countries civil codes such as the EU, Shari'ah code culturally

is influencing this law like many others even though in principle, apart from family law, all codes in the UAE are civil ones. It must be clearly stated that the UAE commercial law is a civil and secular code. Thus, the researcher aims to give great attention to it in relation to the research area. The objective of the third part is to investigate the differences and similarities of the origins and values of both the EU and the UAE. The scope of EU competition law is illustrated next. Following the EU part, the scope of UAE competition law is demonstrated.

### **Chapter Three: The Rational for Implementing Competition Law**

This chapter's main aim is to examine the theoretical rationale justifying the adoption of competition law by the developing economies in general terms and the UAE in particular. Moreover, the secondary aim is to discuss the objectives of competition law and the relationship between an analysis of the goals of competition law and the arguments about the adoption of competition law by the UAE in particular and developing economies in general.

### **Chapter Four: Anticompetitive Agreements and Abuse of Dominant Position**

The aim of this chapter is to demonstrate and examine the prohibition provisions with regard to anti-competitive agreements and control of the dominant position that are under UAE competition law and later evaluate and compare it with the similar provisions under EU competition law. To accomplish this purpose, the EU provisions regarding the anti-competitive agreements, and the control of dominant position, will be examined. In light of the examined EU rules, the UAE competition provisions will be illustrated and evaluated.

### **Chapter Five: Control of Mergers and State Aide**

The aim of this chapter is to discuss two main areas of competition law. The first is merger control, and the second is state aid control. The first part of this chapter aims to evaluate the merger control under the UAE competition law with a reference to EU competition law. Thus, the EU merger control with its history, concept, application of Merger Regulation, and significant cases will be provided first. Then, in light of the EU merger control, the UAE merger control will be evaluated, providing an in-depth analysis. The second part of this chapter aims to evaluate state aid in the UAE based on the same concept in EU law and find the reasons for similarities and differences.

## **Chapter Six: Enforcement of Competition Law**

The enforcement mechanism is very important to measure the effectiveness of any law, thus this chapter aims to examine the enforcement system of the UAE and provide an in-depth evaluation based on the experiences of the EU system.

## **Chapter Seven: Conclusions and Recommendations**

This chapter will summarise the findings and draw conclusions from the preceding chapters. The principal aim of the chapter is to bring together and accentuate the primary thoughts related to the theme of the research. This chapter will set out a list of recommendations to the UAE law makers in terms of modifying the current competition law.

# Chapter Two: Competition Law Background, Values, Origins and scope

## 2.1 Introduction

Success in businesses organisations is highly credited to the value that competition offers. This is explained by the many laws and policies that have been established since the 19<sup>th</sup> century by various governments across the world. In general terms, extensive social-economic growth has been achieved by developed countries as a result of implementing competition laws, which seek to enhance market competitiveness. Of importance especially are the theories and philosophies that form the basis of these competition (anti-trust) laws. The United States and the European Union are among the areas where competition law has seen great evolution since the concept was first developed and adopted.<sup>67</sup>

The principal purpose of this chapter, therefore, is to demonstrate the definition and aims of competition law. In order to attain this objective, this chapter is divided into two main sections. The first section is divided into four parts. The following section discusses the historical development of competition law. Accordingly, section three deals with the theories and schools of thought on competition law. Section four addresses the conclusion of this chapter. The second section consists of five parts. This includes, first, a discussion about the EU competition law origins from Ordoliberal thought towards a more economic-based approach. Second, the values and origins of the UAE competition law under the Islamic law thoughts. Third, an evaluation of both the EU and the UAE competition law origins and values. Fourth, the scope of the EU competition law will be examined. The fifth part will examine the UAE's competition law scope.

## 2.2 Historical Development of Competition Law

### 2.2.1 Origin of Competition Law

Earlier anti-trust laws owe a lot to the influence of behavioural approaches to competition analysis whose focus is directed towards competitive processes that are based

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<sup>67</sup> See Gavil, A. (ed.). *An Anti-trust Anthology*. Cincinnati: Cincinnati, OH: Anderson Publishing. 1996, pp. 13-47

on rivalry. Formal learning about competition started in the 18<sup>th</sup> century through Adam Smith's *Wealth of Nations*. Various terms were applied to describe this section of the law, including restrictive practices, combination acts, restraint of trade and monopolies law. Laws such as the United States Sherman Act (1890) were products of such influence.<sup>68</sup> The Sherman Act has mostly been associated with the origin of competition law. However, the literature shows that, although this statute can take a lot of credit for the leading part it played in the development of competition law, a lot about the concept of competition had already been conceived.

According to Lauda, laws that govern competition can be traced over two historical millennia. Medieval monarchs and the Roman Emperors applied tariffs to stabilise prices and support local production.<sup>69</sup> One example of competition law is the 'Lex Julia de Annona' that was enacted around 50 BC under the Roman Republic. Heavy fines were levied on any individual to safeguard the grain trade.<sup>70</sup> This directly, insidiously and deliberately stopped the supply ships. Through Diocletian, an edict imposed the death penalty on any person violating the tariff system, for instance by concealing, contriving or buying up the scarcity of daily goods. Additional legislation emerged under the authority of Zeno's constitution in 483AD traceable through the Florentine municipal laws between 1322 and 1325.<sup>71</sup>

Banishment and property confiscation was facilitated by this law for any specific trade combination or the joint monopolies granted or private actions by the Emperor. Zeno entirely rescinded the previously issued exclusive rights. Justinian, as a result, introduced legislation to compensate the officials to enable them to manage the state monopolies. Just as Europe slipped into the dark ages, law making records did the same until a time when the Middle Ages brought about greater trade expansion.<sup>72</sup>

Various studies have highlighted developments in English common law that could also be linked to the origin of competition law. England's legislation for regulating monopolies and restrictive practices was operational before the Norman Conquest. For instance, it is well documented that a number of Saxon kings had been involved in the

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68 Peritz, R. *Competition Policy in America, 1888-1992: History, Rhetoric, Law*. New York: Oxford University Press. 1996, p. 47

69 Lauda, L. *Essentials of competition policy. Volume II of European annual competition law*. Oxford: Hart Publishing, 1998.

70 Campbell, A. and Elles, N & Wilberforce, R. *The Law of Restrictive Practices and Monopolies*, 2nd ed. London: Sweet and Maxwell. 1966, p. 20

71 Ibid. p. 22

72 Ullrich, H. *Evolution of competition law in Europe*. Cheltenham: Edward Elgar Publishing, 2006.

implementation of actions against a number of trading practices. During this period there was the practice of purchasing goods prior to reaching the market and later inflating the prices. Fair prices concerns led to attempts to directly regulate the market.

On other occasions, there were laws implemented to prohibit practices such as those involving the purchase of commodities, particularly agricultural produce to resell it at higher prices on a future date or in other markets. During the reign of Magna Carta (1215), for instance, there was also a legislative provision that all monopolies existed contrary to the law as they were associated with harmful implications for individual freedom.<sup>73</sup>

The 1349 statute of labourers was also an important moment in modern competition law. This statute provided that merchants overcharging for their products were to be charged for multiple damages to the injured parties.<sup>74</sup> The common law doctrine on restraint of trade was also significant as it specified that restraint of trade covenants were not enforceable.<sup>75</sup> To this effect, the importance of the common law doctrine on conspiracy, which was adopted for the purpose of regulating the manner in which working individuals could organise themselves, emerged and was also employed in businesses to hinder conspiracies among businesses whose objectives were illegally founded and not in line with the intentions of improving a business' position.<sup>76</sup> In the year 1623, the Statute of Monopolies was enacted and provided the view that all monopolies operated contrary to the law of realism.

However, all the laws discussed above were repealed later. In all aspects of common law, the existence and operation of monopolies were no longer prevented.<sup>77</sup> Currently, competition law deals with issues concerned with the abuse of the power of monopoly rather than their existence. In the modern economic world also, a number of governments have adopted national competition laws as a strategic measure to promote fair and transparent business conduct and development of the various sectors.

Competition theory experienced immense natural changes in the 20<sup>th</sup> century and this has had great implications for competition law as well as for competition policy. There has also been a great influence on competition law from the economic theory of competition

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73 Shenefield, J. H. & Irwin, M. S. *The Anti-trust Laws: A Primer*. (3rd ed.). Washington: AEI Press. 1998, p. 68

74 Gavil, A. *Op. cit.* pp. 9-21

75 The US common law provided a basis for later development of anti-trust law. *Ibid.* p. 35

76 Landes, W. M. & Posner, R. A. Market Power in Anti-trust Cases. *Harvard Law Review*. 1981. 94, p. 837.

77 Posner, R. A. *Anti-trust Law*. (2nd ed.). University of Chicago Press. 2001. pp.24-6

which has always had an impact on the working of competition law (see section 2.3). Authors argue that competition law has, in the last century, been characterised by a cyclical movement, with competition rules altering as and when there are changes in the underlying economic theory.<sup>78</sup> The microeconomic models on which monopoly and perfect competition are based are considered to have been a replacement of the classical economic approach to competition.

## **2.2.2 Modern Evolution of Competition Law**

### **2.2.2.1 Emergence and Growth of Trusts and Combinations**

Competition law has evolved tremendously in recent past years. It became effective first in the US towards the end of the nineteenth century. The work of the anti-trust movement was very instrumental in the development of this law. After the Civil War, there was an emergence of large trusts and combinations in a number of industries, including the sugar, cotton, steel, railroad and petroleum industries. These combinations and trusts were largely responsible for the unfair treatment of farmers in the agricultural part of the US, such as increasingly high prices. The farmers were experiencing disproportionately high freight costs established by the railway companies, which usually combined to affect standard rates such that the farmers were not benefiting from the trend.<sup>79</sup> It was at this point that there arose increased concerns regarding these trusts, their growth as well as their abusive conduct, and this triggered legislative support aimed at restricting the power of the trusts and combinations.

The emergence and growth of these trusts and combinations formed the basis for the formulation of the Sherman Act in the year 1890. More specifically, sections 1 and 2 of the Sherman Act were an important basis for modern-day anti-trust policy. Section 1 states that,

‘Every contract, combination in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among several states, or with foreign nations’ is illegal.<sup>80</sup>

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78 Wakker, P. & Deneffe, D. Mergers, Strategic Investments and Anti-trust Policy. *Managerial and Decision Economics*. [Online]. 1996. 17: 3. pp. 231-240. Available from <http://www.jstor.org/stable/pdfplus/2487854.pdf>. [Accessed: 14 November 2010].

79 Competition law has been through various stages of development, see O'Donoghue, R. & Padilla, A. J. *The Law and Economics of Article 82*. Oxford: Oxford University Press. 2006, p. 9

80 Sherman Anti-trust Act 1989. Section 1.

Section 2 of the same Act indicates that it is illegal for any individual to,

‘Monopolise or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among several States, or with foreign nations’.<sup>81</sup>

It is evident that these two sections feature the central principles on which much of the modern-day anti-trust policy across the world is based, with importance in the consideration of conduct restraining trade or conduct responsible for the creation or maintenance of anti-competitive monopolies.

On the other hand, in the European Union (EU) setting, Articles 81 and 82 (now articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)) of 1957’s Treaty of Rome form the basis of the control of abuse of dominant positions and control of anti-competitive agreements.<sup>82</sup> The European Court of Justice (ECJ) points out that the treaties feature,

‘...a fundamental provision of essentially a great implication in the accomplishment of the tasks entrusted to the community and, in particular, for the functioning of the internal market’.<sup>83</sup>

This illustrates a general agreement that the elimination of tariff barriers, which formed the basic objective of the European Economic Community, would not accomplish the intended purpose in the case of firms which are economically powerful or if private agreements were permitted in the manipulation of trade.<sup>84</sup>

There seems to exist a great similarity between sections 1 and 2 of the Sherman Act and Articles 101 and 102 of Europe’s Treaty of Rome. Irrespective of this similarity, however, and the fact that it came years after the Sherman Act, European Articles 101 and 102 did not adopt wholly the American inspired model, it adopted an approach distinct to the European way of handling anti-competitive conduct.<sup>85</sup>

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81 Ibid. Section 2.

82 Odudu, O. *The Boundaries of EC Competition Law*. Oxford University Press. 2006, pp. 169–70

83 Shuibhne, N. *Regulating the Internal Market*. Cheltenham: Edward Elgar Publishing Limited. 2006, p. 253.

84 Gormsen, L. *A Principled Approach to Abuse of Dominance in European Competition Law*. Cambridge: Cambridge University Press. 2010, pp. 59-83.

85 Hildebrand, D. The European School in EC Competition Law. *World Competition*. 2002. 25. 3, pp. 8–9

### 2.2.2.2 The impact of the development of US competition law

The US competition law is one of the modern competition laws and therefore it is important to demonstrate the history of development of US competition law. The history of modern competition law in the US dates back to the end of the nineteenth century. Various anti-trust laws were later formulated to enable the US economy to reach equilibrium without restraints or otherwise being hampered by undue influence by powerful companies engaging in anti-competitive behaviour. Thus, anti-trust laws were developed to prohibit restraint of trade, as indicated in the 1890 Sherman Anti-trust Act. The federal anti-trust law constitutes not only statutes but also court decisions, administrative regulations as well as enforcement actions directed at regulating the restraint of trade and competition.<sup>86</sup> US anti-trust law owes a lot to American common law in which laws were largely based on court decisions.<sup>87</sup>

The US federal government formulated and implemented the Sherman Act with a very important theme – establishment of a more dynamic and open American economic system. As has already been noted, the Sherman Anti-trust Act pioneered the competition law and has since had a great influence on the economy of not only America but also of the whole world.<sup>88</sup> The government enacted the Act to strengthen the stand on free markets.<sup>89</sup>

The statute made the economic system not only open but also more open to new competitors as well as new technologies. Direct impacts of the law in the 19th century were witnessed in the view of extensive economic expansion and improved living conditions.<sup>90</sup> Thus, the major philosophy behind the enforcement of the Sherman Anti-trust Act was the elimination of behind-the-scenes manipulation of the market by powerful firms.

Moreover, in 1897, a Supreme Court decision regarding a trust formed by 18 railways to fix charges for transport of goods depicted clearly that price agreements were also illegal. Similar to this case, the judges in the Addyston Pipe and Steel case rejected arguments intended to justify price-fixing practice on the basis that the prices charged were

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86 Homan, T. Notes on Anti-Trust Law. *Quarterly Economics Journal*. [Online]. 1939. 54. 1. pp. 73-102. Available from <http://www.jstor.org/stable/pdfplus/1882488.pdf?acceptTC=true>. [Accessed: 12 February 2011].

87 Posner, R. *Anti-trust Law*. (2nd ed.). Chicago: University of Chicago Press. 2001, p. 123.

88 Gerber, D. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. Oxford: Oxford University Press. 1998, pp. 6-8.

89 Ibid

90 Harrington, J. Cartel Pricing Dynamics in the Presence of an Anti-trust Authority. *The RAND Journal of Economics*. [Online]. 2004.35. 4. pp. 651-673. Available from <http://www.jstor.org/stable/pdfplus/1593766.pdf>. [Accessed: 01 December 2010].

unreasonable and fixing prices promoted unhealthy competition'.<sup>91</sup> According to the Supreme Court's perspective, through the Sherman Act, the government made illegal all manner of price agreements.<sup>92</sup>

The prohibition of price agreements among competitors emerged as a strong theme, which is still operational and has minimal exceptions. In the *Dr. Miles v Park and Sons* case of 1911, the Supreme Court employed the Sherman Act philosophy of restriction of price prohibition, although this was a vertical arrangement situation.<sup>93</sup> This position of the statute was confirmed by the court's decision on a situation involving two vital trust cases: the American Tobacco case and the Standard Oil Company case. In this regard, the major aim behind the Sherman Act in seeking to control price-fixing and monopolisation power was to prevent the accumulation of wealth among a few individuals with the view that this trend led to a destabilisation of the economic order as well as of democracy.<sup>94</sup>

In addition, the Federal Trade Commission (FTC) drew its roots from the 1914 Federal Trade Commission Act. The Commission emerged as an independent agency whose major theme involved the regulation of unfair trade and had authority to enforce anti-trust law at the federal level.<sup>95</sup> The philosophy behind this law was that the Sherman Act employed broad language which allowed for fairly loose judicial interpretations. Hence, the Sherman Act was not used as precisely as possible at this period in time. Therefore, the FTC Act emerged as the highly needed, more definitive anti-trust law.

Furthermore, the Clayton Anti-trust Act of 1914 was formed under similar circumstances as the FTC Act and did not feature any new anti-trust provisions *per se*. The philosophy behind the Act was thus the enhancement of the specificity of the anti-trust provisions that had already been implemented.<sup>96</sup>

A number of other anti-trust laws have been document since then and their major philosophy revolves around hindrance of unfair trading practices or unfair competition and to avoid the more elusive definition of terms demonstrated by the Sherman Act. These Acts include: the Robinson-Patman Act (1936) focused on price discrimination; the Celler-

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91 Evans, D. & Schmalensee, R. Some Economic Aspects of Anti-trust Analysis in Dynamically Competitive Industries. *NBER Working Paper 8268*. 2001, p. 17

92 Gavil, A. *Op. cit.* pp.145-67

93 Craig, P. & Búrca, G. *EU Law: Text, Cases and Materials*. (3rd ed.). Oxford: Oxford University Press. 2003, pp. 103.

94 *Ibid*

95 Bork, H. *The Anti-trust Paradox: A Policy at War with Itself*. New York: The Free Press. 1993, pp. 67-71.

96 Van den Bergh, R. & Camesasca, P. *European Competition Law and Economics: A Comparative Perspective*. (2nd ed.). London: Sweet and Maxwell. 2006, pp. 29-30.

Kefauver Act (1950) which was an amendment of the Clayton Act on mergers issues; and the Hart-Scott-Rodino Act (1976), an amendment of the merger provision of the Clayton Act.

### **2.2.2.3 Case law: The Microsoft anti-trust case**

It is very important to mention a case that had an enormous impact on the history of competition law. Maybe one of the most important cases in history regarding anti-competition practices is the Microsoft case. Since the 1990's, Microsoft Corporation has been under investigation by the US Federal government, another 20 US states, the European Union and a number of other private plaintiffs.<sup>97</sup> Microsoft has been under investigation under the Anti-trust Act adopted in the 19<sup>th</sup> century in connection with allegations of involvement in anti-competitive behaviour in high technology industries. The Windows Operating System dominates the PC sector. In its case with the US government, Microsoft was sued for seeking dominance in the industry by manner of intimidation where computer companies such as IBM, Intel and Apple were intimidated into withholding from the consumer products that had great potential to challenge the Microsoft Windows software.<sup>98</sup> It was concluded by a number of tribunals that Microsoft illegally monopolised the PC operating systems market and it was ordered to stop its discriminatory product access and discriminatory pricing policies to allow rivals to engage in free and effective competition with Microsoft in the applications software market on the windows platform. One thing is clear, however, in the development of Microsoft cases: that the philosophy promoted by the Sherman Anti-trust Act is still relevant legally and has been of paramount importance in the regulation of commerce in the current information age. The next part will discuss the major theories that involved in the development of competition law.

## **2.3 Theories and Schools of Thought on Competition Law**

Over 200 years ago economists first started to examine the notion of competition, how it was possible to theoretically analyse such a notion, and the policy conclusions that would result from such analysis.<sup>99</sup> However, it would be much easier to understand today's

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97 Lohr, S. & Markoff, John. How Software's Giant Played Hardball Game. *New York Times*, [Online]. 8 October 1998. Available from: <http://query.nytimes.com/gst/fullpage.html?res=9E07EED8153BF93BA35753C1A96E958260>. [Accessed: 20 March 2011].

98 United States v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2001).

99 Kerber, W. & Schwalbe, U. Economic Principles of Competition Law. In: Hirsch, G., Montag, F. & Sacker, F. (ed.). *Competition Law: European Community Practice and Procedures. Article By Article Commentary*. Uxbridge: Sweet & Maxwell Limited. 2008, pp. 217.

concepts and the terms of competition theory and policy if the theoretical background and debates were clarified.

Modern day competition law draws immensely from the theories and ideologies developed over time, especially in the 20<sup>th</sup> century, by various schools of thought. These schools emerged one after the other, all with a focus on establishing a more definitive approach to enhance competitive practices. The theories assert the importance of control of anti-competitive conduct within the free market situation.

However, the objective of competition law has differed over time between economic systems and this is because competition law cannot be limited to an abstract discussion basis, since this law is highly impacted on by the economic situation specific to a country as well as the country's own historical development. This explains the differing conceptions in the European and American views of competition.

Therefore, the different school of thought and theories of competition law, and the development of this particular area, will be illustrated.

### **2.3.1 Classical Economics:**

Competition was seen as “playing a central role in society,” particularly in the eighteenth and nineteenth century which is known as the period of classical liberalism. Adam Smith is one of the famous classical economists and his 1776 ‘The Wealth of Nations’ is considered the starting point of the classical economics.<sup>100</sup> Smith assumed, based on the notion of a ‘natural order’ that the common interest is advanced by the so-called ‘invisible hand’ of the market. Basically, the ‘invisible hand’ encourages each individual agent to pursue his or her self-interest which results in advancing the common interest.<sup>101</sup> According to this theory, with the intention of increasing social welfare, firms are forced to charge low prices so that demand will increase. Competition was considered as a system of power. Thus, once there is a change in prices in a market that differ from the natural prices, such a system of power takes an immediate effect to stabilise the situation.

However, anti-trust law under the laissez-faire doctrine is observed as unnecessary since competition is viewed as being a dynamic long-term process in which firms compete

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100 Kerber, W. & Schwalbe, U. *Op. cit.*

101 *Ibid.*

against one another to secure market dominance. Within some markets a particular firm may dominate through the facilitation of its competitive advantages in possessing superior skills and ability to innovate. According to the theorists of laissez faire, however, when a firm attempts to increase prices as a way of taking advantage of its monopoly position, it develops profitable opportunities for other firms to compete. As a result a creative destruction process starts and consequently erodes the monopoly.

Moreover, according to the advocates of this theory, monopoly was caused only through public privileges. Therefore, they argued that Governments should avoid attempts at monopoly break-ups while allowing markets to work<sup>102</sup> and demanded to erode policies regarding public restraints on competition.<sup>103</sup>

In the late 19<sup>th</sup> century, it was clear that the large firms had emerged due to the development in the market economy. Stuart Mill used an approach that showed that trade was actually a social act. Any individual who undertakes to trade on any products description to the consumers does something that has an impact on the interests of the other people and society. The conduct of such a person thus comes under the society's jurisdiction. Good quality and cheapness of commodities are effectually achieved through leaving the seller and buyers perfectly free under the control of supply and demand, a process called free trade doctrine. The doctrine rests on grounds that are distinct from the individual liberty principle.<sup>104</sup> Trade restriction and production for trade purposes are restraints indeed.<sup>105</sup>

However, the classical economics approach was criticised. Its opponents argued that market prices “did not necessarily reflect the ‘value’ so defined, for people were often willing to pay more than an object was ‘worth’.”<sup>106</sup> Thus, between the 1870s and the 1880s new ideas began to emerge when many economists in different places started to establish the foundation of what would later be called neoclassical economics. The different approaches, which were known as the Marginal Revolution in economics, aimed to “base value on the relationship between costs of production and ‘subjective elements,’ later

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102 Campbell, R. McConnell, Stanley L. Brue. *Economics: Principles, Problems, and Policies*. New York: McGraw-Hill Professional, 2005, pp. 601-602.

103 Kerber, W. & Schwalbe, U. *Op. cit.* p. 218.

104 Block, M. & Feinstein, J. The Spillover Effect of Anti-trust Enforcement. *The Review of Economics and Statistics* 1986.68.1, pp. 122-131. Available from <http://www.jstor.org/stable/pdfplus/1924935.pdf>. [Accessed: 16 Jan 2011].

105 Mill, J. *On Liberty*. [Online] 1859. Available from: <http://www.econlib.org/library/Mill/mlLbty5.html#Chapter 5>. [Accessed: 23 March 2011]. Chapter V, para 4.

106 Weintraub, R. Neoclassical Economics. [Online] 2002. Available at: <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>. [Accessed: 27 March 2011].

called ‘supply’ and ‘demand’,” and the development of this idea led to the establishment of neoclassical economics.<sup>107</sup>

### 2.3.2 Neoclassical Microeconomics

It is important to mention that credit goes to famous economists, such as Jevons, Marshall, Debreu, Launhardt, Walras, Arrow and Dupuit, who developed the neoclassical economics school. The development of microeconomic theory was completed by the 1930s.<sup>108</sup> Because the neoclassical economics approaches were various, it was difficult to reach an agreement on the meaning of such an approach. While the term competition was used as a competitive and dynamic process in the classical economics approach, the neoclassical economics considered it as a state of equilibrium with a number of desirable properties.<sup>109</sup>

Economic theory’s shift emphasised heavily the theoretical and precise competition model. A simplified free market model for neoclassicals held that the distribution and production of goods and services within a competitive free market maximises social welfare. This model makes assumptions that there are no barriers to entry for new firms and they are free to venture into new markets and compete with the existing firms.<sup>110</sup> Entry barriers, according to economists, hold the very specific meaning that free markets that are competitive deliver productive, allocative and dynamic efficiency.<sup>111</sup>

Contrary to the productive model, the allocative and dynamic efficiency models of the market are oligopolies, monopolies and cartels. When only a single or a few firms are existing in the market, with no credible threat generated from other competing firms entering, prices seem to increase beyond the competitive level towards an oligopolistic or monopolistic equilibrium price.<sup>112</sup>

Production decreases as well, further reducing social welfare through creating a deadweight loss.<sup>113</sup> Sources of this kind of market power include the barriers to market

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107 Ibid.

108 Kerber, W. & Schwalbe, U. *Op. cit.* p. 218.

109 Ibid.

110 Motta, M. *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press, 2004, p. 6.

111 Allocative Efficiency means that an economy’s resources in the long run will be allocated to individual who have the ability and are willing to pay for such resources. On the other hand, productive efficiency means that the society is gaining equally with its capacity. Dynamic efficiency involves the idea that business which frequently compete must create, research and innovate to retain their share of customers.

112 Fields, M. Stabilizing the Anti-Trust Laws. *The Journal of Business of the University of Chicago*. [Online] 1933.6.3. pp.191-214. Available from <http://www.jstor.org/stable/pdfplus/2349380.pdf> [Accessed: 16 January 2011].

113 Deadweight loss in simple words means ‘either people who would have more marginal benefit than marginal cost are not buying the product, or people who have more marginal cost than marginal benefit are buying the product.’

entry, free rider problem and the externalities. Market efficiency may fail due to a variety of reasons; however, if an intervention occurs due to the existence of competition law, that existence could be justified and exempt under the laissez faire rule if there is a possibility of avoiding government failure. Moreover, it has been acknowledged by some economists that the fact that perfect competition is rare in the real world means that it aims at what is referred to as workable competition.<sup>114</sup>

One of the most important criticisms levelled at the neoclassical economics approach was that it had a normative bias. Opponents of this approach argued that its focus was not on the explanation of the actual economics, but rather on describing an ideal community or society which possessed a perfect legal, political and social system in which allocative efficiency applied.

### **2.3.3 The Harvard School**

The Harvard school is linked to the structure-conduct-performance (S-C-P) paradigm. In this, it is established that certain market structures are responsible for influencing certain types of conduct of firms and that this conduct then influences certain types of market performance, such as efficiency and profitability.<sup>115</sup> The school developed the view that concentrated industries are associated with conduct which results in poor economic performance, like monopoly prices and lowered output.<sup>116</sup>

The initial work of this school was put forward by E. S Mason in the 1930s<sup>117</sup> and the concept was later developed by J. S Bain in the 1950s using empirical studies.<sup>118</sup> With the notion that performance was dependent on market structure, the Harvard school initiated the conception that competition law ought to be focused on structural remedies and not behavioural remedies. The Harvard school in the 1960s spurred the establishment of a highly interventionist anti-trust enforcement policy in the United States of America (USA).<sup>119</sup>

The concepts underlying the Harvard school made an immense contribution to competition law. The Harvard school articulated the primary perception of the industrial

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114 Whish, R. *Competition Law*, 5th Ed. Lexis Nexis Butterworths. 2003, p. 14.

115 Faull, J. & Nikpay, A. (eds.). *The EC Law of Competition* (2nd ed.). Oxford: Oxford University Press. 2007, pp. 173–189.

116 Ibid.

117 Mason, E. *Economic Concentration and the Monopoly Problem*. Cambridge: Harvard University Press, 1957.

118 Bain, J. *Barriers to New Competition*. Cambridge: Harvard University Press. 1956.

119 Faull, J. & Nikpay, A. *Op. cit.*

organisation theory in the widely known S-C-P paradigm and explained the relationship between the different variables.<sup>120</sup> Similar to the competitive ideology of workable completion, the Harvard school ideology resulted in an immense and clear impact on completion policy.<sup>121</sup> With the view on the relationship between market conduct, market structure and market outcome, competition law assumed the role of an instrument necessary to produce optimum outcomes, with direct implications for the market structure, i.e. controlling mergers.

Legal proceedings in the 1950s often made reference to the school. Its application provided for the determination of whether given business activities with influence on the structure of the market should be addressed from a competition law perspective based on the impacts of those activities on efficiencies. The Harvard school doctrine also played an essential role in the evaluation of market concentration, which because of the presence of economies of scale meant that the perfect competition model was never appropriate. Harvard school focused on the attainment of desirable economic results, restriction of the extent of power of large firms, the development and promotion of competitive processes and the outlining of the norms characterising fair conduct. The S-C-P paradigm resulted in an anti-trust policy whose intervention sought to protect small firms from large ones, although Posner takes this as a populist move.<sup>122</sup> The Harvard school considered that markets were fragile.

However, there were many shifts in the 1970s and 80s in the American competition policy due to the emergence of a new school of thought, the Chicago school, which according to its scholars was mostly descriptive. They thus made use of the renewed idea of price theory to enhance an understanding of the market structure and the behaviour of the firm. However, the S-C-P paradigm is still relevant in competition analysis.

### **2.3.4 The Chicago School**

In the 1970s, the Chicago school emerged and promoted different forms of opinions about the working of markets and hence proposed a rather lax level of scrutiny compared to the Harvard school.<sup>123</sup> Chicago economists did not believe that the market was fragile

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120 Variables such as characteristics of products, characteristics of production and cost, and the number of buyers and sellers and their market shares.

121 Craig, P. & de Búrca, G. *EU Law: Text, Cases and Materials*. (3rd ed.). Oxford, Oxford University Press. 2003, p. 91

122 Fields, M. *Stabilizing Op. cit.*

123 Fox, E. & Sullivan, L. *Anti-trust-Retrospective and Prospective: Where Are We Coming From? Where are we Going?* *New York University Law Review*. 1987. 62. 936, pp. 956-9.

and this had an immense implication for the progress of anti-trust enforcement in the US. The school was concerned with free market and monetarist economics. Contrary to Harvard, the Chicago school was based on theoretical techniques. The school has also influenced greatly competition law in other parts of the world, such as Europe.<sup>124</sup>

The proponents of the Chicago school argue that there is always a temptation among firms with large market shares to engage in anti-competitive behaviour by lowering output to increase prices and that this conduct signals to other market players that an unmet demand exists in the market, therefore inviting new market entries.<sup>125</sup> It is apparent that entry into the market of new firms will drive prices down while reintroducing a substantial degree of competition, which is enough to sustain consumer desire. Thus, with the recognition that the structure of the market has a potential effect on economic performance, the Chicago school added the view that, in case economic performance triggered an unmet consumer demand, the entry of new firms would be evident.

This economic approach implied that competition law was to a great extent unnecessary, except in situations that hampered new entry. The greatest reason as to why entry was hampered was limitation of the business freedom of firms.<sup>126</sup> This argument makes clear the view that, with no barriers for new competitors, the market possesses the power to heal itself.

The other explanation for the Chicago thinking is that more efficiency was achieved in concentrated markets as firms were in a position to exploit the economies of scale.<sup>127</sup> In this regard, the Chicago school runs contrary to the view under the Harvard school that an increased concentration of firms is rather challenging. The Chicago school held that pursuit of allocative efficiency was to be the sole objective driving competition law, with its trust being laid in the market rather than in small businesses, and also being able to attain efficiency without any government or competition law interference.<sup>128</sup> In another context, there was a belief among the Chicago school proponents that there was high likelihood for law enforcement to destroy the competitive process through their intervention as they

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124 Jones, J. Sufrin, B. *EC Competition Law: Text, Cases, and Materials*: Oxford University Press. 2007, p. 21.

125 Eckbo, E. Mergers and the Value of Anti-trust Deterrence. *The Journal of Finance*. [Online] 1992. 47. 3. pp. 1005-1029.

Available from <http://www.jstor.org/stable/pdfplus/2328975.pdf>. [Accessed: 5 January 2011].

126 Coate, M. Winners and Losers in the Settlement of Merger Litigation. In: Coate, M. & Kleit, A. (ed.). *The Economics of the Anti-trust Process*. Boston: Kluwer Academic Publishers. 1996, p. 156.

127 Bishop, S. & Walker, M. *The Economics of EC Competition Law: Concepts, Application and Measurement*. (2nd ed.). London: Sweet & Maxwell. 2002. p. 197.

128 Jones, J. Sufrin, B. *Op. cit.* p. 23.

posed a great interest in the operation of markets.

There is a clear divergence between the Harvard school and the Chicago school in their approach towards the enforcement of competition law.<sup>129</sup> For example, a Harvard school technique could most likely assume that high prices enjoyed by monopolies were illegal while a Chicago school technique would encourage new market entry given that high prices signal an unmet demand; this has the advantage of rendering the market very competitive in the long run.

The Chicago school considers itself neutral as its only emphasis is on the market forces, although claims of its apolitical position are challenged by Sullivan and Fox claiming that the law in this regard should not be limited to economics only.<sup>130</sup> They argue that economics should only apply as a tool for the support of a system directed at enabling consumers to establish a dynamic system of competition law.<sup>131</sup>

The literature depicts that the Chicago school is probably the school of thought which has had the most influence in competition law. The school has economics as the centre of its analysis of competition law and establishes a coherent perspective regarding the enforcement of competition law based on the confidence that markets have the most efficiency when there is limited court jurisdiction or regulations. From a Chicago school dimension, all non-efficiency objectives do not fall within the operations of the anti-trust policy. Bork, one of the Chicago scholars, argued that the entry aim of anti-trust law can be summarised as being an objective to enhance allocative efficiency without hampering productive efficiency, so extensively such as to compromise consumer welfare.<sup>132</sup> It is a concept that stands on and also corresponds to pure economic considerations and hence this is often not easy to implement in an actual competition policy.

Thus the view by Chicago scholars on economics depicts their view of an ideal society. Potential criticisms also arose regarding the Chicago view that outside government regulation and barriers to entry are rare. Criticism has also been raised in regards to its great emphasis on long-term impacts instead of short-term impacts and its regard for competition as a process. The Chicago model's view on the neoclassical efficiency of the market is rather too simple to account for or make predictions on business conduct in the

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129 Bishop, S. & Walker, M. *Op. cit.* p. 206.

130 Fox, E. & Sullivan, L. *Op. cit.* pp. 960–79.

131 *Ibid.*

132 Bork, R. H. *The Anti-trust Paradox: A Policy at War with Itself*. New York: The Free Press. 1993, p. 91.

real world, and therefore this saw the development of the Post-Chicago school.<sup>133</sup>

### 2.3.5 Post-Chicago School

The post-Chicago school brought a different approach to the concept of new markets and prices. Although the Chicago school has been criticised heavily, its rigorous economic analysis evidently played an important role in competition theory. The post-Chicago school arose from the urge to solve emerging ideas, such as qualifying the S-C-P paradigm. Post Chicago thinking draws from the extreme Chicago ideas tempered by new insights.<sup>134</sup> The school follows the realisation that economics has the potential to provide an important indication of questions worth asking but fails to always yield a definitive answer.<sup>135</sup> In view of the school's conceptions, Khemani and Shapiro argue that modern-day industrial organisation theory emphasises the impacts that the strategic behaviour of firms can have in different market situations.<sup>136</sup>

According to post-Chicago thinking, companies may engage in practices that deter strategic entry.<sup>137</sup> It is evident that post-Chicago competition law scholars allow more complexities, unlike the pure Chicago and Harvard ideologies. The post-Chicago thinking also aims at addressing the benefits of dynamic competition. It is also evident that post-Chicago thinking is rather complex in comparison with the pure Chicago or S-C-P paradigm.<sup>138</sup> While acknowledging the objective of efficiency, the thinking provides for the realisation of real-life complexities basic to the process of devising competition rules to attain efficiency. In the context of applying an enforcement of this competition law, post-Chicago analysis seems to place more demands on decision makers and competition authorities.

There are a number of theories and ideas that are known to play an immense role in informing the post-Chicago perspective and these include the theory of contestable markets, game theory, the theory of transaction cost analysis and the theory of raising rival's costs.<sup>139</sup> These theories were formulated to enhance the understanding and

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133 Ibid.

134 Comanor, W. Strategic Behavior and Anti-trust Analysis. *The American Economic Review*. [Online] 1984. 74. 2. pp. 372-376. Available from <http://www.jstor.org/stable/pdfplus/1816387.pdf>. [Accessed: 5 February 2011].

135 Jones, J. Sufrin, B. *Op. cit.* p. 30.

136 Khemani, R. & Shapiro, D. *Glossary of Industrial Organisation Economics and Competition Law*. Directorate for Financial, Fiscal and Enterprise Affairs. (OECD). 1993

137 Pitofsky, R., Goldschmid, H. & Wood, D. *Trade Regulation: Cases and Materials*. Eagan: West Group Publishers. 2010, pp. 143-179.

138 Calkins, S. Gellhorn, E. & Kovacic, W. *Anti-trust Law and Economics in a Nutshell*. (5th ed.) St. Paul: West Publishing. 2004, p. 97

139 UNCATD. Competition Law and Policy. *6th UN Review Conference*. [Online]. 2002. Available from:

application of the post-Chicago ideology.

## 2.3.6 Other theories

### 2.3.6.1 Transaction Costs Economics

This theory derives from the work initially done by Ronald Coase and which argued that ‘transaction costs’<sup>140</sup> comprise of the costs that are incurred by firms when they engage in trade with other firms.<sup>141</sup> Coase’s argument was on the basis that transaction costs’ size in a firm and on a market depends on the activities that either occurred by the firm itself or bought from the market.<sup>142</sup> In other words, a firm can save on costs by choosing to do things on its own or can also choose to engage the services of other parties, which in this case means referring to the market. For instance, a company manufacturing PCs could either choose to obtain inputs from other parties or produce them by itself. Doing things by itself involves vertical integration or agreements with other parties. In this regard, the comparative efficiency associated with each approach is relied upon when determining the method to use.

Thus, according to the transaction economics point of view, competition law should follow an approach that would not compromise the firms’ ability to take highly efficient options for the end purpose of enhancing more competitive markets. The advocates of this approach argue that traditional microeconomics focused on the production costs and neglected the transaction costs.<sup>143</sup> Thus, a new theory was developed by Williamson in the 1970s, which was considered “as the first approach of the new institutional economics to be applied successfully to competition policy issues”<sup>144</sup>, and was known as the governance approach.

Work in transaction cost has identified various efficiency purposes that prompt firms to employ a number of internal organisation forms. Moreover, the studies have also highlighted the benefit of contractual techniques in stopping opportunistic behaviour that, unless checked, harbours a great potential to deter business arrangements with the ability to increase efficiency.<sup>145</sup> This is achieved by illustrating that the major purpose of most

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<http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&lang=1>. [Accessed: 22 February 2011].

140 The costs that emerge from the completion of transactions, transaction partners search and negotiation are called transaction costs.

141 Watkins, M. The Sherman Act: Its Design and Its Effects. *The Quarterly Journal of Economics*. 1928. 43. 1, pp. 1-43. Available from <http://www.jstor.org/stable/pdfplus/1883940.pdf>. [Accessed: 29 November 2010].

142 Kerber, W. & Schwalbe, U. *Op. cit.* p. 225.

143 Jones, J. Sufirin, B. *Op. cit.* p. 32.

144 Kerber, W. & Schwalbe, U. *Op. cit.*

145 Winston, C. & Crandall, R. Does Anti-trust Policy Improve Consumer Welfare? Assessing the

forms of economic organisation - like vertical integrations, restrictive distribution contracts and joint ventures - is often to minimise costs. By using the behavioural assumption, Williamson showed that some vertical agreements and vertical mergers which were seen as potentially anti-competitive could increase efficiency through reducing transaction costs.<sup>146</sup>

In connection with this, some transaction scholars demand the re-evaluation of doctrines on anti-trust that have impacted harshly on these arrangements. Hence, contrary to the other perspectives adopted by post-Chicago ideology, including the anti-competitive implications of strategic behaviour, the transaction cost economics address a less expansive application of the rules of competition.<sup>147</sup>

### **2.3.6.2 Game Theory**

Game theory draws a lot from the 1940s work of Morgenstern and von Neumann and has over time become a central aspect in the field of modern industrial organisation theory.<sup>148</sup> The importance of game theory lies especially in its use as a tool in the analysis of the conduct of oligopolies. It was defined as the study of mathematical models of decision-makers' cooperation and conflict.<sup>149</sup> The theory models a firm's strategic interactions in respect to both cooperation and conflict, putting these interactions in the context of games whereby every firm devises its own strategy such as in respect to output and pricing, in line with the assumptions focused on what strategy the competitors will adopt.<sup>150</sup> The concepts of game theory apply when different agents' (such as firms, individuals, groups or a combination of any of these) actions are independent.<sup>151</sup>

### **2.3.6.3 Raising Rivals' Costs**

The idea of raising rivals' costs demonstrates the strategic conduct of firms formulated to raise the costs of rival parties relative to its own.<sup>152</sup> Competing with the less efficient corporations is much easier on the basis of the arguments of the raising rival's

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Evidence. *Economic Geography*. 2000. 76. 1. pp. 50-67. Available from <http://www.jstor.org/stable/pdfplus/2138746.pdf>. [Accessed: 19 January 2011].

146 Kerber, W. & Schwalbe, U. *Op. cit.*

147 Jones, J. Sufrin, B. *Op. cit.* p. 32.

148 Von Neumann, J. & Morgenstern, O. *The Theory of Games and Economic Behaviour*. Princeton: Princeton University Press. 1944, pp. 231-47.

149 Turocy, T. & Stengel, B. Game Theory. *Encyclopedia of Information Systems*. 2003, pp. 403-420.

150 Jones, J. Sufrin, B. *Op. cit.* p. 31.

151 Turocy, T. & Stengel, B. *Op. cit.*

152 Krattenmaker, T. & Salop, S. Anti-competitive Exclusion; Raising Rivals' Costs to Achieve Power over Price. *The Yale Law Journal*. 1986. 96.2, p. 209.

costs.<sup>153</sup> However, this calls for quite an extent of market power or political power (at least for some strategies).<sup>154</sup> Normally, this involves interference with either the selling or production of techniques of rivals, supporting or lobbying for regulation by the government which would result in differential implications for the rivals' costs, therefore leading to increased input prices or else raising, switching, and tying costs such that clients find it expensive or rather difficult to shift to the rival's goods. Thus, it is possible for firms through strategies to increase their shares and prices in the market indirectly through increasing other firms' production costs and consequently reduce their output prices.<sup>155</sup>

Moreover, such a strategy also involves a company's indulgence in rapid product innovation in primary markets. It is also worth noting that certain conduct raising rivals' costs could also lead to increased welfare and, if competition law ought to allow or sanction such practices, then it is often dependent on the specific context of the case in hand.<sup>156</sup>

#### **2.3.6.4 Theory of Contestable Markets**

The contestable markets literature arose from a research programme which had a great impact at that time in regard to advancing economic knowledge by claiming two principal achievements and by introducing two significant policy contributions.<sup>157</sup> The main emphasis of the theory of contestable markets lies in the freedom of entry to, as well as exit from, a given market. It should be noted that contestable markets theory is considered as a generalisation of the perfect competition theory's development and more importance is attached to contestability rather than market structure.<sup>158</sup> According to Baumol,

“In the limiting case of perfect contestability, oligopolistic structure and behaviour are freed entirely from their previous dependence on the conjectural variations of incumbents and, instead, these are generally determined uniquely . . . by the pressures of potential competition. . . .”<sup>159</sup>

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153 Normann, H. Vertical Mergers, Foreclosure and Raising Rivals' Costs - Experimental Evidence. Discussion paper No.5. Dusseldorf Institute for Competition Economics. 2010, p.1.

154 Veljanovski, C. *EC Anti-trust in the New Economy: Is the European Commission's View of the Network Economy Right?* ECLR 115. 2001, pp.187-194.

155 Normann, H. *Op. cit.*

156 UNCATD. Competition Law and Policy. *6th UN Review Conference*. [Online]. 2002. Available from: <http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&lang=1>. [Accessed: 22 February 2011].

157 Martin, S. *The Theory of Constable Markets*. Purdue University. 2000, p.5.

158 Jones, J. Sufirin, B. *Op. cit.* p. 31.

159 Baumol, W. Panzar, J., & Willig, R. *Contestable Markets and the Theory of Industry Structure*. New York: Harcourt Brace Jovanovich, Inc. 1982, p. 2.

The most important aspect of this theory is the fact that the ‘hit-and-run’ nature characterising entry by competing firms constrains the conduct of firms within the market such that competitive pricing and efficient performance become evident. According to this theory, highly competitive behaviour could be seen in a single-firm market.<sup>160</sup> For example, if prices were increased in a contestable market beyond the normal price level by a firm in order to gain more profits, other firms (rivals), with the intention of making easy profit by exploiting the prices, will enter that market. Once that firm returns to the normal prices and makes normal profits, the other rivals will exit the market

In addition, Hovenkamp points out that the minimum conditions for the existence of contestable markets constitute instantaneous entry as well as costless exit from the market and, more importantly, the inability of a firm to respond accordingly to the market or another competitor through a reduction in prices.<sup>161</sup> This aspect is especially vital since otherwise the incumbent company can maintain its prices at the monopoly level only to reduce them when it deems it is necessary to respond to competition, which is the same in the case of the oligopoly of two or three firms.<sup>162</sup>

Like in the workable competition situation, the condition for perfect contestability is often not witnessed in the real context,<sup>163</sup> and in case there are small sunk costs,<sup>164</sup> private entry barriers may arise.<sup>165</sup> In this regard, the term ‘contestable market’ arises to imply a market with low barriers to entry and exit in view of the fact that the threat of entry from competitors does considerably constrain the firm. Thus, this theory has contributed immensely to competition law discussions.<sup>166</sup>

### **2.3.6.5 The Austrian School**

Schumpeter’s book ‘Theory of Economic Development’ is considered as the beginning point for innovation economics when he claims that economic development’s endogenous driving force is technological advancement.<sup>167</sup> The Austrian school ideology takes the theory of dynamic competition which extends what was covered by

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160 Brock, W. Contestable Markets and the Theory of Industry Structure: A Review Article. *The Journal of Political Economy*. 1983. 91.6, pp. 1055-1066.

161 Hovenkamp, H. Anti-trust Policy after Chicago. *University of Michigan Law Review*. 1985. 213, pp. 226–229

162 Kerber, W. & Schwalbe, U. *Op. cit.* p. 225.

163 Commission’s XXIXth Report on Competition Policy. (1999).

164 A cost that has already been incurred and cannot be recovered.

165 Kerber, W. & Schwalbe, U. *Op. cit.* p. 225.

166 Bishop, S. & Walker, M. *The Economics of EC Competition Law: Concepts, Application and Measurement*. (2nd ed). London: Sweet & Maxwell. 2002. p. 33.

167 Kerber, W. & Schwalbe, U. *Op. cit.* 227.

Schumpeter.<sup>168</sup> Like in the case of the Chicago school, the Austrian school represents the perception that competition policy is one single face characterising a wider school of economic theory.<sup>169</sup> Schumpeter asserted that applying neoclassical microeconomics with its concept of equilibrium (which includes the perfect competition theory) cannot analyse the economic development process, and rather it needs a different fundamental theoretical model.<sup>170</sup>

Among the strongest proponents of the Austrian School in the 20<sup>th</sup> century was Hayek. His approach was to introduce the concept of new knowledge into the competition concept.<sup>171</sup> He emphasised that competition is considered as a discovery procedure where, without the existence of competition, new knowledge cannot exist. Like the other economists of this theory, he stressed that the neoclassical economics approach is “entirely flawed” due to the fact that it ignores the knowledge concept. The concept of perfect competition assumes that the concept of knowledge is perfect and there is no problem with it and ignores the fact that the search for new knowledge is the main function of competition.<sup>172</sup>

Moreover, he believed in untrammelled free markets as well as the capacity of potential competition to eliminate long-run exploitation by monopoly conduct. This, therefore, implied that competition laws should not hamper the competitive process, not even through prohibition of cartels.<sup>173</sup>

### **2.3.6.6 Ordoliberalism (Freiburg School)**

This school had great implications, especially for the German and EC competition law.<sup>174</sup> Ordoliberalism does not merely refer to a school of competition law but encompasses an entire economic and political philosophy. While the Ordoliberalism School made no contribution to competition theory, it has had an immense effect on the policy of competition in the EU. It developed a unique method for the identification of the most appropriate form of competition policy.<sup>175</sup>

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168 Coate, M. *Op. cit.* pp. 78-85

169 Hovenkamp, H. *Op. cit.* pp. 196–209

170 Kerber, W. & Schwalbe, U.

171 Hayek, F. *Law, Legislation and Liberty: Volume 1: Rules and Orders*. Chicago: The University of Chicago Press. 1973.

172 Kirzner, I. Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach, *Journal of Economic Literature*. 35. 1997, pp. 60-85.

173 Van den Bergh, R. & Camesasca, P. *European Competition Law and Economics: A Comparative Perspective*. (2nd ed.) London: Sweet and Maxwell. 2006, p. 80.

174 Kerber, W. & Schwalbe, U. p. 229.

175 *Ibid.*

The school was developed in the 1930s in Germany and later nurtured at Freiburg University during the Nazi era.<sup>176</sup> It characterised a major aspect of thinking in the post-war period in Germany, indicating a new relationship between the economic system and law; holding that for economic well-being, competition is necessary and that economic freedom dictates political freedom.<sup>177</sup>

Ordoliberalism supports an economic constitution in which economic freedom and competition are incorporated into the law such that there are no discretionary interventions or even unconstrained private forces. According to Ordoliberals, competition law ought to establish as well as protect the conditions essential for competition. This implies that, in itself, competition is a value and not just a means for use to achieve purely economic objectives like efficiency.<sup>178</sup> It is evident that the Freiburg school's thinking enhances the protection of small and medium-sized enterprises as well as competitors irrespective of the implications for efficiency, instead of protecting competition. The approach seeks to promote the freedom of all citizens to enable them to enter and compete in the markets. Ordoliberalism played an essential role in the development of competition law in the EC Treaty's Articles 81 and 82.<sup>179</sup>

### **2.3.6.7 Workable Competition (Effective Competition)**

In the 1940s the workable competition approach was developed and linked with the Harvard school. It maintained the view that, since it was usually impossible to achieve a perfect competition market situation, competition policy should be aimed at producing the best competitive arrangement that is practically attainable.<sup>180</sup> However, this approach also led to the emergence of certain difficulties.

Approaches by which the concept of workability can be assessed encompass conduct, performance and structure and it is rather hard to determine if these have really been accomplished in any specific industry or if some are satisfied or some not. Amato argues that it is rather challenging to decide if workability has been really achieved without necessarily making judgments based on a subjective evaluation.<sup>181</sup> Hence, workable

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176 Gerber, D. Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe. *American Journal of Comparative Law*. 1994. 42, p. 25.

177 Möschel, W. Competition Policy from an Ordo Point of View. In: Peacock, A. & Willgerodt, H. (eds.). *German Neo-Liberals and the Social Market Economics* (London: MacMillan, 1989), p.142.

178 Jones, J. Sufirin, B. *Op. cit.* p. 34.

179 In-depth discussion will be carried out in Chapter 5.

180 Clark, J. M., Towards a Concept of Workable Competition. *American Economic Review*. 1940. 30, pp. 141–156.

181 Amato, G. *Anti-trust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*. Oxford: Hart Publishing. 1997, p. 176.

competition fails to provide an effectively workable basis for the establishment of a sound competition policy. The proponents of the workable competition concept believed that the competition structure was usually imperfect, in which conditions essential for perfect competition were not attainable although the situation was not a monopoly by nature. In the Metro I case of 1976, ECJ put workable competition in a context equating it with the extent of competition essential to make certain that the observance of the primary requirements as well as the accomplishments of the aims set out by the EC Treaty.<sup>182</sup>

The philosophy of workability implies that the major tasks involved include the establishment of practically attainable conditions which play a central role in certain segments of the economy, making the economy operate in the context demanded of it. In this case, the criteria of workability, in combination with aspects like optimum competition, emphasise attaining the best attainable condition in individual markets.<sup>183</sup>

Scherer argues that competition is considered to be workable only if various genuine alternatives are available to traders.<sup>184</sup> He further states that the only significant issue for the workability of any single market comprises the importance, number and nature of product or price options or else their providers or receivers. The idea was put forward by economist J. M. Clarkin whose argument was based on the notion that policy should be focused on the enhancement of the workability of competition, but not necessarily the achievement of a perfect condition.<sup>185</sup> However, today there is still a lack of consensus on what encompasses workable competition, though parties administering competition policy employ a certain degree of the concept.<sup>186</sup>

### **Effective Competition regarding the EU**

The effective competition ideology was developed within the context of the competition law of the EC.<sup>187</sup> However, even though there were some attempts to define effective competition, “there still remains a void both in the literature and the *acquis*.” Veljanovski asserted that “it is rare to find in the EC anti-trust texts, or in statements by the Commission, a clear expression of the nature of effective competition.”

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182 Case 26/76, *Metro v. Commission* (No. 1) [1977] ECR 1875, [1978] 2 CMLR 1, para. 20.

183 Jones, J. Sufrin, B. *Op. cit.* pp. 34-44.

184 Scherer, F. & Ross, D. *Industrial Market Structure and Economic Performance* (3rd ed.). Boston: Houghton Mifflin Harcourt. 1990, pp. 157–159.

185 Eckbo, E. *Op. cit.*

186 Sosnick, S. A Critique of Concepts of Workable Competition. *Quarterly Journal of Economics*. 1958. 72, pp. 380–423.

187 Faull, J. & Nikpay, A. (eds.). *Op. cit.* pp. 183–219.

According to the ECJ, a dominant position, for the application purposes of Article 82 EC (now Article 102 TFEU), included an undertaking's power to hamper effective competition being established in the relevant market.<sup>188</sup> Also in the context of the EC merger regulations, mergers are prohibited on the basis that they harbour a significant potential to hinder competition. The literature shows that the actual meaning of effective competition has not yet been defined precisely. However, Walker and Bishop noted that it ought to be outcome-oriented.<sup>189</sup>

The next part will discuss competition law development in the EU and compare it with the situation in the UAE, including historical evolution, principles and scope of the laws.

## **2.4 Competition Law Values, Origins and Scope**

### **2.4.1 Introduction**

As discussed previously, Ordoliberal principles and thought have noticeably influenced the adoption of EU competition law. It could be said that this school of thought emerged in Germany due to the cartels and the use of economic power by the well-established industries, which caused market distortion. The process of the Ordoliberal School's emergence was accelerated due to the existence of economic and social inequality. However, the debate about the continued influence of the Ordoliberal School might increase, because of the increasing desire to adopt a more economic-based approach by the EU Commission.

On the other hand, Islamic law (Sharia) stated as the main source of legislation in the UAE according to the constitution. In reality, all the law codes, apart from the family law, are civil and modern codes that either set locally or based on other similar codes that have been used somewhere else outside the UAE such as the EU codes. Shari'ah prohibits monopoly and punishes any monopolistic acts. Thus, it has been argued that the enactment of competition law in the UAE was due to the influence of the principles of Shari'ah. Hence, it is very important to understand the principles of Shari'ah on monopoly and other anti-competitive behaviour, and determine how compatible they are with the enacted UAE competition law. This chapter aims to investigate the differences and similarities of the EU

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<sup>188</sup> Case 2/76, *United Brands v. Commission* [1978] ECR 207 [1978] 1 CMLR 429,  
<sup>189</sup> Bishop, S. & Walker, M. *Op. cit.* pp. 16.

and the UAE origins and values and the scope of competition law. In essence, Shari'ah law has some thoughts and views on Competition law but the UAE competition law is a civil code that hardly relate to Shari'ah law.

This section is divided into five core parts. The first part will address the origins of the EU competition law in Ordoliberal thought and the movement towards a more economic-based approach. The second part will address the Islamic law origins of the UAE competition law and values. The third part will evaluate the differences between the EU and the UAE's origins and values. The fourth part of this section will discuss the scope of the EU's competition law. The fifth part will discuss the scope of the UAE's competition law.

## **2.4.2 Competition Law Values and Origins**

### **2.4.2.1 Historical background of the EU competition law: Origins and Values**

The European Union emerged as a result of, first of all, economic integration efforts which removed to some extent the possible barriers for trade between member states. The EU market became more liberalised. Liberalisation of a market makes it necessary to provide transparent and efficient rules. It is impossible to develop an open market in a sustainable way without competition rules. Therefore, in the course of its existence, the EU elaborated a significant piece of competition legislation. The current and succeeding chapters are devoted to providing a comprehensive analysis of the competition law in the European Union and comparing it with the UAE's competition law for the purpose of the study.

In addition, the historical analysis should start with the scrutiny of both the historical roots of competition and the historical evolution of its regulation by the European Union. Therefore, before illustrating the current situation of EU competition law, the next part will give an insight into the roots and historical evolution of competition principles in the EU.

### **2.4.2.2 The path to Ordoliberal thought and principles and the social market economy**

The Freiburg School, or what is known as the Ordoliberal School, was first established in Germany in the 1930s by economist Walter Eucken, and Jurists Hans Großmann-Doerth

and Franz Böhm. "*Fakultät für Rechts- und Staatswissenschaften*" in the University included economics and law and provided an appropriate framework for combining both economic and legal perspectives, which is the attribute of the Ordoliberal and Freiburg School tradition.<sup>190</sup> What united the founders of this school was the need to address the matter of the constitutional foundations for a free economy and society. The scholars opposed the heritage of Gustav von Schmoller's *Historical School* which still had an influence at the time, as well as unprincipled relativism which, according to them, was a heritage responsible for the political economy and German jurisprudence.<sup>191</sup>

On the contrary, the scholars said that their guiding principle on treating all practical politico-economic and politico-legal questions must be based on the idea of an economic constitution.<sup>192</sup> Collaboration of economics and law was a task they termed as clearly essential. The Ordoliberalism of the Freiburg school was a significant section of the theoretical foundations which acted as the basis of creating the Social Market Economy (SME) in post-World War Two Germany. The SME came into being during times of economic hardship and socio-political crises. Political prerequisites and historical experiences formed the conceptual architecture of SME since Germany was preoccupied with the social question from the late 19th century onwards.<sup>193</sup>

This was in addition to liberal capitalism, which was criticised for eliciting a calamity that occurred in the world economy in the year 1930, anti-collectivism and the anti-totalitarianism which occurred as a result of Third Reich experiences. These experiences led to the formation of the Social Market Economy as a viable option and an economic and socio-political alternative to the extremes of a collectivist planned economy and laissez-faire capitalism.<sup>194</sup> This was not regarded as a compromise, but basically an amalgamation of conflicting objectives which included an additional social security establishment by the state and the protection of individual liberty. As the totalitarian Third Reich went down with its corporatist, statist economic policy, academicians together with the economists at Freiburg University advanced the neo-liberal and socio-economic order.<sup>195</sup>

In the beginning, the model was contentious, but became widespread with time in

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190 Eucken, W. The Competitive Order and Its Implementation (translated by C. Alborn and C. Grave). *Competition Policy International*. 2006. 2, p. 230.

191 Ibid.

192 Cseres, K.J. *Competition Law and Consumer Protection*, Kluwer Law International. 2005, p. 60.

193 Ibid.

194 Gormsen, L, L. The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC. *European Competition Journal*. 2007. 3. 2, p. 330

195 Ibid.

Austria and West Germany since achievements in the economy were noted in both states. SME from the 1960s became the basic economic model in mainland Western Europe. Administrators of both Centre-left (Social Democratic Party –SDP) and Centre-right (Christian Social Union of Bavaria –CSU and Christian Democratic Union – CDU) pursued this economic concept.<sup>196</sup> The Social Market Economy concept has remained a common economic basis for several German political parties and a commitment to some type of Social Market Economy has been identified in the European Union Constitution. However, the project was abandoned in 2005 after the referenda in the Netherlands and France led to negative outcomes.<sup>197</sup>

### 2.4.2.3 Ordoliberal Objectives

The fundamental objective of Ordoliberalism is that the states need to regulate their markets such that the market outcome is able to approximate the theoretical results in a market that is flawlessly competitive. This implies that none of the actors will manage to influence or control the prices of goods and services. One important factor that is seldom discussed when it comes to the reasons why Germany stresses stability in price is based on the reasoning of Ordoliberalism by German economists. This theory, as mentioned above, was a reaction to the effects of unregulated liberalism in the 1930s that led to the consequent Nazi monetary and fiscal interventionism.<sup>198</sup>

Another characteristic of Ordoliberalism is that it varies from other schools of liberalism, which also include the neo-liberalism dominant in the Anglo-Saxon world. It tends to place more emphasis on the prevention of monopolies and cartels. Similarly, Ordoliberalism is similar to neo-liberalism when it comes to opposing interventions by government on the economy. For instance, it opposes fiscal policies and expansionary monetary in recession aimed at stabilising the cycle in business, implying in this sense that it is anti-Keynesian.<sup>199</sup>

The supporters of the Ordoliberalism approach argue that government intervention could lead to market distortion. They claim that it is possible that well-established market players are likely to influence the government (such justification is not based on fairness

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196 Korah, V. Interface between Intellectual Property and Anti-trust: The European Experience. *Anti-trust Law Journal*. 2001. 69. p. 828.

197 Ibid.

198 Mestmacker, J. E., The EC Commission's Modernisation of Competition Policy: a challenge to the Community's constitutional order. *European Business Organization Law Review*. 2000. 1. 3, p. 411.

199 Cseres, K.J. *Op. cit.* p. 30.

considerations).<sup>200</sup>

In political terms, between 1948 and 1966, Ordoliberalism had a close connection to the rise of the first phase of SME in Germany. Although it was broad and it encompassed social goals, the SME concept integrated the basic concepts of Ordoliberalism. The concepts were also portrayed in the then legislation, such as the law opposing competition restraints, the law on collective bargaining and the Bundesbank law. Ordoliberalism was instrumental in enhancing rapid reconstruction and an increase in people's living standards. The road to Ordoliberalism and SME positively changed the German policy debate. It reverberates far beyond the individuals engaging in economic analysis, and although it is not as important as it was in Germany's economy, Ordoliberal ideas have at some point influenced several economists in their careers.<sup>201</sup>

#### **2.4.2.4 The Ordoliberal framework: Competition law and the Economic constitution's function and its influence in Europe**

The constitutional method applied by the Ordoliberals when it comes to competition in the market was that a competitive order has to be regarded as a public good. This implies that, just like in all cases of public goods, it is crucial to clearly differentiate between the interests of an individual enjoying the benefits of a public good and how he/she contributes to its protection.<sup>202</sup> A public good is applied to a competitive order where it is important to differentiate, on one side, the issue of whether an individual enjoys the benefits offered in a competitive market environment and, on the other side, if the individual yields to the constitutional constraints of a competitive market order.<sup>203</sup> The legislators and governments are required to act according to a constitutionally determined mandate for the benefit of all citizens.

This includes creating, managing and preserving the regulatory framework that ensures efficient operating of the free market. Within the Ordoliberal framework, competition law notes that it is possible for some individuals to violate the rules at other people's expense.<sup>204</sup> This can be through explicit rule violation by cartel formation, or by advocating exceptional privileges. The latter is considered attractive since the person does

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200 Ibid.

201 Ibid. p. 31.

202 Eucken, W. *Op. cit.* p. 230.

203 Evans, D. & Padilla, J. Excessive Prices: Using Economics to Define Administrable Legal Rules. *Journal of Competition Law and Economics*, 2005. 1, p. 101.

204 Cseres. *Op. cit.* p. 64.

not engage in cheating but lobbies the government to raise the platform of cheating through protective duties, direct subsidies, and tax privileges. The state becomes enjoined in “orderly markets” or monopoly formation, thus overriding the regulations of the prevailing order to favour one individual at the expense of others.<sup>205</sup>

Although the Ordoliberalists never used the concepts of game theory, or the term public good, they recognised the function of the economic constitution and the game of competition. This presents a situation known as prisoner’s dilemma where, despite the fact that all individuals are better off functioning in a competitive regime, everybody is interested in being exempted from the constraints enforced in a competitive environment.<sup>206</sup> Nevertheless, when all individuals manage to seek protection from competition, everyone will end up in a protectionist regime that is not beneficial for anyone. According to Ordoliberalists, this situation would not be chosen by anyone if the two alternatives were offered.<sup>207</sup>

The most important case here does not entail the implications of Ordoliberalism in the economic and political lifestyle in post-war Germany, but its significance for the EU competition law, and other sectors of Europe. Therefore, one important element that should be noted is that economic freedom was regarded as the most crucial source of both prosperity and political freedom. It was believed that an economy that functions in the absence of government intrusion would grow and prosper. In this sense, freedom in the economy would also enhance political freedom and reduce the probability of a government or a dictator controlling the industry.<sup>208</sup>

Nevertheless, the Ordoliberalists in Europe argued that an economy that is liberated from interference by the government would consequently lead to the establishment of market powers and the formation of cartels. The result would not be in line with the norms of Ordoliberalists, but result in economic power. Ordoliberalism believes in economic freedom where there is a character of positive liberty enabling all individuals to enter and compete in the market. Cartelisation in Europe would curtail this liberty and create market power. Therefore, Ordoliberal thinkers were in a dilemma, because their vision was to sustain freedom in the economy in Europe and allow the economy to operate without

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205 Ibid.

206 Gormsen. *Op. cit.* p. 331.

207 Ibid.

208 Mestmacker, J. E. *Op. cit.* p. 415.

meddling from the government so as to enable freedom in political terms, but also an economy that operates without the risk of creating cartels and market powers.<sup>209</sup> The economy in Germany experienced very high inflation when the economic depression occurred in 1929. The core objective of Ordoliberalism was to safeguard economic freedom where the private and governmental economic powers are secured.<sup>210</sup>

The Treaty of Paris was signed in 1951, leading to the establishment of the European Coal and Steel Community (ECSC). Its mission was to enhance economic expansion and support peace in Western Europe. The economic and legal provisions of organising trade were influenced by Ordoliberal ideologies since they contained provisions for competition law. There were three major provisions: outlawing the abuse of economic power, elimination of cartels and a system of monitoring mergers. One issue that contributed to the success of the ECSC was that the movement sought to integrate Europe further. Jean Monnet, who was the President of the high authority and a French administrator, played a crucial role in drafting the ECSC Treaty proposing cooperation on higher political and economic levels<sup>211</sup>.

Paul-Henri Spaak, the Belgian foreign minister, was appointed to head the commission that drafted a blue print for the Treaty of Rome, which was instrumental in creating the European Economic Community (EEC) in 1958.<sup>212</sup> Some of its objectives coincided with Ordoliberalism's objectives, such as lifting living standards and establishing economic activities, raising stability and having close relations. For the objectives to be achieved, the EEC ensured that there was a system of promoting factual competition. It has not been disputed that Ordoliberal thoughts were of major influence in European integration.<sup>213</sup>

#### **2.4.2.5 Effects-based approach**

The European Court of Justice (ECJ) managed to adopt a concept in its own jurisprudence when it comes to unrestricted movement of goods within the European internal market. The rule arose on the basis of Article 28 EC (now 34 and 36 of the Treaty on the Functioning of the European Union (TFEU)), that forbade quantitative restrictions

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209 Eucken. *Op. cit.* p. 231.

210 *Ibid.*

211 *Ibid.* p. 232.

212 Gormsen, *Op. cit.* p. 332.

213 *Ibid.*

on exports and imports, or actions which contained similar effects. In *Cassis de Dijon Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, a distinction was made by the ECJ concerning actions that broke Article 34 of the TFEU that were applied indistinctly as opposed to being applied distinctly.<sup>214</sup> It should be mentioned that, unlike Ordoliberalism's approach, which aims is to protect the individual's freedoms and at the same time to limit market intervention, the effects-based approach focuses on consumer welfare *per se*.<sup>215</sup>

Indistinctly applicable measures are those which *prima facie* fail to side with domestic producers over importers, but their impact is the same on both groups. According to the ECJ, indistinctly applicable measures which tend to favour people who trade domestically over those who import does not imply breaking Article 34 of the TFEU. However, they could be acceptable when they meet the compulsory requirements. This measure is essential for safeguarding the public and consumers. The European Rule of Reason basically proposes that a proportionality exercise has to be performed by the Court so as to establish whether the effect of Member State legislation on the free movement of goods has been justified. This is in light of the stated goals of the legislation. The ECJ put into application the proportionality exercise beyond the restrictions of Article 36 of the TFEU used from the beginning.<sup>216</sup>

An approach which looks at effects in EU anti-trust enforcement has a real-world meaning where different cases are regarded as object constraints. Different practices have been lost from the anti-trust enforcement agenda due to the so-called effects-based approach to Article 101 of the TFEU. Nevertheless, it paradoxically appears as if it is trying to articulate Rule of Reason standards that provide legal substance to "effects" restrictions.<sup>217</sup> There are several benefits which have been brought by the turn to an effects-based approach to Article 101 of the TFEU. Reducing the anti-trust exposure has several common arrangements that are part of the day-to-day life of many firms. The ECJ has adopted the Rule of Reason in its own jurisprudence when it comes to the unrestricted flow of goods in the European internal market.<sup>218</sup>

The rule arose in the context of Articles 35 and 34 of the TFEU (ex 28 EC) that

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214 Elhauge, E. and Geradin, D. *Global Competition Law and Economics*. Oxford: Hart Publishing 2007, p.53.

215 Ibid.

216 Ibid.

217 Korah, *Op. cit.* p. 829.

218 Ibid.

prohibit quantitative limitations on exports and imports. An effects-based approach placed an emphasis on anti-competitive effects which tend to harm customers. It is based on the analysis of each specific case, and sound economics that are based on facts. The foremost concern of such an approach is the enhancement of wellbeing of consumers and this suggests the importance of protection of competition rather than competitors.<sup>219</sup> Consumer welfare is the foremost concern of the Rule of Reason and competition law. However, the limitation is that nowhere is it explained in detail how assessment of the effects on consumers is to be made. However, lip service is paid to embracing a method that is grounded on the probable outcomes in the market.<sup>220</sup>

#### **2.4.2.6 The departure from the Ordoliberal theory to a modern EU Competition Law**

One of the widely known dichotomies in European integration is the difference between positive and negative integration. References that are made to this distinction involve the impact of the integration process on national policies. The integration process seeks to foster market building by prohibiting trade barriers and the application of economic freedoms. Market corrective mechanisms in Europe seek to foster positive measures which are challenging to achieve based on the old unanimity rule. The negative/positive ideology is simplistic but provides a positive point of departure as well as an interpretive framework that informs our analysis.<sup>221</sup> There are two interdependent reasons which can be drawn from this argument. First, positive and negative integration involves regulative (market-correcting) and constitutive (market-making) policies. It partially encompasses the range of policies implemented in the European welfare states. Defending state competencies when it comes to social policies and restricting the integration project to basic economic objectives can result in the rearrangement of social and economic objectives in Europe.<sup>222</sup>

It allows differentiation that is primarily driven by the economic wealth and political inclinations of the different member states. European bias is most of the time complemented by the objective of reinforcing capabilities and advancing positive market-compensating policies. For the European level of governance to be reinforced, it must be

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219 Giocoli, N. Competition versus Property Rights: American Anti-trust Law, the Freiburg School, and the Early Years of European Competition Policy, *Journal of Competition Law & Economics*. 2009. 5. 4, p. 753.

220 Ibid.

221 Evans, D. & Padilla, J. *Op. cit.* p. 107.

222 Ibid.

followed by democratisation and provoke an additional specified quest for the overcoming of the social deficit in Europe.<sup>223</sup> This is considered the main reason why the positive/negative dichotomy is a good starting point for enquiring into the Convention process. Not only does it deepen constitutionalism, but it also enhances the politicisation of regulative into distributive policies.<sup>224</sup>

In terms of the EU's competition law, the first EU competition provisions can be found in the Treaty establishing the European Coal and Steel Community of 1951. The Treaty established the first Community organisation and regulated its operation. The Treaty of Paris contained European-wide competition rules in the coal and steel industry.<sup>225</sup> In particular, the treaty prohibited economic abuses and cartels in the coal and steel industries.<sup>226</sup> The executive organ of the European Coal and Steel Community was in charge of the implementation of the competition provisions.<sup>227</sup>

The further expansion of the competition rules is associated with the Treaty establishing the European Economic Community of 1957 (the Treaty of Rome). The Treaty signifies a full economic integration of the member states: it establishes the common market. In the preamble to the Treaty the governments expressed their recognition of the importance of fair competition.<sup>228</sup> The Treaty provides that the European Community has the power to institute a system ensuring that there is no distortion of competition in the common market.<sup>229</sup> The Treaty covers three areas: mergers, dumping regulation and state aid. While the Treaty of Rome contains the rules of competition it does not establish any specific agency responsible for the enforcement of the rules. Geradin et al. reveal that such an approach was a compromise between the positions of the German government and the French government.<sup>230</sup> The German government position was that the EC Treaty should contain competition rules.<sup>231</sup> At the same time, the French government was reluctant to delegate the authority to intervene in market-related matters to the Community.<sup>232</sup> Therefore, the inclusion of the competition rules but the absence of the enforcement rules in the Treaty became a compromise between the French and German positions.

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223 Mestmacker, J. E. *Op. cit.* p. 417.

224 *Ibid.*

225 Geradin, D., Layne-Farrar, A. & Petit N. *EU Competition Law and Economics*. Oxford: Oxford University Press. 2012, p. 16.

226 *Ibid.*

227 *Ibid.*

228 Treaty of Rome of 1957.

229 *Ibid.* Article 3 (f).

230 Geradin, et al. *Op. cit.* pp. 16-17.

231 *Ibid.* p. 17.

232 *Ibid.*

As far as the EU is concerned, the creation of the European Communities by Jean Monnet and Robert Schuman has logically led to the establishment of a single market.<sup>233</sup> Furthermore, the emergence of the single market logically required the enactment of a consistent, just, transparent, and unified regulatory framework for competition law, taking into account the fact that competition - or, in other words, the struggle for commercial advantage - is a salient feature as well as an intrinsic specificity of a vast and open single market.<sup>234</sup>

To attain this purpose, in 1962, the Council of the European Economic Community passed Regulation 17/62.<sup>235</sup> This regulation was the first legal document implementing Articles 85 and 86 of the Treaty Establishing European Union. This means that the regulatory framework of competition law in the European Union was born with the adoption of Regulation 17/62, while the incentives to create such a regulatory framework had been set forth in Articles 85 and 86 of the Treaty Establishing the European Community (hereinafter referred to as the TEC).<sup>236</sup>

Despite the fact that the regulatory framework of the EU competition law was created in 1962, at the moment when Regulation 17/62 was given legal force, the EU competition law was not completely established due to the lack of a legal mechanism which could guarantee the supremacy of EC law over the national legal systems of the member states. This shortcoming of the Community law was brought to an end by means of judicial practice. Thus, the decision in *Van Gend en Loos* filled the gap. In a nutshell, *Van Gend en Loos* is a landmark case of the European Court of Justice which prescribes that the Treaty Establishing the European Economic Community is capable of giving rise to legal entitlements enforceable before the national courts of member states.<sup>237</sup>

Furthermore, the Regulation implemented rules of merger control. The Commission was empowered by the Regulation to require undertakings and associations to bring an end to the infringement of competition rules contained in Article 81 of the Treaty of Rome.<sup>238</sup> Undertakings and associations were required to notify the Commission about integration

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233 Davies, K. *Understanding European Union Law*. Abingdon: Routledge-Cavendish. 2003, p. 5.

234 *Ibid.*

235 The Council of the European Economic Community. *Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty*. 1962. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:I:1959-1962:31962R0017:EN:PDF> [Accessed: 9 March 2013].

236 *Consolidated Version of the Treaty Establishing the European Community*. [Online] 2002. Available from: [http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf) [Accessed: 9 March 2013].

237 *Van Gend en Loos v Nederlandse Administratie der Belastingen*. 1963. Case 26/62. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:NOT> [Accessed: 9 March 2013].

238 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty.

agreements that could give rise to claims under Article 81 (1) of the Treaty. After the adoption of Regulation 17/62 the Commission was loaded with notifications. In order to deal with them in a swift manner the Commission developed various guidelines, negative clearance decisions, block exemption regulations, de minimis notices and so on.<sup>239</sup> Thus, one may observe that the Regulation gave the Commission significant powers to enforce the competition rules set forth in Article 81 of the EC Treaty.

Forty years after the adoption of Regulation 17/62, the Commission decided to review the EU competition rules enforcement mechanism.<sup>240</sup> The Commission issued a 'White Paper on the modernisation of the regulations implementing Articles 85 and 86 of the EC Treaty'.<sup>241</sup> The White Paper revealed that EU and non-EU firms notified a huge number of agreements, many of which did not pose any threat to competition.<sup>242</sup> The Commission, therefore, spent a lot of time reviewing this safe agreement, and was unable to spend time on the agreements that may indeed have distorted competition.<sup>243</sup> Subsequently, the Commission submitted to the Council a regulation draft reforming the competition enforcement system. In 2003, Regulation 1/2003 was adopted to replace Regulation 17/62. The main change introduced by the 2003 Regulation is decentralisation of the enforcement system. It replaced the notification system with an *ex post* legal exception system: from then firms were no longer required to notify the Commission on proposed agreements but to self-assess their business practices within the provisions of the core treaties.<sup>244</sup>

In 2009 the Treaty of Lisbon came into force. The Treaty amends the Treaty of Rome. The amended version of the Treaty of Rome is referred to as the Treaty on the Functioning of the European Union (TFEU). Competition rules, which were contained in the Treaty of Rome, were basically re-enacted in the TFEU. Only state aid provisions underwent considerable changes.<sup>245</sup> Also, in TFEU the term 'common market' is replaced by the term 'internal market', which indicates a greater integration of economic activities.

The modern EU competition law represents a system of general and specific rules. General rules are set forth in framework legislation such as Regulation 1/2003, Council

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239 Geradin, et al. *Op. cit.* p. 7.

240 *Ibid.* p. 18.

241 *Ibid.*

242 *Ibid.*

243 *Ibid.*

244 *Ibid.*

245 *Ibid.* p. 19.

Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation (the Merger Regulation)), and a range of state aid regulations and so on. Specific rules are not universal but cover only certain industries and sectors. For example, Council Regulation (EC) No 487/2009 specifies competition rules as applied to certain categories of agreements in air transportation.

To sum up, basic competition rules, including anti-trust provisions, merger controls and dumping have not changed dramatically over the last sixty years. The state aid provisions, however, have been modified significantly. While basic competition rules are more or less stable, the enforcement system constantly changes. This can be explained by adjustment to the existing practices in the market and by the newly appearing experience of the Commission in competition matters.

### **2.4.3 Values and Origins of the UAE Competition Law:**

#### **2.4.3.1 Introduction**

As discussed in Chapter One, the UAE government has been keen to follow the Islamic (Shari'ah) principles within its legal system's framework. According to Article 7 of the UAE constitution, Islam is the official religion of the federation, and the Islamic Shari'ah (Islamic law) is a main source of legislation.<sup>246</sup> Nevertheless, in order to discuss and analyse the UAE competition law, it is necessary to review the Islamic principles. Thus, the following section will review and discuss the Islamic legal system, including its origin, features and sources, which is part of the framework of UAE legislation. This is mainly to look at the cultural influence and how it influenced the formation of the UAE competition law which is purely civil code that meant to serve the country locally and beyond its borders. This must be stated that the competition code is a civil code that might be flavoured or influenced by the Shari'ah law.

However, before taking a look at the sources of Islamic law, we should have a look at the nature of Shari'ah itself and whether it is purely a religious law. Because of its name, the mainstream of the literature believes that Shari'ah is purely a religious law. In addition, the other legal traditions, including common law, do not address the religious issues that are covered by Islamic law.<sup>247</sup> It should be noted that Shari'ah law is divided into two main

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<sup>246</sup> United Arab Emirates Constitution, Article 7.

<sup>247</sup> Greiss, M. Evaluating the Influence of EU Competition Rules and Islamic Principles on the Treatment of Abuse of Dominance Under Egyptian Competition Law. Ph.D. Thesis, Sussex Law School, 2011, p. 97.

sections. The first section only addresses religious matters, which include praying, fasting, zakat, haj, etc. This section under Islamic law is called *Ibadat*. The second section covers transactions in society and is called *Mu'amalat*.<sup>248</sup> According to Badr, only about 3 per cent of the *Quran* constitutes legal principles that deal with family law and inheritance issues. Shari'ah is not entirely a religious law, and only the *Ibadat* section is “manifestly divine.”<sup>249</sup> It is the section of *Mu'amalat* that is a man-made law “with mere reflections on moral considerations and rationalisations behind prohibitions”<sup>250</sup> which is the subject of this research.

#### 2.4.3.2 Islamic (Shari'ah) Law sources:

It has been commonly agreed within Islamic society that Shari'ah law has two main sources of legislation. The first source of legislation is considered as the primary source of Shari'ah law, which consists of the *Holy Quran*, *Sunnah* of the Prophet Mohammad, (peace be upon him), *Ijma* and *Qiyas*. The Islamic jurisprudence (*Usul Al Feqeh*) is considered another source of legislation in Shari'ah law, which is viewed as a secondary source of Shari'ah law.<sup>251</sup>

Today, in some Islamic law countries, the *Holy Quran* is the core source of legislation which includes some clear prohibitions and sentences. There is a clear obligation and responsibility in the *Holy Quran* on the states and their citizens regarding the prevention of economic exploitation as well as creating economic justice to ensure that all transactions in the society have been carried out with ‘fair play.’<sup>252</sup> On the other hand, the *Sunnah* consists of the acts and statements or records of Prophet Mohammad (Peace be upon him), and the written statement or record is called *Hadith*.<sup>253</sup> Each *Hadith* has to pass through a quite rigid process in order to be approved. The content and transmission of each *Hadith* has to be analysed in order to determine its reliability and validity.<sup>254</sup>

The third Shari'ah source is *Ijma* (consensus). It refers to the agreement of the Muslim community on religious matters. *Ijma* could be explicit or implied. The fourth source of Shari'ah is *Qiyas* (Analogical reason). *Qiyas* literally means the weight, quality

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248 Badr, G. M. Islamic Law: Its Relation To Other Legal Systems. *American Journal of Comparative Law*. 26. 1977-1978, p. 188

249 Ibid.

250 Greiss, M. *Op. cit.*

251 Ibid.

252 Dabbah, M. *Competition Law and Policy in the Middle East*. Cambridge: Cambridge University Press. 2008, p. 79.

253 Moghul, U. F. Approximating Certainty in Ratiocination: How to Ascertain the *Illah* (Effective Cause) in the Islamic Legal System and How to Determine the *Ratio Decidendi* in the Anglo-American Common Law. *Journal of Islamic Law*. 1999. 4, p. 136.

254 Siddiqui, M. Z. *Hadith literature: its origin, development and special features*. 1993.

or length measurement or ascertaining of something. *Qiyas* can also mean to propose a similarity or equality when comparing with another opinion between two or more things.<sup>255</sup> However, in the jurisprudential sense it is described as a procedure that offers a ‘methodical analogy’ in order to reach an indirect outcome.<sup>256</sup> Dabbah has described this process of “systematic interference or analogy”.<sup>257</sup>

The secondary source of Islamic law includes *Istihsan, Almasaleh Almursala and Urf*. *Istihsan* could be interpreted as a jurist’s preference. There are different definitions for the term *Istihsan* as some Muslim jurists defined it as moving from an analogy to a stronger one. Other jurists defined it as giving up an analogy for a stronger evidence whether from the *Quran, Sunnah or Ijma*.<sup>258</sup>

*Almasaleh Almursalah* (Public interests) is another secondary source in the Islamic Shari’ah. It refers to accepting public interest when there is an absence of ruling in the Shari’ah regarding an issue.<sup>259</sup> Thus, it seeks to permit or prevent something on the basis of serving the public interest. *Urf* is another source of the Islamic Shari’ah. It refers to the customs or knowledge of a society. It should be noted that *urf* must be compatible with Shari’ah in the Islamic society.<sup>260</sup> *Urf* defined as recurrence of the practices that are acceptable to people. However, for *urf* to be acceptable there are some conditions to be met. First, it should be current and common. Second, it must be in practice at the time of transaction. Third, it must not violate the *Quran* and *Sunnah*. Fourth, it must not violate a term of a valid agreement according to Shari’ah.<sup>261</sup> While It should be noted that, because of the secondary sources, Shari’ah law has been flexible enough to be applied to many different areas and adapted to social aspects in all times.<sup>262</sup>

Shari’ah law could be divided into two categories that are *Ibadat* and *Mu’amalat*. The first category is concerned with worship obligations, while the other is concerned with the obligations of legal and civil matters. Competition regulation would be under the latter category. Rather than the main sources of Shari’ah law (*Quran* and *Sunnah*), the source of

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255 Adigun, T. The Relevance of Qiyas (analogical deduction) As a Source of Islamic Law in Contemporary Time. A Master’s Thesis, Ahmadu Bello University. 2004, p. 39.

256 Greiss, M. *Op. cit.* p. 98.

257 Dabbah, M. *Op. cit.*

258 Alwan, A, *A Lecture in Islamic Shari’ah, its Jurisprudence and Sources*. Cairo: Dar Asslalm Press. p. 54. 2007

259 *Ibid.*

260 Glenn, H. *Legal Traditions of the World*. Oxford: Oxford University Press, 2007, p. 201.

261 Bello, S., Hassan, R. APPLICATION OF ‘URF IN ISLAMIC AND CONVENTIONAL BANK, *Journal of Arts and Humanities (JAH)*. 2013. 2. 4.

262 Rahim, A. *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi’i and Hanabli School*. Lucaz: London. 1911, pp. 168.173. *Ibid.*

*Ijtihad* has played a significant role in the development of competition regulation that is seen from the Islamic point of view. This is because the sources of the *Quran* and *Sunnah* are very limited in this matter. Since early Islam, many different schools have emerged which benefited from the flexibility of Shari'ah through using different Islamic tools, especially the source of *Ijtihad*, in order to develop their thoughts and opinions on the different disputed matters in law.<sup>263</sup>

However, now there are four schools of thought whose major differences are referred to minor branches of Shari'ah and not the fundamental ideologies of faith. These schools are: the Maliki, Shafi'i, Hanbali and Hanafi schools, and it should be noted that they are all agreed on the primary source of Shari'ah law. These schools are known as "personal schools"<sup>264</sup> and considered equally orthodox.<sup>265</sup> The difference between these schools only arose in the areas of *Hadiths*' narrations, analogy methods, meaning of words, and certain principles of admissibility.<sup>266</sup> For the purpose of this study, it is important to mention that Shari'ah law includes many principles that are concerned with the economic sector, which includes: monopolies prohibition, economic sector freedom, the prohibition against abusing any right, etc.<sup>267</sup>

### 2.4.3.3 Shari'ah Perspectives on Competition Law

#### 2.4.3.3.1 Maslahah

*Maslahah* is harmonious with the *Maqasid* objectives in Shari'ah as they seeks to find a balance between private and public interests.<sup>268</sup> *Maslahah* could apply to either right of Allah or mankind aiming to protect both rights. It is known that the public interests aims to preserve law objective and thus, it is important to protect such to protect such interest.

It could be noticed that *Maslahah* is related to competition law and policy with the principle of price regulation or what is known as (*Tasi'ir*).<sup>269</sup> For example. The Ministry of Economy represented in the Consumer Protection Department prohibited merchandisers from selling rice and other products at prices that are higher than the ceiling.<sup>270</sup> The traders

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263 Philips, B. *The Evolution of Fiqh*. Riyadh: International Islamic Publishing House. 2000.

264 Each school has groups of followers designated to the leading juris consult

265 Shalabi, M. *Introductory in the Shari'ah Law*, Beirut: Dar-Al-Nahdah Al-Arabia. 1985, p. 209.

266 Ibid.

267 Mohammed, A. *The Aspects and Developments of the Shari'ah Law*, 2nd ed., Mecca: Organization of Islamic Word. 1994, pp. 170-178.

268 Kamali, M. *Principles of Islamic Jurisprudence*. 2nd ed. Kuala Lumpur: Ilmiah Publishers Sdn. Bhd. 1998. p. 267. Also See Zaidan, A. *Al-Wajiz fi Usul Fiqh*. Beirut: Muassasah Risalah. 1994. pp. 236-244.

269 Sabiq, S. *Fiqh Sunnah*. Vol.3. Beirut: Dar Fikr. 1995. pp. 117-118.

270 *Al Deberky*, S Consumer Protection Department recalls rice brand after price hike, *Gulf News*, [Online] 22nd Januray 2014.

were penalised with a fine of AED100,000.<sup>271</sup> The existence of such law would help protecting public interests and prevent inflation that is likely to harm them. Thus, *Maslahah* is very important as without having a law, inflation will be caused and traders will fix prices to the maximum profit ignoring public interest.

Article 5 of the UAE Competition law prohibits agreements that may affect prevent, limit or prejudice competition such as price fixing and limiting production, market sharing, and technical developments. It could be said that Article 5 has followed the same principle of *Maslahah*, which reveals the comprehensiveness of the Shari'ah law in commercial transactions. *Maslahah* and competition law implementation and enforcement are tandem. Thus, it could be said that competition law is encouraged by Shari'ah law.

#### 2.4.3.3.2 Sadd Al-Dhara'i

Literary *Sadd Al-Dhara'i* means blocking the means. In *Usul al Fiqh* it means blocking the means of evil<sup>272</sup> or to an evil dead.<sup>273</sup> It should be noted that there are several legal maxims regarding the principle of *Sadd Al-Dhara'i*. First, if any harm occurs then it should be redressed. Second, it doesn't matter how big is the harm, since a greater harm must be avoided then if an action resulted in a minor harm it should be avoided to. Third, general harm has the priority over specific harm. Forth, avoiding a harm is always prior to promoting an interest. Fifth, normal rules of legality are ignored in case of emergency and restore to unlawful acts are allowed.<sup>274</sup> Thus, it could be said that the reason of blocking means is to scrutinise the consequences of actions and what could lead to. If the consequences are leading to a harm and evil. Whereas, if the consequences are directed towards benefits, they are desirable.<sup>275</sup>

An example for *Sadd Al-Dhara'i* could be seen in the prohibition of monopoly by the Prophet Mohammad (Peace be upon him).<sup>276</sup> The Prophet in a hadith mentioned that Allah will curse anyone who monopolise others. Also, in another Hadith reported by Al-

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Available from: [http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/nationgeneral/2014/January/nationgeneral\\_January175.xml&section=nationgeneral](http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/nationgeneral/2014/January/nationgeneral_January175.xml&section=nationgeneral) [Accessed: 22 April 2014].

271 Ibid.

272 Abdul-Hannan, S. *Usul Al-Fiqh*. [Online] Available from: [http://www.2muslims.com/books/usul\\_al\\_fiqh.pdf](http://www.2muslims.com/books/usul_al_fiqh.pdf) [Accessed: 9 April 2014]. p.31.

273 Kamali, M. Op cit. p.311.

274 Zaidan, A. Op cit. 245-247.

275 Ibid.

276 Nawawi, R. *Islamic Law of Transactions*. Kuala Lumpur: CT Publications Sdn. Bhd. 1999. p.2. Also see: See also Sabiq, S. Op cit. pp. 119-120.

Tirmidhi, the Prophet stated that: anyone monopolises is not but wrongdoer.<sup>277</sup> Also, hoarding of a product (*Iktinaz*) is prohibited under Shari'ah law. Through hoarding, products and supplies are kept less than the demand to rice prices and maximise profits. In Hadith narrated by Ibn Majah the Prophet said that it's a crime to hoard grain in order to sell it at a higher price.<sup>278</sup>

By mean of comparison, Article 6 of the UAE competition law regulates the behaviour of undertakings and individuals who are in a dominant position that are abused through -for example- imposing unfair prices, Obliging a client not to deal with a competitive establishment, and The total or partial rejection to deal in accordance with the usual commercial conditions. It could be said that the principle of Sadd Al-Dhara'i justifies the importance of implementing competition law. Competition law is there to prevent any act that might harm the society. Any absence of such law that regulate the behaviour in community, including commercial deals and trades, will cause a great harm to the community. Thus, it could be said that Sad Al-Dhara'i is a great principle that competition law is in line with it.

#### **2.4.3.3 Su Isti'mal Al-Haq**

Under Shari'ah law *Su Isti'mal Al-Haq* means the prohibition of the exercise of rights that lead to harming others. Abusing of rights are prohibited and condemned in Islam. Because a trader will be in a position of monopoly causing damage to other traders. Consequently, it is against the principle of justice in Islam. However, it should be noted that exercising the rights itself is valid *per se*. it is only unlawful and prohibited if it caused harm to others.<sup>279</sup>

An example for *Su Isti'mal Al-Haq*, when Prophet discouraged his companions from meeting trader outside the city, so they don't buy their goods for unfairly low prices.<sup>280</sup> Such a sale is unlawful if the seller is not allowed to cancel the transaction in case he found he was treated unfairly knowing the real market price.<sup>281</sup> Thus, according to Shari'ah, the seller has the right to cancel the transaction when he arrives at the market place. This is to ensure fair commercial dealings. By contrasting with UAE competition law, Article 5 and

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277 Ibid. p.25.

278 Sabiq, S. Op cit. p. 119.

279 Ida Madieha Abdul Ghani. Some Thoughts on the Interface between Copyright and Competition Policy: The Malaysian Perspective. 2003 (2) *CLJ*, p.18.

280 Nawawi, R. Op cit.p.32. Also see: Al- Zuhaili, W. *Fiqh al-Islami Wa Adillatuhu*. Vol. IV. Kuala Lumpur: Dewan Bahasa dan Pustaka. 2002. p. 240.

281 Ibid.

6 provides the rules to on the restrictive agreements to avoid abusing of rights.

It could be noted that understanding and implementing the concept of *Su Isti'mal Al-Haq* will lead to economic fairness and justice. Competition promotes the concept of *Su Isti'mal Al-Haq* as competition law has already adopted and implemented such concept nowadays.

Based on the above, it could be said that Shari'ah views competition law as preferable and should be included in the administration of justice particularly, in this case, the economic and commercial felids. The principle of public interests supports this view, as well as blocking of the means of an evil deed. In addition, the concept of Shari'ah objectives and the concept of wrongful exercise of rights or abuse of rights are also in favour this view. In case of unfair competition, applying Shari'ah principle will lead to take a positive measure to avoid such conduct so no harm can be caused.

#### **2.4.3.4. Monopoly under Shari'ah law**

Competition scholars have generally observed competition law as barely linked with Shari'ah, which is why this concept has not been given sufficient consideration throughout the literature.<sup>282</sup> It could be said that, in Islamic history, the concept of competition law could be traced back to the seventh century. From the tenth to the thirteenth century, works of prominent Muslim scholars such as Al-Farabi, Ibn Rushd, Ibn Sina and many others, are considered to be solid proofs for the enormous influence on economic theory and the development field.<sup>283</sup> However, it was only in the twentieth century that some of the Islamic countries adopted competition law. This is because of the trade related matters between such countries and the Western countries, which adopted competition laws a long time ago, that inspired and made them realise the importance of implementing such laws among their legal systems.<sup>284</sup>

With regard to monopoly, this is prohibited in Islam, and the *Quran* clearly states this prohibition in Sura *Al-Hajj*, verse 25, when it says: "...and whoever inclines to evil actions therein or to do wrong, him We shall cause to taste a painful torment".<sup>285</sup> The previous verse was interpreted by many Muslim scholars, and one of them was Ibn Kathir,

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282 Dabbah, M. *Competition Law and Policy in the Middle East*. *Op. cit.* pp.18-19.

283 *Ibid.*

284 *Ibid.*

285 Khan, M., and Al-Hilali, M. *Interpretation of the Meaning of Noble Qur'an*. Riyadh: Darussalam. 1996. Surah Al-Hajj, verse. 25.

who interpreted it as the prevention of hoarding in Mecca.<sup>286</sup> Also, the Sunnah prohibits monopoly as the Prophet Mohammad says that whoever practises hoarding (monopolising) is considered to be a sinner.<sup>287</sup>

There have been several attempts to define monopoly by many Muslim scholars depending on each school's principles. As was indicated earlier, there are four existing schools of thought in Islamic jurisprudence: Maliki, Shafi'i, Hanafi and Hanbali. Each school has different interpretations and opinions. However, practically speaking these schools are not exclusive or limited to rely on, and account is given to "decrees of rulers, and in part on simple custom".<sup>288</sup> Scholars of the Maliki School have defined monopoly as goods hoarding to increase prices in order to increase the profit. However, according to this school, food hoarding is not an act of monopoly if the reason was just for eating.<sup>289</sup> Therefore, according to the Maliki scholars, Ihtikar<sup>290</sup> is monopolising different markets such as oil, cotton, food and other essential products to prevent "the society from gaining possession thereof."<sup>291</sup>

There are several definitions in the Hanafi School. Some scholars of the Hanafi School have defined Ihtikar (monopoly) as the act of withholding food to raise the prices and then sell it.<sup>292</sup> This is what Al-Robi's has pointed to, based on the principles of this school when he defined it as the act of food purchasing, either from the existing market or from neighbouring markets and hoarding it for forty days to raise the prices.<sup>293</sup>

According to the School of Shafi'i, monopoly is the practise of purchasing food (such as grain) at periods when there is a demand for it, and withholding it to sell it at higher prices in the future. The difference in this school's definition is that it included the intention to harm others, which was not the case in the other schools.<sup>294</sup>

The Hanbali School requires three elements to consider the existence of monopoly. According to Ibn Qudamah, these elements are: first, the purchase of the goods; second,

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286 Ibn Kathir, A. *Tafsir Ibn Kathir (Abridged)*, Riyadh: Darussalam, 2000. vol. 4, p. 529.

287 Al-Mundhiri, A. *The Translation of the Meanings of Summarized Sahih Muslim*. Riyadh: Darussalam, 2000. vol. 1. p. 480.

288 Hill, E. Comparative and historical study of Modern Middle Eastern Law. *American Journal of Comparative Law*. American Association of Comparative Law. 1977-1978. 26, p. 292.

289 Al-Homiri, M. *The Large Code*. Egypt: Al-Kiriah Publication. 1906. vol. 10, p. 122.

290A term which means monopoly in Arabic.

291 Zaki, L. H. *The Law on the Protection of Competition and the Prohibition of Monopoly*. Cairo: University of the Six of October. 2005/2006, pp. 35-36.

292 Ibid.

293 Al-Robi, R. *The Economic Dimension of Islamic Principle of Monopoly and the Opinion of Scholars*. Mecca: Umm Al-Qura University. 1991, p. 11.

294 Al-Hithami, S. *Tohfa Alminhaj Bisarah Almintaj*. Egypt: Dar-Alfiker. 1897. vol. 2. p. 120.

the goods must be important for consumers; third, the harm caused to other consumers or buyers due to the purchase of the goods.<sup>295</sup>

From the above, it is notable that there are common conditions between the different definitions of the four schools in order to consider the existence of monopoly under Shari'ah. Monopoly only occurs if trading was the purpose of holding a good and withholding it created a shortage until the price rose. This means that, in case a person holds a good and restrains others in order to fulfil family needs, this is not considered a prohibited monopoly in Islamic law. One of the conditions is the harm caused to consumers should be due to the practice of increasing prices. Moreover, the necessity of the goods for consumers without having any other alternatives in terms of prices and quality is another element.<sup>296</sup>

Monopoly under Shari'ah is not only restricted to food, as many other scholars believe that it is widely applicable to different services and goods, not just food. According to El-Din, monopoly is not limited to food because if that was the case then monopoly would be permitted in other essentials, such as medicines, fuel, and clothes. This is a clear contradiction with the objectives of Shari'ah, which are based on generalised principles.<sup>297</sup> The reason behind prohibiting food monopoly is the fact that most monopolies at the early stages of Islam were food related as it was a commodity that was used on a daily basis. Each monopoly that may harm people and tend to increase prices "is faithless". Thus, monopoly's prevention includes all the other goods and services that are essential for living.<sup>298</sup>

It should be mentioned that, even though monopoly is prohibited in Shari'ah law, the UAE's competition law does not prohibit all kinds of monopoly. The UAE Government allows certain market players to operate in the market of certain goods and services (practice monopoly) in two cases. Firstly, the competition law excludes the Federal Government and any Emirates' Government from the application of this law. Generally, certain sectors are controlled through government monopoly, such as public transportation, postal services, civil aviation, oil and gas, and telecommunications, which is called a state monopoly. Shari'ah law allows the government as a public sector to regulate the necessary

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295 Ibn-Qudamah, A. *Al-Mugni*. Egypt: Cairo Library. 1970. vol. 4. p. 244.

296 Al-Robi, R. *Op. cit.* p. 14.

297 El-Din, M. M. S. *Al-Ihtikar fi Al-Shari'ah Al-Islamia* (Monopoly in Islamic Shari'ah). Beirut: International Institution for Studies and Publication. 1997, pp. 35, 93.

298 Ibid. pp. 130-134, 137.

services for social purposes: however, Shari'ah does not allow the abuse of state monopoly. Secondly, the Commercial Agency law (1981)<sup>299</sup> allows a legal monopoly in certain types of business. For instance: car dealership is one of the areas where legal monopoly exists, which in the view of Shari'ah is prohibited and considered illegal.

As stated from the outset and from the above, it can be said that Shari'ah law has no influence on the UAE competition law at the current moment and does not prevent monopoly practices in some private sectors and does not prohibit the Government (Federal and local) from abusing control of the public sector services. Islamic principles are not ingrained in all sectors of the UAE civil system. Shari'ah law is limited only to personal and family affairs (family law and inheritance issues), and to a certain extent in criminal affairs. However, further attention will be given later in this chapter to the UAE's competition law, illustrating the previous points.

#### **2.4.3.5 Market Intervention, prevention of damage, control of prices under Islamic law**

The prohibition of causing harm to others is a major general principle that is applied in all different types of law, such as commercial, criminal, civil and family law. Hence, unfair competition certainly causes harm to the market and its players. The same principle of causing any sort of harm to others is prohibited in Shari'ah, as Prophet Muhammad stresses that no one shall harm himself nor cause harm to other people.

It should be mentioned that, although the UAE competition law includes provisions to prevent anti-competitive practices that might cause market damage, such as price fixing, the enforcement mechanism is rather ambiguous.

It was only during the 1950s that the debate over market intervention by governments and control of prices developed within the literature on economics and Islamic law. As a record from *Sunnah*, Prophet Muhammad refused a request from a person to fix prices in the market. In another case, the Prophet also refused a similar request saying that only Allah (God) increases or decreases prices, and "I do not wish to face Allah with a burden of injustice."<sup>300</sup>

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<sup>299</sup> Federal Law 18/1981 Concerning the Regulation of the Commercial Agencies. This law was amended several times; Federal Law 14/1988; Federal Law 13/2006; and final Federal Law 2/2010.

<sup>300</sup> Hadith reported by Anas Bin Malik.

Another piece of evidence from Shari'ah is the report by Imam Malik on Caliph Umar. According to the report, the Caliph passed by Hatib bin Balta'ah, who was selling dried grapes, and asked him to raise the price or else to leave the market. However, Imam Sahfi'i reported that this was not the complete story and the Caliph went back to Hatib and told him to sell the product at whatever price he liked. He explained that when he made that decision it was only a personal concern for people's welfare and it was not a verdict or an expert's opinion.

There has been a great debate on the topic of market intervention between the different Islamic schools. According to the Hanbali School, government intervention in the market's prices should not be permitted. This view is based on the Hadith reported by Anas, as they argue that if the Prophet allowed the change of prices, then it would be legal to do so. However, according to this view, the Prophet pronounced that price control was equal to injustice, which is inherently prohibited by Shari'ah law.<sup>301</sup> In addition, the scholars of this school believe that price control would lead prices to increase and imports to decrease, which will lead to hoarding and negatively affecting society.<sup>302</sup>

However, the majority of Islamic schools are of the view that market intervention should be permitted to a certain limit. The Maliki and Hanafi scholars believe that state intervention should not be restricted. It is only permissible when it is detrimental to society's interest. The majority of Islamic schools hold the view that the previous Hadith reported by Anas is not strong enough to refuse market intervention. The reason for this is when people asked the Prophet to raise market prices, there was no evidence that it was due to the merchants' interference. The second reason is that the Islamic law prohibits price increase with no reason because this will lead to injustice, which is prohibited. With regard to the evidence of the Caliph Umar, the majority of Islamic schools points to the act of the Caliph when he returned to Hatib and allowed him to sell at any price he liked.<sup>303</sup>

It should be noted that the majority of Islamic scholars allowed state intervention and control of prices in the market to a certain limit due to several reasons. First, Shari'ah law took into account the interests of individuals, thus the interests of the whole society should come first. This means that state intervention and price control should be acceptable when

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301 Bashar, M. L. A. Price Control in an Islamic Economy. *Islamic Economics*. 1997. 9, pp. 31-32

302 Al-Maqdisi, I. Q. *Al-Sharh al kabir*, Printed on the Margin of al Mughni by Ibn Qudamah. Egypt: Matba'a al Mansur. 4. 1374, pp. 44-45, as cited by Bashar. *Op. cit.*

303 Ibrahim, H. *The Shari'ah Position towards Monopoly: Comparative Study*. Alexandria: Knowledge Institute. 2011, pp. 107-112.

the interest of a whole group is a priority, and at the same time there is no harm taking place. Second, the increase in prices at the time of the Prophet was not due to the acts of merchants, such as hoarding, but was rather due to other reasons, such as the lack of supplies.<sup>304</sup>

#### **2.4.3.6 Exclusive agreements in Shari'ah**

According to Ibn Taimiah, the behaviour of a group of sellers who monopolise and sell a particular product to buyers or provide products to a particular group of buyers is considered unfair in Shari'ah law. This is because such a product is only sold by a particular seller/s and not allowing other sellers to sell such types of products directly to consumers.<sup>305</sup> Such arrangements are known as 'exclusive agreements' and are prohibited under Article 5(1)(e) of the UAE competition law, because they constitute limiting competition which may result in eliminating other competitors. Also, such agreements are prohibited under Article 6(1)(d), (e) and (f) because they constitute abuse of the dominant position in the market which may limit or prevent competition. This shows that some of the Islamic law principles are used in the UAE's competition law.

#### **2.4.3.7 Precautionary measures**

A principle known as 'market price' is applied under Shari'ah law, which prohibits any conduct of sales that lead to unfair competition. For example, receiving products outside the market before the arrival of the seller is prohibited<sup>306</sup> as the Prophet clearly stated that it is not allowed to buy goods before the arrival of the seller at the market place as the seller has the authority to approve or decline the sale after his arrival.<sup>307</sup>

Also, the Sale by a resident on behalf of a nomad is prohibited under Shari'ah law.<sup>308</sup> The Prophet prohibited people from going to meet the caravan on the way to buy their products without letting them know the prices of the market. He said a town dweller should not sell the good of a desert dweller on his behalf. Because in that case the town dweller will tend to monopolise the market and sell the products in a higher prices. The purpose of

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304 Ibid. p. 113.

305 Ibn Taimiah, A. *The accountability in Islam*. Cairo: Al-Mtbaah Al-Salafiah, 1980, p. 13.

306 Al- Jawani, M. *The Commerce Principles in the Islamic Economic*, Beirut: Dar-Al-Kotob Al- Almiah. 2005. pp. 401–405.

307 Al-Mundhiri, A. *The Translation of the Meanings of Summarized Sahih Muslim (Summarised)*, Riyadh: Darussalam, 2000. (1). p. 480.

308 Al- Jawani, M. *The Commerce Principles in the Islamic Economic*, Beirut: Dar-Al-Kotob Al- Almiah. 2005. 401–405.

such precautionary is to prevent any monopolistic behaviour that might exist.<sup>309</sup>

#### **2.4.3.8 Enforcement under Shari'ah Law (Hisba)**

The head of the Islamic State appoints people to carry out the responsibility of supervising and enforcing commercial rules of the Shari'ah law in the market. It gives the responsibility of enjoying what is right in case of neglecting it and what avoid and forbid what is wrong in case of engaging in it. The purpose is to protect people's faith and the society from deviance and guarantee the welfare of people.

*Hisba* has emerged and developed from the time of Prophet Mohammed (PBUH). However, there is no existence for it within the current competition law or policy in the UAE unlike the Saudi Arabia as the Commission for the Promotion of Virtue and Prevention of Vice' does exist. It should be noted that there are four principle commercial tasks for *Hisba* as following:

*Hisba* forbids unlawful trading in the market; it control the prices in the market; it prevents commercial fraud and cheating in the commercial activities; and it prohibits monopoly.<sup>310</sup>

The current UAE commercial law grants the Ministry of Economy the power to enforce the provisions of the law that allows monitoring and control of the commercial activities and transactions in the market. It should be noted that the *Hisba* principles and functioning is as the same that of the functions of the Ministry of Economy.

#### **2.4.3.9 Shari'ah Law punishment**

Monopoly is prohibited under Shari'ah law and monopolisers are punished with one or more punishments. Shari'ah gives the head of the Islamic State the discretionary right to punish monopolisers by fine, jail, whipping, and confiscation of monopolised goods.<sup>311</sup>

The UAE competition law punishes the anti-competitive practices that are provided in Articles 16-23. The maximum fine that is provided for in the law is 5 million Dirhams. However, there is no imprisonment punishment under the law. The efficiency of preventing violators under the UAE competition law would be enhanced in the case of implementing

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309 Khan, M. *Summarized Sahih Al-Bukhari*, Riyadh: Darussalam, 1996p. 480

310 Al-Driwesh, A., (1989), *The Rules of The Market in The Islam*, Riyadh: Dar Alam Alkotob, pp. 464-469.

311 Abd Alsamee, A. *The Monopoly in the Balance of Shari'ah Law*. Alexandria: Dar- Al Jameah Al Jaddedah. 2007 pp. 106-107.

an imprisonment sanction, as a criminal offence, as well as being compatible with Shari'ah law.<sup>312</sup> The sanctions under the UAE competition law will be illustrated later in this chapter.

#### **2.4.3.8 Critical Analysis**

From the above, it is obvious that there are similarities and differences between the values and origins of Shari'ah and the Ordoliberal method. These differences and similarities can be referred to many reasons. First, on one hand it will be noticed that Shari's is indeed a law. On the other hand, Ordoliberalism is not a law, but merely a method that had an influence on the enactment of a law (the EU competition law). Some scholars might arise an argument that Shari'ah is not an ordinary law, but a religious law that is not codified and deals with divine matters. However, Badr argues that Shari'ah should be considered like an ordinary law. Although Shari'ah and Ordoliberal theory emerged due to the anti-competitive conduct that markets were experiencing, the reason and justification behind their emergence is not the same. In regard to Shari'ah, it emerged based on day to day issues giving a divine message on what is desired from what is condemned or prohibited. Unlike the Ordoliberal thought, the emergence of Shari'ah was not due to resolving a specific matter. The Ordoliberal thought emerged in Germany after the market distortion aiming to change a specific situation; specifically, protecting competition from market intervention, cartels and economic power.

The second reason of the similarities and differences between Shari'ah and the Ordoliberal approach is the objective of each of them. Shari'ah prohibits and condemns any injustice in society. Thus, Shari'ah's core object is to protect society from any harm or injustice that may occur from monopolistic behaviour. On the other hand, Ordoliberal thought's objective is to protect the process of competition and accomplish social justice and security. Thus, it could be said that the objectives of competition protection under both approaches are similar and overlap.

Third, with regard to market intervention, supporters of the Ordoliberal approach oppose any market intervention in the process of competition. They argue that the market is able to maintain itself from any distortion and approximate its outcome if the market is flawlessly competitive. On the other hand, the views of Islamic jurisprudence, the Shafi'i

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312 Ibid.

and Hanbali on market intervention could be seen as similar to the Ordoliberal approach, since the two Islamic views prohibit any market intervention with regard to price control. However, their view is not the prevailing model in Shari'ah. According to the views of the Maliki and Hanafi schools, nothing should restrict market intervention and it is only acceptable when it is detrimental to society's interest. Under Shari'ah, market intervention and the control of prices is not permitted all the time. It is only permitted to a certain extent where the interest of a whole group of society is a priority and no harm takes place for any individual in that society.

Based on the above, market intervention becomes inevitable if a company implies a pricing structure that is high and which may harm society. It should be noted that the reasons which justify non-intervention in the Shari'ah and Ordoliberalism approaches differ. The supporters of the Ordoliberalism approach claim that market intervention by governments often leads to market distortion since the well-established players influence the government. On the other hand, on the basis of fairness rationalisation, Shari'ah is likely to prevent market intervention by stressing the maintenance of equality and justice.

Fourth, the influence of both approaches on the enactment of competition law is another reason for the similarities and differences. The aim of the Ordoliberalism approach was to protect the process of competition by implementing competition regulation and applying a social market economy (which was the case in Germany) in order to resolve market distortion. This approach has not only stayed in Germany, it has been expanded to the course of European unification. For instance Paul-Henri Spaak was the head of the Commission which drafted a blueprint for the Treaty of Rome. That was the basis of the creation of the European Economic Community in 1958. The blueprint's objectives coincided with Ordoliberalism's objectives, such as raising stability, improving living standards and establishing economic activities. However, it should be noted that the EU Courts and Commission are not obliged to follow this approach in relation to the adoption of competition law and they are free to adopt whatever they deem appropriate. On the other hand, the principles of Shari'ah have, at least to a limited degree, been included within the UAE's legal system. However, the competition law has not been influenced by Shari'ah law. It is only limited to the personal and family level and to a certain extent in criminal affairs. When it comes to the commercial field, it is noticeable that there is no Shari'ah law but few Shari'ah principles applicable. Clearly, if Shari'ah law was applicable the banking system, for example, would follow Shari'ah rules, unlike the situation that prevails.

It should be mentioned that the Ordoliberalism method is not codified in the EU and, hence, it is not obligatory for EU Courts or the Commission to follow the model. On the contrary, Shari'ah has a constitutional underpinning under the UAE system.<sup>313</sup> Although Article 7 seems to provide a desire for the government to comply with the Islamic principles within its legal system, there is no direct evidence that the Courts or the Competition Regulation Committee are obliged to follow Islamic principles in their approach.

Fifth, to what extent are the EU and UAE legal systems obliged to follow their origins? By moving towards an economic-based approach, the EU Commission seems to support the effects-based approach. It should be noted that this approach is contrary to the Ordoliberalism approach and some of the Islamic jurisprudence in regards to price control. The effects-based approach aims for consumer welfare *per se*, unlike the Ordoliberalism approach whose objective is the prevention of market intervention and the protection of individual freedoms. The difference between the two approaches is that the Ordoliberalism method requires a minimum degree of market intervention, which is contrary to effects-based analysis (that is more flexible).

On the other hand, the UAE government does not agree with the Shafi'i and Hanbali views regarding pricing control restriction. However, the UAE adopted the interventionist approach that reflects its Islamic origins as long as the principle of no harm is given a greater consideration when intervening in the market. Accordingly, it is noticeable that, unlike the Ordoliberalism approach, Shari'ah coincides more with the effects-based approach.

By departing from the Ordoliberalism approach and its origins, the EU Commission has adopted a less restrictive method by moving towards a more-economic-based approach. Thus, it is very important to mention that the EU competition law has inspired the UAE government to adopt an effects-based approach which is more or less the same approach as that of Shari'ah. The next section will illustrate the scope of competition law in the EU and the UAE.

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<sup>313</sup> Article 7 of the UAE Constitution provides that "Islam is the official religion of the federation and Islamic Shari'ah is a main source of legislation therein and the official language of the federation is Arabic".

## 2.5 Scope of Competition Law

After illustrating the origins and values of competition law in the EU and the UAE and discussing the similarities and differences between them, the next section will demonstrate the scope of competition law both in the EU and the UAE. Under this section the similarities and differences will be discussed as well.

### 2.5.1 Scope of the EU Competition Law

As the foregoing discussion suggests, the term “scope” means boundaries within which a particular phenomenon manifests itself. In the context of EU competition law, the concept of boundaries may have a different meaning. Thus, some experts in the field of EU competition law claim that this law has wide territorial scope, frequently reaching outside the borders of the EU and European Economic Area (EEA).<sup>314</sup> In this sense, the scope of the EU competition law should be understood as the geographical boundaries within which this law has its effects. It is possible to agree with the arguments of Audia et al. that the EU competition law often has an effect on other countries which are not member states of the EU, but constitute the EEA. Thus, according to Article 53 of the EEA Agreement, the EU competition law may be regarded as a law which affects not only EU member states, but also the EEA and the European Free Trade Association (EFTA states) such as Iceland, Liechtenstein and Norway.<sup>315</sup>

*Ahlstrom Osakeyhtiö and others v Commission as known by (the Wood Pulp case)* was regarded as “a statement on the first importance on the scope of the EC competition law”<sup>316</sup>, especially over the non-EEC members. In this case, the Commission reached a decision that the applicants had violated European competition law and imposed fines on them.<sup>317</sup> The ECJ validated the fines imposed by the Commission in *Wood Pulp II* on the wood pulp producers who were outside the EEC jurisdiction.<sup>318</sup> The court reached the conclusion that it did not matter where the agreement of anti-competitive conduct was

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314 Audia, B. M., Tamussino, P. & Hull, D W. *Recent developments in European competition law*. ACCA Docket. June/August 2001. Available from: <http://www.cov.com/files/Publication/2de6409c-4e5c-4c8a-8a55-59359b04d4e9/Presentation/PublicationAttachment/4d2f72c7-00b0-4474-9a5f-65bb7e069c37/oid6006.pdf> [Accessed: 9 March 2013].

315 *Agreement on the European Economic Area*. 1994. Available from: <http://www.efta.int/~media/Documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> [Accessed: 9 March 2013].

316 Vollmer, A. N. & Sandage, J. B. Wood Pulp Case: Casenote. *International Lawyer (ABA)*, 1989. 23, 3, pp. 721-724.

317 See *Wood Pulp*, 27 O. J. Eula. Comm. (No. L 85/1) (1984), [1982-85 Transfer Binder] Common Mkt. Rep. (CCH) 10,654 (1985).

318 Gubner, S. T. Wood Pulp - The European Economic Community and Effects Doctrine Jurisdiction: The Community's New Weapon: [notes]. *Transnational Lawyer*. 1990. 3. 2. pp. 759-800.

formed. It only mattered where the anti-competitive conduct occurred.<sup>319</sup> Thus, with this significant case, any firm will be subject to the European competition law in case of any violation no matter where the agreements were formed as long the effect is within the EU member states.

Apart from the territorial scope, the EU law has boundaries in terms of subjects. In other words, Audia et al. correctly state that the rules of EU competition law aim at regulating competition, or, in other words, the struggle for commercial advantage. In this connection, many small business entities fall outside the scope of this law as they are not capable of showing a substantial struggle for commercial advantage or their market shares are negligible.<sup>320</sup> Hence, it follows that the EU competition law regulates only those deals which involve commercial competition.

Aside from the above, the scope of the EU competition law may also be analysed through the scope of its sources. Thus, notwithstanding the fact that the boundaries of Article 101 of the TFEU are not definitely clear, there is an opinion that the aforesaid Article concerns only the issues of consumer welfare.<sup>321</sup> From the contrasting point of view, Townley contends that the EU competition law in general, and Article 101 of the TFEU in particular, takes into account the issues of public policy, such as environment and public health, as well.<sup>322</sup>

However, the EU competition law consists of three broad branches: cartel policy, merger control and state aid.<sup>323</sup> Such categorisation was laid down by the Treaty of Rome which addressed competition issues in the context of cartel/anti-trust, mergers and acquisitions and state aid. Each branch addresses the scope of issues associated with artificial distortion of the internal market.<sup>324</sup> Since the Treaty of Rome, the EU competition law has evolved in a more or less structured area: it has gained profile and stature.<sup>325</sup>

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319 Ibid. p. 762.

320 Audia, Tamussino, & Hull, *Op. Cit.*

321 Communication from the Commission on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector C 82/20. 2010. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:082:0020:0023:EN:PDF> [Accessed: 9 March 2013].

322 Townley, C. *Article 81 EC and Public Policy*. Oxford: Hart Publishing. 2009.

323 Bannerman, E. *The future of EU competition policy*. London: Centre for European Reform. 2002, p. 6.

324 Ibid.

325 Ibid.

### **2.5.1.1 Cartel Policy**

#### **2.5.1.1.1 Prohibition of Agreements That May Harm Competition**

Article 101 of the TFEU (Previously Article 81 of the Treaty of Rome) prohibits agreements that distort competition and trade between member-states and, thus, harm consumer interests. The prohibition covers both horizontal agreements between companies operating in the same industry and vertical agreements between firms in the same supply chain. At this point, it is important to give due consideration to the concepts of horizontal and vertical agreements.

#### **2.5.1.1.2 Horizontal Agreements**

Horizontal agreements are agreements between firms at the same level. For instance, an agreement between two manufacturers is a horizontal agreement. Horizontal agreements may take many forms. Thus, examples of horizontal agreements are joint development and research agreements and joint production agreements.<sup>326</sup> Horizontal agreements are not illegal *per se*, but only if the aim was the distortion of competition in the internal market.<sup>327</sup> Examples of illegal horizontal agreements are agreements providing for price fixing.

#### **2.5.1.1.3 Vertical Agreements**

Vertical agreements are agreements between companies at different levels of the supply chain. For instance, agreements between a wholesaler and a producer and between a retailer and a wholesaler are vertical agreements.<sup>328</sup> Vertical agreements are generally regarded as less harmful to competition.<sup>329</sup> As well as horizontal agreements, vertical agreements are not illegal *per se*. The European Commission points out that vertical agreements which define the price and quantity of goods do not usually restrict or harm competition.<sup>330</sup> Vertical agreements become illegal only when they distort competition in the internal market. Examples of illegal vertical agreements are agreements that impose certain restraints on the buyer or on the supplier, when these distort competition.<sup>331</sup> For instance, if the agreement obliges the buyer to purchase certain goods only from the

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326 Slorach J. S. & Ellis, J. G. *Business Law 2007-2008*. 15th ed. Oxford: Oxford University Press. 2007, p. 250.

327 Ibid.

328 Black, O. *Agreements: A Philosophical and Legal Study*. Cambridge: Cambridge University Press. 2012, p. 300.

329 Ibid.

330 European Commission. Guidelines on vertical restraints. [Online] 2010. Available

from: [http://europa.eu/legislation\\_summaries/competition/firms/cc0007\\_en.htm](http://europa.eu/legislation_summaries/competition/firms/cc0007_en.htm) [Accessed: 14 March 2013].

331 Ibid.

supplier, the agreement can be held as aiming to distort competition.

However, there is a clear definition of vertical agreement under the Commission Regulation 30/2010. According to Article 1 (b), vertical agreement could be defined as a concerted practice or arrangement between two or more parties at different levels of the supply chain “and relating to the conditions under which the parties may purchase, sell or resell certain goods or services”.<sup>332</sup>

#### **2.5.1.1.4 Block Exemptions**

As has been mentioned above, not all horizontal and vertical agreements are illegal: their legality is assessed according to the TFEU and other EU instruments. At the same time, the Commission can establish so-called block exemptions for some types of agreements.<sup>333</sup> Thus, the anti-cartel rules do not apply to the exclusive relationship between car dealers and their official distributors.<sup>334</sup>

#### **2.5.1.2 Mergers Control**

##### **2.5.1.2.1 The Link between Abuse of Dominant Position and Merger Control**

Merger control is intrinsically tied to the threat of abuse of dominant position. Dominant position is not illegal *per se*. However, the abuse of a dominant position is illegal. Abuse of dominant position can take various forms: exclusive distribution and predatory pricing that drive the competitors out of the market. Predatory pricing can be defined as “a reduction of price in the short run so as to drive competing firms out of the market or to discourage entry of new firms.”<sup>335</sup> The simple reduction of the price is not predatory pricing. Predatory pricing occurs when prices are reduced to an unreasonable or unprofitable level with the expectation of recovering the loss when the competitors leave the market. One of the simplest ways to maintain a dominant position in the market is merging with or acquiring the competitor. Because mergers may potentially give rise to the abuse of dominant position, there is extensive merger control.<sup>336</sup>

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332 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

333 Bannerman, E. *Op. cit.* p. 7.

334 *Ibid.*

335 Joskow, Paul L. and Klevorick, Alvin K.. A Framework for Analyzing Predatory Pricing Policy. *Yale Law Journal* [Online] 1979. 89. 2. pp. 213- 270. Available from: [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2334&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2334&context=fss_papers) [Accessed: 20 March 2013].

336 *Ibid.*

#### **2.5.1.2.2 Mergers that Benefit Consumers**

As mentioned, mergers are not illegal *per se*. They are illegal only when they may distort competition. In some cases, mergers can even be beneficial to consumers. Indeed, the merger of companies may result in more cost-effective production and the reduction of prices for consumers.<sup>337</sup> Another example: two-medium sized firms may merge so as to become an equal competitor to a large firm, and thus to increase competition.

#### **2.5.1.2.3 How Merger Control is maintained**

In order to maintain merger control the Commission has adopted the so-called Merger Regulation. The resolution will be discussed in detail in Chapter Five. At this point, suffice to say that the resolution establishes a threshold for the turnover of companies. If the merger exceeds this threshold the merger is subject to review by the Commission. The merger review is conducted in clearly defined stages.<sup>338</sup> During the first stage the Commission experts identify whether a given merger has competition implications. If there are serious concerns about the detrimental impact of a merger, the Commission launches the second stage, which is a four month investigation.<sup>339</sup> At this stage, the experts scrutinise the potential impact on relevant markets and discuss the options available to resolve the situation.<sup>340</sup> During the investigation stage, the Commission and merging parties may agree on certain remedies to compensate for the possible detrimental effect of the merger. Apart from this official review, there can also be informal consultations between merging parties and the Commission before the formal notification.<sup>341</sup>

#### **2.5.1.2.4 Statistics on Merger Review**

In the period between 21 September 1990 and 28 February 2013, the Commission received 5,159 notifications about mergers.<sup>342</sup> In 2012, out of 283 notifications, four were withdrawn at the first stage and one at the second stage. In the same year, 254 notifications were found to be compatible with the Merger Regulation.<sup>343</sup> In 2012, only one merger was prohibited by the Commission: the merger between Deutsche Börse and NYSE

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337 Bannerman, E. *Op. cit.* p. 9.

338 *Ibid.*

339 *Ibid.*

340 *Ibid.*

341 *Ibid.*

342 European Commission. Merger Statistics. [Online] 2013. Available from: <http://ec.europa.eu/competition/mergers/statistics.pdf> [Accessed: 2 April 2013].

343 *Ibid.*

Euronext.<sup>344</sup>

### **2.5.1.2.5 Organisational Issues in Merger Review**

The statistics suggest that the Commission is quite overloaded with merger notifications. There are concerns that at some point the Commission's merger review workload may become unmanageable.<sup>345</sup> Merger review is a knowledge-intensive and time-consuming process. In other words, it requires expertise and time.<sup>346</sup> While conducting the merger review, the experts apply complicated economic models in order to assess whether a merger may distort competition. However, even such a knowledge-based approach is not able to provide 100 per cent accurate forecasts. The results of the assessment are always speculative. For this reason, negotiations regarding remedies can be difficult: the company may take a diametrically opposite view in relation to the Commission's findings.<sup>347</sup> In a word, the organisation process of merger review is quite complex.

### **2.5.1.3 State Aid Control**

#### **2.5.1.3.1 The Concept of State Aid**

The concept of state aid is quite old. In medieval times, kings and queens subsidised their subjects or the subjects of foreign kingdoms in order to achieve their political and geopolitical goals. Monarchs also subsidised the projects they were interested in. For instance, the Spanish monarchs, Ferdinand and Isabella, subsidised Columbus so as to enable him to reach new lands and enlarge Spanish territories. In the pre-industrial and industrial eras the concept of state aid or subsidies became more attached to the idea of the welfare of the state. At this stage, many European states acknowledged the importance of promoting welfare states. The industrial revolution was marked not only by the rapid developments in manufacturing, but also by tensions between workers and business owners. Many existing economic and social rights were claimed by workers in the era of the Industrial Revolution. In this period, subsidies were mainly confined to social needs: education, medical care and so on. However, another pattern of state aid was helping strategically important enterprises to cope with financial difficulties and not distort trade

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344 European Commission. Mergers: Commission blocks proposed merger between Deutsche Börse and NYSE Euronext. [Online] 2012. Available from: [http://europa.eu/rapid/press-release\\_IP-12-94\\_en.htm](http://europa.eu/rapid/press-release_IP-12-94_en.htm) [Accessed: 18 March 2013].

345 Bannerman, E. *Op. cit.* p. 10.

346 *Ibid.*

347 *Ibid.*

and competition and have fair competition.<sup>348</sup> It soon became apparent that state aid might distort competition.<sup>349</sup> Indeed, it is very difficult not to discriminate between enterprises. To put it simply, why are some enterprises entitled to receive state aid, while others are not? In other words, in some situations state aid may represent an unfair competitive advantage.

### **2.5.1.3.2 Evolution of State Aid Control in the European Union**

#### **1. Treaty of Paris of 1951 and Treaty of Rome 1957**

The first Community-wide state aid provisions were set forth in the Treaty of Paris. Article 4 of the Treaty stipulated that subsidies or aid granted by member-states are incompatible with a common market of coal and steel, and thus should be abolished and prohibited.<sup>350</sup> Article 54 proclaimed that the High Authority of the Community had the power to impose fines on firms who received state aid.<sup>351</sup>

Similar provisions reappeared in the Treaty of Rome. However, these provisions were not confined to the coal and steel industry but extended to almost all, with a few exceptions, the industries of the European Economic Community (EEC). The Commission obtained powers similar to those of the High Authority of the Coal and Steel Community.<sup>352</sup> However, for a long period state aid control was a low-ranking priority. In the period between 1958 and 1968 the Commission issued only three final decisions under the state aid proceedings as it prescribed by the Treaty of Rome.<sup>353</sup>

#### **2. Activation of State Aid Control**

The activation of state aid control coincided with the completion of the customs union in 1968.<sup>354</sup> The first significant case which was prosecuted by the Commission was the case of preferential rediscount rates granted by France to steel exporters in intra-European trade.<sup>355</sup> The Court of Justice of the European Union (CJEU) – now the European Court of

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348 Rydelski, M. S. *The EC State Aid Regime: Distortive Effects of State Aid on Competition Trade*. Cambridge: Camron May Ltd. 2006, p. 23.

349 Vickers, J. State aid and distortion of competition. *Office of Fair Trading*. [Online] 2005, p. 2. Available from [http://www.offt.gov.uk/shared\\_offt/speeches/spe0605.pdf](http://www.offt.gov.uk/shared_offt/speeches/spe0605.pdf) [Accessed: 22 June 2013]

350 Thomas, Kenneth P. *Competing for capital: Europe and North America in a global era*. Washington: Georgetown University Press, 2000, p. 87.

351 Ibid.

352 Ibid.

353 Ibid.

354 Ibid.

355 Commission of the European Communities v French Republic [1969] ECR 523.

Justice (ECJ) - ruled that the grant of such rediscount rates was prohibited state aid.<sup>356</sup> In the course of time, state aid control became more and more tight. The times when state aid was considered a low-ranking priority were left behind. At the same time the forms of state aid became increasingly sophisticated and complicated. Thus, in the 1990s one of the major issues in state aid control was whether outward investments constituted state aid.<sup>357</sup>

### **3. Modern Approach to State Aid**

The EU competition law does not ban all forms of state aid. Thus, the Commission may allow the state aid designed to support certain public policy objectives.<sup>358</sup> For instance, the Commission may uphold the state aid for companies located in the poorest regions of the EU so as to support industrial development. Another form of state aid which can be permissible is the support for small and medium-size businesses. Furthermore, in some cases, the Commission may allow state aid in support of inward investments. At the same time, one should bear in mind that all the exceptions are regulated in a very detailed way.<sup>359</sup>

#### **2.5.2 Scope of the UAE Competition Law**

Article 2 of the UAE Federal Law No. 4 of 2012 states that this piece of legislation is meant to protect and enhance competition in the UAE market.<sup>360</sup> Further, the law is aimed at fighting monopolistic practices in the country by creating an environment whereby efficiency and competitiveness can be relied upon to safeguard consumer interests and economic freedoms. Additionally, the law bans anti-competitive behaviour such as restrictive agreements, abuse of dominant positions and unfair economic concentration activities among other activities that may hinder competition in the UAE.

The competition law affects all commercial entities with operations in the UAE.<sup>361</sup> Additionally, the law not only covers entities' operations which are located in the UAE, but also any operation that is carried out by any entity that is located outside the country which is likely to have an impact on competition in the UAE. This includes companies or entities that hold intellectual property rights in or outside the UAE. Article 4 of the UAE Federal Competition Law exempts certain enterprises from the provisions of this law.

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356 Ibid.

357 Thomas, Kenneth P. *Op. cit.* p. 92.

358 Bannerman, E. *Op. cit.* p. 13.

359 Ibid.

360 Thomson Reuters, *Federal Law No. (4) of 2012 Concerning Regulating Competition*. New York: Author. 2012, p. 2.

361 Jones Day. *UAE Competition Law: A New Beginning*. Washington D.C: Author, 2013, p .1.

According to Article 4 (1), these include sectors such as telecommunications, finance, petroleum and gas, the pharmaceutical industry, transport (land, sea and air), sanitation and the waste management sectors.<sup>362</sup> These enterprises are largely under the control of both the federal government and the administrations of various emirates' governments. The law authorises the Cabinet to add new activities or sector/s or remove any existing sector/s from the exclusion. Further, according to the law, certain small and medium enterprises (SMEs) are exempted from the provisions of this law. Article 4 (3) provides that the Cabinet can exempt small and medium enterprises under certain conditions.<sup>363</sup> The actual definition of small and medium enterprises to be excluded from this law remains unclear as there are many different definitions within the different sectors. However, the Ministry of Economy is about to finalise the new SME law which includes a clear definition for SMEs.<sup>364</sup> In addition, Article 4 (2) of the law exempts the Federal or local governments' activities and actions of enterprises upon the Federal or any local government's authorisation or resolution or under the supervision of any of them, including the activities of the enterprises owned or controlled by the Federal or local governments according to the Cabinet's guidelines.

The extent to which the aforementioned state-owned enterprises are to be exempted should be well articulated, otherwise there is the likelihood of an uproar from private enterprises if there appear to be elements of undue favouritism. Private establishments can, however, find solace in the fact that the sectors excluded from the application of the UAE competition law are governed by other regulatory regimes specifically designed for them.<sup>365</sup>

### **2.5.2.1 Cartel Policy**

Article 5 of the UAE Federal Competition Law is quite elaborate on what constitutes Restrictive Agreements. The government of the UAE recognises that cartels hide under these agreements. This article prohibits the making of agreements that have the objective to create bias against certain businesses or prevent competition. Some of the characteristics of such agreements include colluding in tenders or rigging of bids.<sup>366</sup> Additionally, restrictive agreements could be made with the aim of refusing to buy from certain

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362 Thomson Reuters, p. 3.

363 Article 4 (3), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

364 Ibid.

365 Latham & Watkins, *How New UAE Competition Law Will Impact Business*, Number 1512. 2013, p. 2.

366 Article 5 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

businesses or establishments or selling exclusively to certain businesses or establishments.<sup>367</sup> Such things are done with the aim of stopping these businesses from carrying out their operations. In addition, this section of the competition law warns against and ultimately outlaws practices such as price-fixing and hoarding of goods from certain markets with a view to creating unreasonably high demand for them (Article 5 Paragraph 1(a) and (f)).<sup>368</sup>

Any plans to divide market segments among establishments and along geographical considerations to the exclusion of other market players are also outlawed.<sup>369</sup> Business enterprises are also prohibited from uniting with a view to blocking other businesses from accessing the same market.<sup>370</sup> However, Article 5 (3) provides an exemption to Article 5(1) and 5(2) excluding paragraph (a) of Article 5(1) and paragraph (a) of Article 5(2), in case the impact of the agreements was weak “in which the total share of establishments party thereto fail to exceed the percentage specified by the Cabinet of the total transactions in the relevant market.” The finer details in Article 5 of the UAE competition law will, of course, be known once the accompanying executive regulations are published. This section of the UAE’s competition law is certainly in its nascent stage and that is why legal and business experts would be tempted to consider it narrow. Other jurisdictions’ competition regimes on cartels are significantly broader.

### **2.5.2.2 Economic concentration (mergers and acquisitions)**

Articles 9, 10 and 11 of the UAE’s competition law address the issue of economic concentration.<sup>371</sup> The definition of economic concentration is provided under Article 1. It refers to any transaction - for example mergers, acquisition of assets, proprietary rights or shares - which allows a certain entity or a group of entities to directly or indirectly control another entity or other entities. The precise meaning of control is not yet clear under the competition law. The concept of economic concentration under the UAE’s competition law is so broad that it could be used to govern transactions such as joint ventures.<sup>372</sup>

Mergers and acquisitions that contain aspects of economic concentration must be scrutinised by the minister of the economy and subsequently cleared by the same authority

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367 Article 5 (1)(e), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

368 Thomson and Reuters, 3.

369 Article 5 (2)(a), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

370 Article 5 (2)(b), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

371 Ibid. 6 & 7.

372 Latham & Watkins, 3.

through the issuance of a resolution. What the competition law requires is for the parties to a merger or acquisition to file a written notification with the Ministry of Economy 30 days before the start of the implementation of the merger or acquisition deal. It would then take around 90 days (from the day of the filing of the notification) for the minister to scrutinise the deal and approve or disapprove it. If the minister is in need of further details about the merger or acquisition deal and has made a request to this effect, the clearance period by the minister can be extended by 45 days (on top of the 90 days) as provided for under Article 10 Paragraph 3 of the UAE competition law.<sup>373</sup> Additionally, if the minister did not have communicated after the expiry of the aforementioned period, the merger or acquisition will be deemed to have been approved. The purpose of this scrutiny by the minister is to ensure that the merger or acquisition does not raise any competition issues such as the formation of a dominant position and the likelihood of abuse of such a position by the merged enterprises. The minister is given powers by the competition law to revoke a merger or acquisition even after having approved it. This could be occasioned by the discovery of falsehoods (if the parties to the merger obtained clearance from the minister using misleading or inaccurate information) in the initial deal or a breach of the merger agreement by the parties. It is important to note that the threshold of the market share (the percentage of the market) that a merged enterprise can control is set by the Cabinet through the advice of the minister. This threshold is flexible and can be adjusted from time to time by the Cabinet depending on the prevailing economic situation. Businesses should bear in mind that the failure to seek approval from the minister of the economy over merger and acquisition deals will attract hefty fines as provided for under Article 17 of the UAE competition law.<sup>374</sup>

### **2.5.2.3 State Aid**

Over the past couple of decades, the UAE has been encouraging foreign investors to do business in the country. In fact, the federal government has instituted policies that make the country's business environment very conducive for foreign investment.<sup>375</sup> The new UAE federal competition law is part of the policy reforms aimed at streamlining the business legal regime in the country. It was preceded by several pieces of legislation

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373 Thomson and Reuters, 6.

374 Sangar, A. *New Competition Law in the UAE*. [Online] 2013. Available from: <http://www.emiratesbusinesslaw.com/2013/04/12/new-competition-law-in-the-uae> [Accessed: 27 May 2013].

375 KPMG in the UAE, *Investing in the United Arab Emirates*. Dubai: Author. [Online] 2006. Available from: <http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/inv-uae-O-0611.pdf> [Accessed: 27 May 2013].

including the Federal Companies Law, Commercial Agencies Law, Federal Industry Law, and the Government Tenders Law.<sup>376</sup> The competition law goes a long way in cementing the UAE's position as one of the most investor friendly nations in the Gulf region.

Economic liberalisation has been noted as the way to go in many parts of the world. This has often entailed the privatisation of state enterprises and corporations. However, there is not a single nation in the world that can be said to have completely liberalised their economy. The UAE, among other high growth economy countries, views overall privatisation with scepticism and that is why it pursues a system of hybrid liberalisation whereby the state owns enterprises in the critical sectors of the economy while at the same time encouraging private investment.<sup>377</sup> It is against this backdrop that the UAE's competition law is enacted.

A close scrutiny of the competition law will not reveal any prohibition of government aid to businesses. It appears that government aid could be provided using the exemption routes provided for under Article 4 of the competition law. It is Article 4 that provides for the exemption of certain sectors, especially enterprises run by the federal or local (individual emirates) government, from the provisions of this law. It seems that the government is also keen on aiding small and medium enterprises by insulating them from the likely effects of the competition law.<sup>378</sup> As has previously been mentioned, the UAE Cabinet is yet to decide on what precisely constitutes small and medium enterprises. The exemption of small and medium-sized enterprises from the application of the competition law is provided for under Article 4 Paragraph 3, while both federal and state enterprises (and private businesses acting for the state) are exempted under Article 4 Paragraph 1. The complete list of the sectors and activities exempted from the application of the competition law is found in Chapter IX.<sup>379</sup> It should, however, be noted that the exempted sectors are regulated by other less stringent legal instruments and bodies.

The reluctance of the EU to shield member state enterprises from competition from

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376 U.S Department of Commerce. *Doing Business in the United Arab Emirates: 2012 Country Commercial Guide for U.S Companies*. Washington D.C: Author. [Online] 2012, p. 40. Available from: [http://export.gov/unitedarabemirates/build/groups/public/@eg\\_ae/documents/webcontent/eg\\_ae\\_052507.pdf](http://export.gov/unitedarabemirates/build/groups/public/@eg_ae/documents/webcontent/eg_ae_052507.pdf) [Accessed: 28 May 2013].

377 Middlebrook, P. *Building a Fragile Consensus Liberalisation and State Fragility*. [Online] 2012, p. 11. Available from: <http://www.oecd.org/dac/incaf/WP6%20Liberalisation%202012.pdf> [Accessed: 28 May 2013].

378 Stephenson Harwood, *A New Federal Competition Law in the United Arab Emirates*. London: Stephen Harwood LLP. [Online] 2013, p. 1. Available from: [http://www.shlegal.com/Asp/uploadedFiles/File/Newsletters/2013\\_newsletters/02\\_13/02\\_13\\_Competition\\_BN\\_UAE.pdf](http://www.shlegal.com/Asp/uploadedFiles/File/Newsletters/2013_newsletters/02_13/02_13_Competition_BN_UAE.pdf) [Accessed: 28 May 2013].

379 Thomson and Reuters. *Op. cit.* p. 13.

private enterprises could be informed by the fact that most state enterprises have long been liberalised. That is, they have long been privatised and therefore the member states do not carry out commercial activities on a regular basis except for a few cases. This is contrary to the situation in the Emirates. Several of the most prosperous enterprises in the UAE are owned and run by the Federal or local government. This is especially true for the petroleum and gas industry as well as the telecommunications sector whose largest operator, *Etisalat*, is state-owned.<sup>380</sup>

### **2.5.3 Critical Analysis**

Since the term ‘scope’ means boundaries, it has been suggested that the EU competition law has a wide territorial scope that covers outside the EU and the EEA. In addition, the EU competition law has boundaries in terms of subjects as it aims at regulating commercial competition. In general terms, the boundaries of Article 101 of the TFEU are ambiguous as it deals only with consumer welfare issues since it takes into account public policy issues. On the other hand, similarly to the EU competition law, the UAE competition law does not only cover all commercial entities that operate within the boundaries of the UAE; it covers any operations that are carried out by any entity which likely to affect competition in the UAE, even if it was outside the country. This means that the law has the power to look at the activities no matter whether the entity was based in or outside the country. The UAE law aims to protect and enhance competition within the local market. In addition, the law aims to safeguard economic freedoms and consumer interests through establishing a competitive and efficient environment that can tackle monopolistic behaviour. Unlike the EU competition law, the UAE competition law granted an exemption to various sectors in the market such as finance, petroleum and gas, transport, telecommunication, etc. However, some similarities can be found between the UAE and the EU competition laws in regards to the SMEs. The UAE competition law exempts SMEs under certain conditions, while the EU in the past did not have any exemption for small agreements. This has now superseded been by certain exemptions, particularly the agreements on block exemptions. Also, the law provides an exemption to the activities of the federal and local governments, and activities of enterprises upon Federal or any local government’s resolution or authorisation, which includes the actions of establishments that are controlled or owned by the federal or local governments in accordance with the

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380 Library of Congress. *Op. cit.* p. 19.

guidelines provided by the Cabinet.

With regard to cartels, the scope of the EU's competition law can particularly be seen in Article 101 TFEU. Article 101 prohibits agreements that may harm the economy within the member-states and consumer interests. Both horizontal and vertical agreements are not illegal *per se*; however, they would be illegal if the aim was to distort competition in the market. On the other hand, the scope of the UAE competition law regarding cartels can be seen in Article 5, which has quite an elaborate discussion of what are considered restrictive agreements, since cartels hide under such agreements. This article prohibits the agreements between establishments that aim to prejudice, limit or prevent competition. The law grants an exemption to Article 5(1) excluding paragraph (a) and Article 5(2) excluding paragraph (a). It should be noticed that, similarly to the EU competition law, the UAE competition law grants exemptions. However, the difference is that the EU competition law grants the Commission the power to issue block exemptions for some types of agreements, where the UAE law does not grant that authority. The UAE's competition law is very specific as regards restrictive agreements, unlike EU competition law which is significantly broader.

With regard to mergers control, it should be noticed that a dominant position in the EU is not illegal *per se*. However, mergers control is linked with abuse of dominant position which is illegal *per se*. The EU Competition Commission adopted the Merger Regulation to maintain merger control if a merger is subject to the Commission's review, which has two stages. In case the merger was found to have serious competition implications then a second stage of 4 months of investigations will be launched. In addition, the Commission and the merging parties could have informal consultations before the formal notification. Because of the heavy load of notifications, which is a time consuming process, there are concerns that it could become unmanageable.

On the other hand, the UAE competition law addresses the issue of economic concentration, which is defined under Article 1, within Articles 9, 10 and 11. Economic concentration refers to any transaction that allows an entity to directly or indirectly control another entity or entities, such as assets acquisition, mergers, etc. It is worth mentioning that economic concentration's concept is very broad under the UAE competition law and could regulate transactions such as joint ventures. Similarly to the EU Merger regulation, the parties to a merger or acquisition in the UAE have to file a written notification. However, the difference is that the notification should be submitted before the

merger/acquisition takes place. At the moment the UAE competition law does not provide any guideline on how to apply for economic concentration or the type of documents that should be attached with the application. Such guidelines are set up in the accompanying executive regulation, which has not been published yet. In addition, the executive regulation will provide the guidelines of economic concentration verification procedures.

In regards to state aid, the concept of state aid in Europe has roots going back to the medieval era. This concept developed to become more attached to the idea of state welfare in the pre-industrial and industrial era. However, it has been recognised that state aid might lead to an unfair competitive advantage. The Treaty of Paris of 1951 set up the first modern state aid provision to be incompatible with a common market of coal and steel. Specifically, Article 4 prohibits and abolishes aid or subsidies provided by member-states. In addition, the High Authority of the Community had the authority, under Article 54, to impose fines in regards to state aid. The same provisions were introduced into the Treaty of Rome 1957 to be applicable to almost all EEC industries. It is worth mentioning that the current EU competition law does not prohibit all types of state aid. The laws permit state aid in cases where it is designed to support certain public policy objectives, such as supporting industrial development in the poorest regions of the EU, and supporting SMEs and foreign investments. Such exceptions are regulated within detailed guidelines.

On the other hand, the UAE competition law does not provide any prohibition on state aid to businesses. The UAE has been following, like many other countries, an economic liberalisation policy to a certain limit. State aid could be provided through the exemptions that are provided to the enterprises owned or controlled by the federal or local government/s under Article 4 of the UAE Federal Competition Law. Like the EU competition law, Article 4(3) provides an exemption to SMEs from the application of the law. In addition, the law exempts several sectors which are provided under Chapter IX of the law. It should be noted that the concept of state aid control in the UAE is different from the EU. Most of the enterprises in the EU are liberalised and privatised, and thus the member states are not involved in commercial activities except for few cases. The situation is totally different in the UAE as many enterprises are owned or run by the federal or local government.

## **2.6 Conclusion**

It is indisputable that competition law has contributed immensely in streamlining

trade and commerce within and between nations. However, of great importance is the extent of consumer welfare achieved through the establishment of these laws. This can be attributed to the evolution of competition law over time as explained by the various theories and schools of thought developed to address the issues pertaining to anti-competitive behaviour. These schools emerged one after the other, all with a focus on establishing a more definitive approach to enhance competitive practices.

There are specific objectives - including economic efficiency, distribution of wealth, preservation of liberty, and protection of competitors, among others - that drive competition law in any country. However, there also tend to be country-specific factors, such as the economic situations specific to a country, that influence competition law. Such is the reason why there tends to be a difference in the conception of competition law between the EU and the USA for instance. Currently, competition law addresses issues concerned with abuse of dominant positions, mergers and restriction of competition. In this regard, the law controls the conduct of monopolies rather than the existence of monopolies themselves.

Although studies have shown that there were other laws, such as the English common law, that type of regulated trade earlier, it was the US Sherman Act (1890) which lay the foundations for competition law to be established

The Ordoliberal approach has been considered to have deep roots in the origins of the EU competition law. The influence of this approach is still open to question because of two assumptions. First, the European Courts and Commission are not obliged to follow this approach on competition principles based on the fact that there is no constitutional underpinning. Second, the EU Commission has adopted a more economic-based method which does not represent the Ordoliberal theories.

On the other hand, over the past fourteen centuries, Shari'ah principles dealt with competition regulation through preventing monopolies and the harming of other individuals in the market by establishing a fair competitive market. The Shari'ah approach to competition regulation prohibits any conduct that may affect prices, such as price fixing and monopoly. Moreover, Islamic scholars developed a theory to prevent other types of anti-competitive behaviour such as exclusive agreements.

Shari'ah has influenced the legal system in the UAE. However, it has no influence

on the enactment of the competition law. Failing to adopt or develop a modern legal system that is derived from Shari'ah in order to regulate market activities has led to government monopolies that abuse its right in the UAE market. In addition, even though Shari'ah has constitutional underpinning under the UAE system, there is no direct or indirect evidence that the UAE government is obliged to follow Shari'ah principles in practice.

The scope of the EU competition law is quite broad. Indeed, the EU law regulates matters of mergers and acquisitions, abuse of dominant position, state aid and cartel agreements. The EU law demonstrates a comprehensive approach to the arrangements and transactions which may potentially give a rise to distortion of competition. Thus, the EU does not prohibit certain conduct (horizontal and vertical agreements, dominant position, and mergers) *per se*. The law prohibits only the conduct that aims to distort competition in the intra-European market.

Being the first of its kind in the UAE and probably the entire Middle East, Federal Law No. (4) Of 2012 (commonly referred to as the competition law) ushers in a new era of business competition in the UAE. By enacting this piece of legislation, the UAE joins other recognised global competition jurisdictions like the United States' (US) anti-trust laws and the European Union's (EU) competition rules. This law will help in eliminating anti-competitive practices in the conduct of business within the UAE. In fact, the new competition law addresses issues that jeopardise competition, much the same as the EU competition rules do. These issues include restrictive agreements, abuse of a dominant position, and unfair acts of economic concentration like uncontrolled mergers and acquisitions. In addition, the competition law provides legal redress (through the federal and local courts) channels for aggrieved parties. Eleanor Fox observes that the primary aim of any competition policy is to provide a level playing field for businesses with the ultimate goal of protecting the consumer.<sup>381</sup> It suffices to mention that the competition law will significantly contribute to the creation of a level playing field in the UAE market.

It would be a disservice to entirely judge the UAE's new competition law using the EU competition regime since the former has not yet been tested. Even the EU competition rules display some ambiguities from time and time, and when the Commission notices them, it is quick to propose a review. Therefore, business and legal experts who have worries over the scantiness of the details in the UAE competition law should give the law

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381 Fox, E. *U.S and E.U Competition Law: A Comparison*. Washington D.C: Institute for International Economics n.d, p.340.

a chance to evolve. After all, even Rome was not built in a day. However, when drafting the executive regulations, the UAE government should employ the European experience. It is the details contained in the executive regulations that will give meaning to the various provisions of the competition law. Uncertainties over issues such as what constitutes a small and medium enterprise as well as the circumstances under which a private enterprise can apply for exemption from the application of this law should be settled by the provision of such details through the executive regulations. Learning from the experiences of the European competition regime would help the UAE government avoid the pitfalls encountered by the EU Commission. In spite of the aforementioned inadequacies, investors are in agreement that the UAE's competition law is a landmark piece of legislation.

# Chapter Three: The Rationale for Implementing Competition Law

## 3.1 Introduction

Competition law is a concept adopted by various states and jurisdictions so as to restrict, regulate or deter the tendency of businesses or similar entities to enter into contracts or engage in activities that impair trade.<sup>382</sup> The most common examples of antitrade behaviour include the creation of cartels and monopolies<sup>383</sup>, violation of intellectual property rights and hoarding, among many others.<sup>384</sup> The adoption of competition laws has been effectively practised in the United States as anti-trust laws and in the Europe as the European competition law.<sup>385</sup> Within the commonwealth states' laws, the law of contract provides for non-recognition of the contacts by the courts as long as they contain the clauses either by implication or in express terms excluding contracts in restraint of trade.<sup>386</sup> It is, however, evident that most developing economies have not yet fully and effectively implemented competition laws.<sup>387</sup> In addition, those that have adopted the laws lack the institutional and the operational mechanisms to effectively implement them.<sup>388</sup> The need for effective competition laws from another perspective has been critically examined by various scholars, including law experts and economists, some of whom differ in thought with respect to the need for the laws and policies.<sup>389</sup> It is thus important to examine whether competition laws can positively or negatively have an impact on the developing economies and by extension whether such laws are needed in the developing economies.

Thus, this chapter aims to examine the theoretical disputes and the rationale

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382 Buttigieg, E. *Competition Law: Safeguarding the Consumer Interest: a Comparative Analysis of US Anti-trust Law and EC Competition Law*. London: Kluwer Law International. 2009, p. 3.

383 Sawyer, MC. *The Economics of Industries and Firms*. London: Routledge. 1985, p.233.

384 Gerber, D. J. *Global Competition: Law, Markets, and Globalisation*. London: Oxford University Press. 2010. Available from: [http://books.google.co.uk/books?id=vSWUR-qSRaIC&pg=PT157&source=gbs\\_toc\\_r&cad=4#v=onepage&q&f=false](http://books.google.co.uk/books?id=vSWUR-qSRaIC&pg=PT157&source=gbs_toc_r&cad=4#v=onepage&q&f=false) [Accessed: 29 February 2012].

385 Duns, J. & Duke, A. *Competition Law: Cases and Materials*. London: Lexis Nexis Butterworths. 2011. and see: Pace, L.F. *European Competition Law: The Impact of the Commission's Guidance on Article 102*. London: Edward Elgar Publishing. 2011.

386 Dabbah, M. *International and Comparative Competition Law*. London: Cambridge University Press. 2010, p. 15.

387 Martin, W. Trade Policies, *Developing economies, and Globalization*. The World Bank. [Online]. 2001. Available from: [http://siteresources.worldbank.org/INTPRRS/Resources/2866\\_trade\\_martin.pdf](http://siteresources.worldbank.org/INTPRRS/Resources/2866_trade_martin.pdf) [Accessed: 08 June 2011] p. 22.

388 Sally, R. Developing Country Trade Policy Reform and the WTO. *Cato Journal*. 2000. 19.3., pp.403-423.

389 Gal, M.S. *The Ecology of Anti-trust: Preconditions for Competition Law Enforcement in Developing Economies*. University of Haifa. Working Paper No. 02-03. [Online] 2004. Available from: <http://ssrn.com/abstract=665181> [Accessed: 06 July 2011] pp. 20-38.

justifying the adoption of competition law in developing economies in general and the UAE in particular. For that, the objectives of competition law in developing economies will be demonstrated. The arguments regarding the implementation of competition law in relation to the analysed goals of competition law will be illustrated. Then the arguments against the implementation of competition law will be discussed.

Before discussing these issues and ideas it is worthwhile to revisit the relevant economic factors, mentioned, at a glance, earlier in section “1.1 United Arab Emirates Economy - Overview”. These factors that made it impossible for the UAE legislators to ignore the introduction of the Competition Law within the country’s civil code.

## **3.2 Economic Development**

### **3.2.1 Economic Background:**

Even before the federation was established, particularly before 1957, the economy of each emirate relied on the available human and natural resources.<sup>390</sup> Each emirate had different economic resources based on the population, area and abundance of resources of each of them.<sup>391</sup> The economic situation at that time was poor and dependent on agriculture, trade, fishing, pearl diving and grazing.<sup>392</sup> However in 1957, another period of economic development started when the oil was discovered and produced and later exported. During this period, oil became the backbone of the economy because of the huge amount of revenues it provided. On the other hand pearl diving and trade lost their importance.<sup>393</sup>

When the UAE was established in 1971, a new era started “which necessitated the merger of the emirates’ economies and utilising available resources to build up the country and form a unified economic entity.”<sup>394</sup> Since that time the federal government has been playing an important role with regard to building a modern state and society. However, since the mid-seventies the UAE witnessed a rapid economic and social development which led to the achievement of high levels of economic growth and thereby an increase in the income rate.<sup>395</sup>

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390 Shoult, A & Terterov M. (eds). *Doing Business with the United Arab Emirates*. 2nd Edition. London: GMB Publishing Ltd. 2006. p. 14

391 Ibid.

392 Ibid. p 13

393 Ibid.

394 Ibid.

395 Greenway, D (ed.) *The World Economy: Global Trade Policy 2008*. (2009). Malaysia.

The country has witnessed a huge growth in the economic sector, especially between 2001 and 2004. The country's annual economic growth was 14 per cent each year.<sup>396</sup> Thus, that growth placed the country among the highest ranked countries in terms of some economic indicators, such as per capita income rate and per capita rate of consumption of energy. The productive and service sectors, which are part of the economic sector, have achieved relatively high development rates, which contributed directly in accelerating the rate of economic growth overall and therefore contributed to increasing the living standards of the citizens and expatriates all over the country.<sup>397</sup> However, the reasons behind the high growth rate are: free market regulations and policies, free trade, "an enabling business environment, economic diversification away from oil to non-oil industries," and the enhanced private sector role "as a contributor to growth over the long run."<sup>398</sup>

### 3.2.1.1 Oil and Gas Sector:

Although the current policy of the government of the UAE seeks to reduce the dependence on natural resources, the country extensively depends on the production and export of oil since it is the mainstay of the economy. The majority of oil production is derived from the emirates of Abu Dhabi, Dubai and Sharjah and exported in the form of raw material, even though there are several oil refineries which are able to refine crude oil.<sup>399</sup>

It has been proven that the economy of the UAE has been dominated by petroleum since the rise of oil prices in 1973, "accounting for most of its export earnings and providing significant opportunities for investments."<sup>400</sup> Approximately 10 per cent of the global oil supply and about 5 per cent of the world's proven natural gas reserves are controlled by the UAE.<sup>401</sup> The UAE has proven oil reserves estimated at 97.8 billion barrels in 2009, according to the Oil and Gas Journal (OGJ), although it was slightly higher in 1998 with 98.2 billion barrels. The leading Emirate for oil production is Abu Dhabi with

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396 Ibid.

397 Omaira, M. The Economy of the United Arab Emirates: The Achievements and the Future Aspiration. *Journal of Economic Cooperation among Islamic countries*. [Online] 2002. Available from: <http://www.sesric.org/files/article/217.pdf> [Accessed: 12 November 2010].

398 Greenway, D. *Op. cit.*

399 Ibid.

400 Shoult, A & Terterov M. (eds). *Op. cit.*

401 Shackmurove, Y. Economic Development in the Middle East. 2004. Penn Institute for Economic Research (PIER) Working Paper No. 04-022. The City College of The City University of New York - Department of Economics; The University of Pennsylvania - Department of Economics, p. 30.

92.2 billion barrels, followed by Dubai (4 billion barrels), Sharjah (1.5 billion barrels) and Ras Al Khaimah (100 million barrels).<sup>402</sup>

The UAE produced three million barrels per day (bbl/d) of total oil liquids in 2008. Of the three million bbl/d, crude oil was 2.57 million bbl/d and 356,000 bbl/d was natural gas liquids (NGLs). Approximately (2,475,000) bbl/d was exported mainly to Asian countries (with 40 per cent going to Japan), while only (525,000) bbl/d was consumed locally. However, due to a decision by the Organisation of Petroleum Exporting Countries (OPEC) in late 2008, the crude oil production was reduced to an average of 2.2 million bbl/d. The following figure demonstrates the increase in the oil production and consumption from the year 1999 to the year 2008.<sup>403</sup>

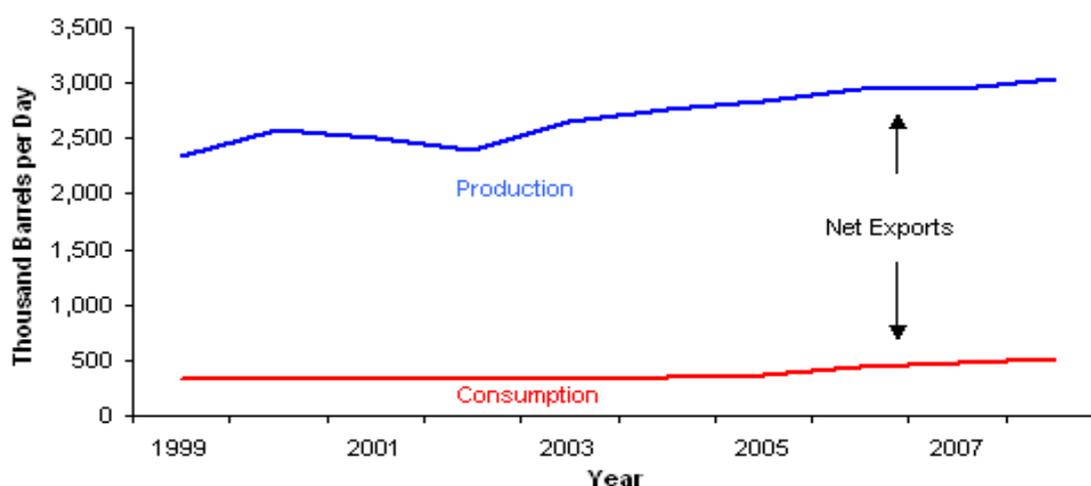


Figure 1: UAE Oil Production and Consumption, 1999-2008<sup>404</sup>

Regarding natural gas production, the UAE is number six in the list of countries with the largest proven natural gas reserves. It comes after Russia, Iran, Qatar, Saudi Arabia and the United States with proven reserves of 214.4 trillion cubic feet (TCF) as of January 2009.<sup>405</sup> According to the OGJ, Abu Dhabi holds the largest reserves of natural gas with 198.5 TCF. Sharjah follows with reserves of 10.7 TCF, then Dubai with reserves of 4.0 TCF and finally Ras Al Khaimah with 1.2 TCF.<sup>406</sup>

402 US Energy Information Administration. *United Arab Emirates: Oil* [Online]. 2009. Available from: <http://www.eia.doe.gov/cabs/UAE/Oil.html> [Accessed: 12 November 2010].

403 Ibid.

404 Ibid.

405 US Energy Information Administration. *United Arab Emirates: Natural Gas* [Online]. 2009. Available from: <http://www.eia.doe.gov/cabs/UAE/Oil.html> [Accessed: 12 November 2010].

406 Ibid.

Because of the rapid growth in the consumption of natural gas rather than production, the UAE became a net importer of natural gas in 2007. Figure 4.2 below illustrates the production and consumption of natural gas from 1999 to 2008. The UAE consumed 2.1 TCF of dry gas in 2008, while the production was less than that at 1.77 TCF.<sup>407</sup>

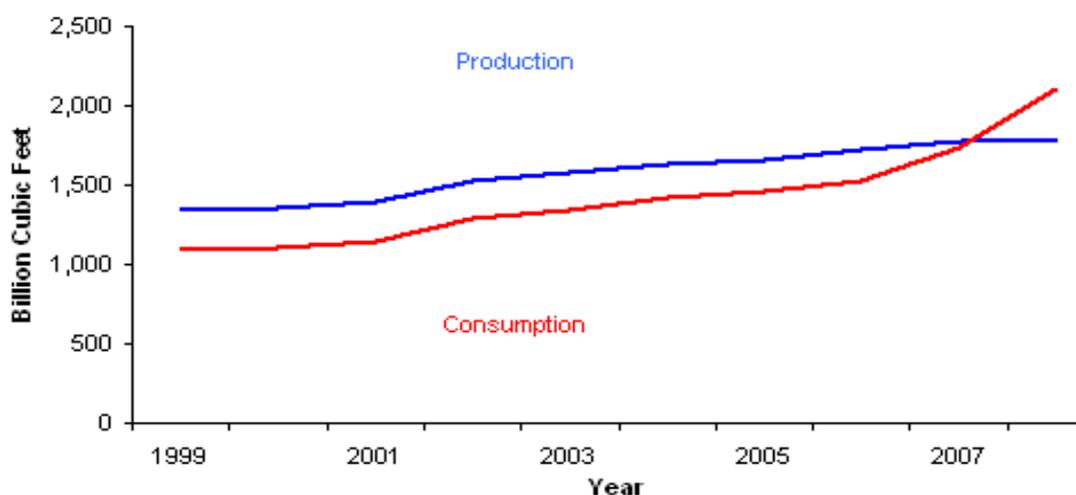


Figure 2: Natural Gas Production and Consumption 1999-2008<sup>408</sup>

However, it is expected that, at the current production rate of energy reserves, it will take at least 100 years before it runs out. Thus, the UAE has already recognised the need for diversification by focusing on the development of other sectors such as the “service sector and non-oil and gas industrial base” sectors.<sup>409</sup> Currently, beside the oil and gas exports (which comprise 44.9 per cent of the total exports), other exports including textiles, foodstuffs, base materials and chemicals comprise the rest of the exports.<sup>410</sup>

Moreover, the UAE not only depends on the oil and gas, but also other sectors, such as agriculture, tourism, trade and foreign direct investment, play an important role in the economic development of the country. The next part will illustrate such sectors.

### 3.2.1.2 Non-Oil and Gas Sector:

The non-oil and gas sector has contributed with 62.1 per cent of the total GDP in 2008. The following part will discuss such sectors.

407 Ibid.

408 Ibid.

409 Shackmurove, Y. *Op. cit.*

410 Shoult, A & Terterov M. (eds). *Op. cit.* p. 10.

## **A. Agriculture:**

Agriculture has contributed only with 3.8 per cent of the UAE's GDP as was stated in 1999.<sup>411</sup> This is because the total area of land under agriculture and forestry consists of less than 1.5 per cent of the total land area of the country. However, it has been claimed that, although the country faces such limited agricultural potential "with unsuitable land, water scarcity and harsh climate," it never became an obstacle to its economic development.<sup>412</sup> The cultivated area was 15,000 hectares (ha) in 1977 and increased to 71,000 ha in 1994, reaching around 269,923 ha in 2008.<sup>413</sup> The UAE's agricultural production consists of dates (which are the UAE's main crop and there are over 40 million date-palm trees in the UAE, with 16 million of them lining the roads), vegetables and fruit (mainly citrus and mangoes), and green fodder. In addition, the UAE produces livestock as well as milk, eggs, and meat and poultry.<sup>414</sup> Agriculture in the UAE has shown remarkable progress since independence. This is due to the encouragement and help provided by the federal government through several methods such as: providing free land to the farmers, offering financial assistance to them in the form of low interest loans, and providing them with significant physical and technical assistance.<sup>415</sup>

## **B. Tourism:**

Tourism is another important economic sector for the UAE. From the late 1980s up to the early 1990s, plans to establish an entirely new tourism industry were laid which have exceeded expectations. The different emirates have already considered tourism "as an important factor in their future growth and prosperity."<sup>416</sup> While Abu Dhabi has invested in the development of the tourism industry, "tourism is now worth more to Dubai than its income from oil."<sup>417</sup> Each emirate of the federation has invested in the tourism industry's related infrastructure, such as golf courses, cultural centres, shopping malls, theme parks, and airports and aviation.<sup>418</sup>

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411 Al-Abed, I & Hellyer, P. (eds.) *United Arab Emirates: A New Perspective*. London: Trident Press Ltd. 2001, p. 249.

412 Ibid.

413 United Arab Emirates: Ministry of foreign Trade. *Trade Policy Review: The United Arab Emirates. 2010*, p. 69.

414 Al-Abed, I., Hellyer, P., Vine, P., and Vine, P. (eds.) *United Arab Emirates Year Book 2007*. London: Trident Press Ltd. 2008

415 Al-Kamali, M. *Op. cit.* p. 17.

416 Ibid.

417 Al-Abed, I., Hellyer, P., Vine, P., and Vine, P. (eds.) *Op. cit.* p. 126.

418 Vine, P (ed.), *United Arab Emirates Year Book 2008*. [Online] 2010. Available from:

[http://www.uaeinteract.com/uaeint\\_misc/pdf\\_2008/index2008.asp](http://www.uaeinteract.com/uaeint_misc/pdf_2008/index2008.asp) [Accessed: 16 November 2010] p. 143.

According to the Trade Policy Review, approximately 5.4 million tourists visited the UAE in 2004.<sup>419</sup> However, that number had increased in 2009 to reach 8.7 million tourists.<sup>420</sup> The industry of tourism represented about 5.4 per cent of the total GDP of the country as of 2009 and is expected to rise by the year 2016 to 9.1 per cent.<sup>421</sup> Tourism directly contributed with \$12.8 billion to the country's economy according to the World Travel and Tourism Council (WTTC).<sup>422</sup>

### C. Trade

Trade has always played an important role in the economy of the UAE. It was and still is one of the most important sources of livelihood after oil.<sup>423</sup> In terms of global trade, the UAE has been named as a leading Arab economy and “one of the top 30 nations in the world.”<sup>424</sup> About 10 per cent of the GDP was consistently contributed by trade and commerce.<sup>425</sup> The trade surplus was estimated at USD 28.1 billion in 2004 and 53 billion in 2007. Around one third of the exported merchandise is re-exported, which makes it the second source of revenue after petroleum exports.<sup>426</sup>

To demonstrate the importance of the UAE's trade on the international level and make it a key player in the global market, the UAE's government established the Ministry of Foreign Trade (MoFT) in 2008. The Government believes that it is a fact that free trade in the long run will be an essential element for “increased competitiveness and productivity.”<sup>427</sup>

Since the UAE has noted the importance of free trade as “a pre-requisite for strengthening the international trade system”<sup>428</sup>, it has worked hard to overcome any obstacles. Regionally, the UAE seeks the creation of a common market with the other Gulf Cooperation Council (GCC) members to achieve a regional economic and trade integration and cooperation. In addition, the GCC has a trade facilitation agreement with the European Commission (EC). Moreover, the UAE joined the Greater Arab Free-Trade Area

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419 Trade Policy Review Body: World Trade Organisation, Trade Policy Review Reported by the United Arab Emirates. 2006.

420 Almuhsain, M. *Tourism statistics*. Cairo: Dar Altibaa. 2010, p. 12.

421 AME Info, United Arab Emirates Tourism Sector Competitiveness Ranked 18th Globally. [Online] 2007. Available from: <http://www.ameinfo.com/113976.html> [Accessed: 17 November 2010].

422 Oxford Business Group. The Report: Abu Dhabi 2010. London, p. 146.

423 Al-Kamali, M. *Op. cit.* p. 15.

424 United Arab Emirates: Ministry of Foreign Trade. *Why UAE? Maximising opportunities*. Abu Dhabi. (n.d), p. 29.

425 Ibid.

426 Ibid.

427 Ibid. p. 31.

428 Ibid. p. 30.

(GAFTA)<sup>429</sup> in 1997, which came into force in 1998. The agreement eliminated all trade barriers between the member states in 2005.<sup>430</sup>

#### **D. Other non-oil sectors:**

The sector of real estate is considered as one of the most important sectors in the UAE. Real estate has witnessed rapid progress since 2006 as it has contributed with 8 per cent of the total GDP in 2008.<sup>431</sup> Only in 2006 was the real estate market of Abu Dhabi opened to foreign investors. The emirate has designated three areas which permit foreign ownership. However, in Dubai the situation is different. The property boom started in May 2002 when the ruler of Dubai issued a decree allowing foreigners to buy and own properties in the emirate. Now there are over 30 designated areas that permit foreign ownership.<sup>432</sup>

Another non-oil sector that has contributed to benefiting the economy is Free Zones and Special Economic Zones as they generate thousands of jobs, which helps “in the transfer of knowledge, expertise and technology to the country.”<sup>433</sup> The framework of the free zones has resulted in many advantages, such as FDI, since the free zone regimes allow 100 per cent foreign ownership of enterprises.<sup>434</sup>

#### **3.2.2 Economic Features:**

The economy of the UAE is characterised by different key features, which makes it different from most of the developing economies. Similar to the rest of the oil producing countries, the economy of the UAE relies heavily on oil revenues, which were invested directly on the implementation of development projects and infrastructure projects (schools, hospitals, telecommunications, airports, etc.). Knowing that oil is a depleted resource, the Government has already started to depend on other resources, as was pointed out above.

The geographic location of the UAE enabled it to establish excellent economic relations with the surrounding countries, such as the Gulf, Arabian and Asian states, which led to an increase in the domestic exports that positively reflected on the economic growth

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429 The GAFTA members are the GCC members plus Algeria, Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Somalia, Sudan, Syria, Tunisia and Yemen.

430 United Arab Emirates: Ministry of Foreign Trade. (2010) *Trade Policy Review: The United Arab Emirates. 2010*, pp. 21-22.

431 United Arab Emirates: Ministry of Foreign Trade. *Why UAE? Op. cit.* p. 28.

432 *Ibid.* pp. 62-63.

433 *Ibid.* p. 50.

434 United Arab Emirates: Ministry of foreign Trade. (2010) *Trade Policy Review: The United Arab Emirates. 2010*, p. 52.

rates.<sup>435</sup> The UAE has adopted an open economic policy, which depends on freedom of investments and trade in all sectors where the role of the government is limited to designing macro-economic policies which reflect the overall strategy of the free economy, and at the same time the private sector plays a leading role in the national economy.<sup>436</sup>

In conclusion, the economy of the UAE has witnessed rapid progress since independence. The economy of the UAE largely depends on the oil and gas sector. However, this has been changed in recent years when the Government started to look for new resources and started to depend on the non-oil and gas sectors such as trade, tourism, free zones, and agriculture. The economy of the UAE is different from other developing economies for several reasons, such as the reliance on a free economic system, the geographical location, and the dependence on oil.

### 3.3 Reason for implementing competition law

There has been a view that several fundamental pillars of economic development are heavily linked with competition law and policy, which can be persuasively evidenced from all over the world. Many examples could be used as evidence to demonstrate that the increases in investment, productivity, average living standards and economic growth are clearly due to the high level of competition.<sup>437</sup> According to the Organisation for Economic Co-operation and Development (OECD), competition law is essential for markets to work well. That is because the governments of the developing economies, in regards to achieving rapid and sustained development, need to create conditions that permit the private sector to flourish.<sup>438</sup> Advocates of this view claim that consumers are benefited directly and indirectly because of the competition between firms.<sup>439</sup> The proponents of adopting competition law in developing economies agree on the view that competition law contributes to economic growth and competitiveness.<sup>440</sup> The following part will

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435 Omaira, M. *Op. cit.*

436 Ibid.

437 OECD. *Global Form on Competition: Competition policy and Economic Growth and Development*. Paris. 2002.

438 OECD. *Implementing Competition Policy in Developing Economies: Promoting Pro-Growth: Private Sector Development paper*. Paris [online] 2006 p. 37. Available from: <http://www.oecd.org/dac/povertyreduction/36563626.pdf> [Accessed: 20 June 2011].

439 Directly, through better quality, better choices of products and low prices, and indirectly, through the impact of competition on economic performance and economic growth. See: Preston, J. *Implementing Competition Policy in Developing Economies: The Role of Donors*. In *International Conference on 'Reforming the Business Environment From Assessing Problems to Measuring Results'* 29 November-1 December 2005. Cairo: 2005, p. 7.

440 In 2002 a paper by OECD based on a survey concluded that competition law contributes significantly to economic growth, and moreover competition policy is associated with "numerous basic pillars of economic development." See: Mehta, S. & Nada, N. *Competition Policy, Growth and Poverty Reduction in Developing Economies*. [Online] 2004. Available from: <http://www.google.ae/url?sa=t&source=web&cd=1&ved=0CBsQFjAA&url=http%3A%2F%2Fwww.competition-regulation.org.uk%2Fconferences%2Fsouthafrica04%2Fmehta%26nanda.pdf&ei=g-xCToWJFcXCtAabyYjBw&usg=AFQjCNHvGpeh8bFVD-OHXfAYrZ2SLZy-Dg> [Accessed: 10 November 2011] p. 2.

demonstrate the advantages of implementing competition law.

### 3.3.1 Fighting anti-competitive practices:

#### 3.3.1.1 Cartels

It has become easy to recognise the existence of anti-competitive behaviour in the markets of developing economies, particularly the UAE, because of conditions that allow for anti-competitive practices to flourish.<sup>441</sup> Many scholars recognise the need for an effective implementation of competition laws to fight such practices. That is because it will allow such countries (just like it did in the United States (US) and the European Union (EU)) to directly tackle hard-core cartels that engaged in bid rigging, market sharing and market allocation and price fixing.<sup>442</sup>

There has been an increase in cartels' activities in recent years.<sup>443</sup> The existence of monopolisation would seriously damage the fabric of competition.<sup>444</sup> Other firms that exist in a market and are not in a position of monopolisation would struggle to compete with the monopolising firms. Therefore, such firms have no choice but to join a cartel in order to survive in the market, otherwise they will be eliminated from competing in the same market.<sup>445</sup>

Many studies have paid more attention to the influence of cartels on the developed countries rather than developing economies. It is surprising that there is a little action taken by governments or consumers in the developing economies regarding the cartels issue, even after they have been found to exist.<sup>446</sup> Scholars such as Singh argue that, if cartels can exist and operate in a country like the US, with a long history of anti-trust laws and their enforcement, there is a higher chance that they exist in developing economies.<sup>447</sup>

It cannot be neglected that this has become a serious issue for some authorities of developing states that are not manned by the right people, especially when dealing with

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441 Jenny, F. *Op. cit.* pp. 109-137.

442 Levenstein, M., Suslow, V. & Valerie, Y. Contemporary International Cartels and Developing Economies: Economic Effects and Implications for Competition Policy. *Anti-trust Law Journal*. 2003. 71.3, p. 801.

443 CUTS Centre for Competition, Investment & Economic Regulation. Pulling Up our Socks: A Study of Competition Regimes of Seven Developing Economies of Africa and Asia under the 7-Up Project. [Online] 2003, p. 74. Available from: <http://www.google.co.uk/url?sa=t&rct=j&q=pulling%20up%20our%20socks&source=web&cd=3&sqi=2&ved=0CD8QFjAC&url=http%3A%2F%2Fwww.cuts-international.org%2Fpdf%2FFCCIER-1-2003.pdf&ei=4QFYT5AYxvrxA4z8rO0O&usg=AFQjCNGCrElG5yZQatgN6kqTwRwxdowD3A> [Accessed: 06 March 2012].

444 Dabbah, M. *International and Comparative Competition Law*. *Op. cit.* p. 297.

445 Ibid.

446 Levenstein, Margaret and Suslow, Valery Y. *Op. cit.*

447 Singh, A. Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions. Working Paper in the Centre for Business Research. 2002, University of Cambridge, pp. 14-16.

cases that have an international dimension. The authorities of developing economies do not take any action against cartels that exist in their own countries, or there is little attempt made to cooperate and gather information from developed countries' competition authorities. This is because of the fact that the authorities in such developing economies are unaware of the international cartels' anti-competitive practices or prosecution in the developed world.<sup>448</sup>

The narrow domestic industrial base of the many developing economies has made them dependent on imports in their early industrialisation stages, as was the case of the UAE.<sup>449</sup> Such imports would be subjected to anti-competitive behaviour, either by domestic firms or international suppliers. Therefore, it is possible that the importing country could be penalised by import prices higher than what they are supposed to be, as well as being penalised by import cartels and by abuses of dominant position firms in export countries.<sup>450</sup>

Therefore, competition laws should be enforced and used as a tool to abolish the harmful practices of international cartels, as Singh has emphasised.<sup>451</sup> Many scholars have supported this view, claiming that not only consumers but also producers in developing economies may face the harmful effects of international cartels if no action is taken against such practices.<sup>452</sup>

A great deal of evidence demonstrates that there are some concerns that the economic development of developing economies could be at risk and might be damaged in the long run by private corporations' arrangements of international cartels that are involved in restrictive practices.<sup>453</sup> In 1997 a study conducted by the World Bank showed that goods worth \$81.1 billion were imported by developing economies (which represented 6.7 per cent of imports and 1.2 per cent of GDP) from industries where conspiracies of price-fixing were discovered during the 1990s, although several other conspiracies had not been discovered at that time.<sup>454</sup> The study illustrated that such cartels were made up of producers that were based in developed states. Heavy electrical equipment is a good example

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448 CUTS Centre for Competition, Investment & Economic Regulation. *Op. cit.* p. ix.

449 The UAE has imported goods worth of 600 billion AED, in 2011. For more information see: <http://www.uaestatistics.gov.ae/EnglishHome/tabid/96/Default.aspx>

450 Teo, C. *Competition Policy and Economic Growth*. In Paper for the ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area in Bali. Bali: 4-8 March 2003, p. 6.

451 Singh. *Op. cit.*

452 Levenstein, M., Oswald, L. & Suslow, V. International Price Fixing Cartels and Developing economies: A Discussion of Effects and Remedies. *Working Paper at William Davidson Institute*. 2003, p. 538.

453 Ibid.

454 CUTS Centre for Competition, Investment & Economic Regulation. *Op. cit.* pp. 74-75.

illustrating many of these points. Almost every developing economy needs such items to meet their growing energy demand through installing electricity generation plants.<sup>455</sup> However, cartelisation led to higher prices for such equipment, which consequently led to higher prices of electricity generating plant installation and therefore expensive energy prices.<sup>456</sup>

Another example is the liberalisation of the cement industry in Egypt in 1999, which did not have any competition law at that time. The liberalisation meant the market was controlled by three firms: Lafarge, CEMEX<sup>457</sup> and the Suez Cement Company.<sup>458</sup> Due to the increased demand in the cement industry another local cement company (the Egyptian Cement Company) entered the market. However, in 2002 the demand decreased, which made the Egyptian Cement Company export cement to the Canary Islands where the other three companies were serving that market. Thus, the three firms decided to decrease their prices in the Canary Islands in order to force the Egyptian Cement Company to lower its sales and eliminate it from that market.<sup>459</sup> Not only that, but the three firms also conspired to fix prices and eliminate the local firm from the local Egyptian market. Neither the EC Commission nor the Spanish government carried out any investigation with regard to the conspiracy.<sup>460</sup> In addition there was no enforcement taken in Egypt because of the absence of a competition law.

This example shows that, in the absence of competition laws, not only consumers but also the economies of developing countries (such as Egypt) could be damaged through the existence of cartels. Thus, implementing and enforcing an effective competition law would help protecting the state's economy and consumers, and eliminating such harmful practices. The UAE recognises this issue and the implementation of the new competition law is evidence of prohibiting such behaviour.<sup>461</sup>

### **3.3.1.2 Merger control:**

Another reason for which competition law would benefit the UAE is related to the increased international cross-border merger movement that has reshaped the world

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455 Ibid.

456 Ibid.

457 Lafarge, CEMEX are worlds second and third largest cement manufactures.

458 Evenett, S. & Jenny, F. Anti-competitive practices in sub-Saharan Africa: Myth, Reality and Perspectives. A paper presented at the CRC 3rd International Conference Pro-Poor Regulation And Competition: Issues, Policies and Practices, Cape Town, 7-9 September 2004.

459 Jenny, F. Competition Law and Policy: Global Governance Issues. *World Competition*. 2003. 26. 4, pp. 609-611.

460 Evenett, S & Jenny, F. *Op. cit.*

461 Such matters are dealt with in Articles 5 and 6 of the UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

economy over the past decades.<sup>462</sup> According to the data of the 2001 and 2002 United Nations Conferences on Trade and Development (UNCTAD), cross-border acquisition had a global value of 0.5 per cent of the world's GDP in the mid-1980s. However, this value rose to 2 per cent in 2000.<sup>463</sup> International mergers, especially between huge companies located in developed countries, call for critical review of competition policies, which authorities have put in place in developing economies.

It should be noted that, during the time of a merger taking a place, the value of the acquired firm tends to increase by an average of 20 to 30 per cent while that of the acquiring firm basically remains the same. This implies that the combined result basically leads to a high value of the involved firms. However, authorities must implement effective competition laws and policies pertaining to mergers and acquisitions to ensure that certain stakeholders are not negatively affected. On several occasions, stakeholders of the acquiring firm have suffered from systematic losses six months after a takeover and this may continue for a number of years.<sup>464</sup> Although the companies involved may experience an increase in revenue and profitability levels, it may take several years before this is transferred to the shareholders of the firm.

In the modern world, one of the most important concepts of competition laws is merger control. In the first half of 2008, the worldwide mergers and acquisitions was equal to \$1.6 trillion, while the figure in India alone was \$33.1 billion. India has outpaced the USA as the largest foreign investor in the United Kingdom<sup>465</sup>, because of the adoption of a more effective Competition Act in 2002.<sup>466</sup>

As the global economy continues to experience increased mergers, developing economies, including the UAE, must ensure that appropriate competition laws and economic policies are not only implemented but also efficient in avoiding any monopolistic tendencies.<sup>467</sup> Since mergers can have their roots both locally or from a multinational perspective, the need for an effective competition law to address their functionality is

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462 Singh, A. Foreign Direct Investment and International Agreements: A South Perspective. *TRADE Occasional Paper*, No. 6, October. South Centre, Geneva. 2001, p. 2.

463 Ibid. p. 6.

464 Ibid. p. 33.

465 Fox, E. *Op. cit.* p. 2.

466 This shifted the focus to promotion of competition instead of just curbing monopolies, and the Act was fully implemented by May 20, 2008. The Act recognised the fact that trade agreements have the capacity to restrict, prevent, discourage, distort, scuttle or impede competition in the markets. See: Holscher, J. & Stephan, J. Competition Policy in Central Eastern Europe in the Light of EU Accession. *Journal of Common Market Studies*. 2004. 42. 2, pp.321-325. (322).

467 This issue is addressed under Article 9 of the UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

extremely important.<sup>468</sup>

### 3.3.2 Attracting foreign direct investment

One of the greatest benefits that would result from the effective implementation of competition law in developing economies, particularly the UAE, is the attraction of foreign direct investment (FDI), which would promote economic growth and development. In a similar way, altering trade tariffs between countries makes it easier for firms in different jurisdictions and regions to move their goods and services around the world. This can only happen in countries that have strong institutional policies and mechanisms that would be able to guard the right to property ownership<sup>469</sup>, not just as a fundamental right but also as an initiative to encourage the honest pursuit of ownership of property.

As the UAE has adopted an open-door policy with foreign investments, the adoption of a proper competition law will ensure fairness in the market and prevent any anti-competitive behaviour that are likely to exist. In addition to the current consumer law, there has been an excessive need for a regulation that aims to control the market giving a sufficient protection for the market players.

There should be laws that guide and regulate competition between firms, including granting foreign firms a level playing field to operate in the developing economies without adversely harming the infant industries.<sup>470</sup> These laws are assumed to be existed in any developing economy involved. However, if such laws are not clearly spelled out as competition laws, the enforcement agencies will find it hard not only to understand but also to enforce such laws.

It has been argued that there is particular economic and political importance to having Foreign Direct Investment (FDI) in developing economies.<sup>471</sup> However, Dabbah argues that developing economies do not have an unconditional, open door policy for the 'welcomed' FDI. Rather, they are subject to 'strict conditions laid under the law, such as are required to lead to development in technologies, sustainable development, economic

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468 Sullivan, L. A & Grimes, W. S *Op. cit.* p. 34.

469 Kokkoris, I. & Lianos, I. *The reform of EC competition law: New challenges*. London: Kluwer Law International. 2010, pp. 334-337.

470 Such laws should also be able to guard the freedom of movement in terms of business operations and also association in terms of the kinds of firms an individual can associate him or herself with. See: Page, S. *How developing economies trade: The institutional constraint*. London. 1994.

471 De Mello, L. R. Foreign Direct Investment in Developing Economies and Growth: A selective Survey. *Journal of Development Studies*. 1997. 1.

growth and the quality enhancement of products.<sup>472</sup> Moreover, some developing economies might have stricter conditions to ensure that foreign firms do not get involved in a monopolistic position in their local market.<sup>473</sup>

Borissova believes that, when such policies are effectively implemented, they put a nation in a better position for attracting FDI.<sup>474</sup> This is because, firstly, multinational companies will be in the position of identifying the way these laws operate and dealing with several concerns within different business processes. Secondly, multinational organisations usually expect authorities to establish a level playing field between domestic and foreign companies, as well as among the Multinational Corporations (MNCs) themselves.<sup>475</sup>

This implies that developing economies which have effectively implemented competition laws have a higher chance of creating a favourable economic environment to invite foreign investors.<sup>476</sup> Over the past several years, developing economies have implemented macroeconomic reform programmes, which significantly relied on the market instead of state intervention.<sup>477</sup> Noticeably, there has been a renewed confidence that individual consumers and market forces can contribute greatly to social and economic development compared to a centralised economic system. In the UAE, the FDI has contributed to the enhancement of the economy with \$9.6 billion.<sup>478</sup>

Competition laws have been known to enhance competition and create a level playing field for all companies. However, it would be difficult to realise some potential benefits when it comes to a market oriented economy, if companies are forced to enact some measures that are intended to restrict competition. Thus, competition authorities should critically analyse competition laws to ensure that organisations do not take advantage of their current dominant position in the market. This includes state-owned enterprises that managed to establish ‘natural monopolies’ and this calls for competitive

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472 Dabbah, M. *International and Comparative Competition Law. Op. cit.* pp. 298-300.

473 Ibid.

474 Borissova, L. Regulatory Policy and Creation of Regulatory Authorities in the Telecommunications Sector in Central and Eastern Europe. *European Journal of Law Reform.* 2002. 4.2, p. 462.

475 Ibid.

476 Ibid.

477 Some of the fundamental changes pertain to reduction of tariff barriers, lowering of subsidies to domestic firms, elimination of several qualitative import restrictions, privatisation of public enterprises, encouragement of foreign direct investments, and easing of foreign exchange controls. See: Evenett, S.J. *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, Report prepared for the Secretariat of the World Trade Organization (WT/WGTCP/W/228). 2003, p. 72.

478 Emirates News Agency (WAM), UAE Foreign Direct Investment increase by 2.5% to \$9.6b, *Gulf news*, [Online] 27 June 2013. Available from: <http://gulfnews.com/business/economy/uae-foreign-direct-investment-increases-by-25-to-9-6b-1.1202794> [Accessed: 2nd July 2013].

authorities to analyse their competitive practices so as to establish a competitive market.

Additionally, a robust economic policy must be implemented if a country needs to establish an effective economic reform. Chen and Lin emphasise that price liberalisation that is carried out in the absence of competition laws can lead to a significant increase in prices and thus reduce the general benefit of the entire economy.<sup>479</sup> Whenever monopolistic organisations are allowed to carry out their activities without an effective regulation, the economy will not bear any fruit from price liberalisation. Evenett highlights that, in any developing economy that wants to open up its markets through FDI competition and import competition, authorities must put in place some safeguards to ensure that foreign organisations do not engage in anti-competitive behaviour or take advantage of their dominant position.<sup>480</sup> This calls for a strong and effective competition law, which will lead to an end to anti-competitive behaviour and thus enhance net public benefits. Thus, it could be said that implementing a strong and effective competition law will lead to the enhancement of the economy through providing a safeguard for foreign investors and their local competitors.

### 3.3.3 Enhancing sustainable development

A wide range of information has been documented arguing that competition laws do not frustrate, but in fact foster, broader sustainable development goals. In addition, sustainable development is considered as an overarching objective.<sup>481</sup> As societies continue to modernise, anti-trust laws are a major characteristic of economic regulation as countries continue to implement new competition laws in their economic system. The international community has a major role to play when it comes to integrating competition regimes in order to enhance sustainable development goals.<sup>482</sup>

Gehring argues that competition laws improve economic governance, and they indirectly enhance sustainable development.<sup>483</sup> This is achieved through stimulation of constant product improvement and innovation among companies, thus enabling a country to achieve sustainable development. Based on this notion, cartels and monopolies have

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479 Evenett, 73.

480 Evenett, 73.

481 This was reaffirmed by more than 140 countries in Johannesburg, South Africa. See: Geradin, D. *Competition Law and Regional Economic Integration*. Cambridge: Cambridge University Press. 2002, p.11.

482 Different nations had proposed that the WTO should be made an umbrella body for international competition disciplines, and this was discussed in the Cancun 5th WTO Ministerial Conference. See: Asian Development Bank. *Competition Law and Policy in Emerging Economies*. [Online] 2012. Available from: <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw080000.asp> [Accessed 03 March 2012].

483 Geradin. *Op. cit.* p. 17.

been known to evade markets, leading to economic injustices, poor quality and higher prices of goods and services for customers. Therefore, competition laws aim at enhancing greater equity, which leads to economic growth and development. In addition, more competitive practices enable companies to develop healthier, safer and more socially and environmentally friendly products whenever customers require such goods.<sup>484</sup>

Dakolias and Said state that companies which are protected by cartels or hide under the monopolistic practices usually lack the incentive to change and develop new practices.<sup>485</sup> However, organisations which are exposed to competitive practices look for means of developing new product lines, changing old practices so as to fulfil the social and environmental expectations of their customers. To achieve these appropriate standards, authorities must be ready to implement good governance, which is one of the most important principles of sustainable development laws. When competition law is enforced, companies are provided with an incentive to enhance their efficiency, avoid wasteful practices and thus ensure that there is sustainable use of natural resources.<sup>486</sup>

Most significantly, lack of enforceable and sound competition law can lead to few benefits from any trade liberalisation programme if not harming it. This could mean that the first organisations that enter a market may block other competitors. Such a practice would effectively deny consumers access to competitive goods and services.<sup>487</sup>

Whereas these arguments are not exhaustive, they are certainly worthy of consideration, particularly in emerging economies. However, since competition law is also exposed to certain negative attributes, these arguments do not entirely address the central question of whether it is possible to implement a sustainable international competition law agenda, and the means of achieving it. Dakolias and Said are of the view that it is challenging to develop and maintain a successful competition authority. A huge amount of financial investment and political and human resources are needed, as well as appropriate mechanisms to monitor and enforce the procedures laid down.<sup>488</sup>

According to advocates of competition law and sustainable development, theories

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484 Ibid.

485 Dakolias, M. & Said, J. Judicial Reform, A Process of Change Through Pilot Courts. *European Journal of Law Reform*. 2000. 2.1. p. 97.

486 Ibid.

487 This implies that there would be little need for a developing economy to open its market to international trade if it would simply be taken over by an international cartel or monopoly. See: Vickers, J. Abuse of Market Power. *The Economic Journal*. 2005. 115, p. 244.

488 Dakolias, M. & Said, J. *Op. cit.* p. 102.

alone cannot be effective in enhancing development and ensuring that there is free and fair competition in a market. Therefore, if competition law is to be made a priority, such that decision makers are persuaded to invest their scarce political capital, it is important to look for ways of ensuring that competition law directly enhances sustainable development.<sup>489</sup> This leads us to one of the most important factors in competition policy and law: whether different kinds of public concerns can be allowed to influence competition decisions. Thus, any developing economy, including the UAE, would benefit from the effective implementation of competition law through enhancing its sustainable development, leading to the benefit of consumers and other market players.

### **3.3.4 Economic growth and productivity enhancement**

Competition laws have been cited as significant in the attainment of long-term productivity and growth in developing economies. With regard to economic growth, firstly, it has been suggested that to achieve high economic growth and development, a strong and effective market economy is necessary. However, to keep such a market functioning efficiently, a competition policy with well-designed and administered competition laws is needed.<sup>490</sup> Not only that, but also to ensure that competition considerations are an essential part of “the background to business decisions, and to government decisions affecting the market”, it is required to promote competition culture.<sup>491</sup>

Competition law has many advantages, such as enhancing productivity. In a healthy market, goods and services will be delivered to consumers at competitive and lower prices due to market competition, which will result in more production and consumption.<sup>492</sup> However, such producers are consumers as well, who purchase different products (goods and services) to cover the whole production process, from raw materials to the end process. Any lack of competition in those markets will lead to an increase in the prices of such products. Eventually, it will make firms suffer in the market due to a lack of competition and at the same time it will lead to an increase in the prices of products that are delivered to consumers.<sup>493</sup> Thus, the existence of a well-designed and well-administered competition

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489 APEC. *Database: A variety of Contributions by Countries to the Database*. [Online]. Available from: <http://www.apec.org.tw/>. [Accessed: 3 March 2012].

490 Perston, J. *Competition, Growth and Poverty Reduction*. [Online]. 2004. Available from: [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences\\_CompetitionPolicyTanz\\_John+Preston+2.prn.pdf/\\$FILE/Conferences\\_CompetitionPolicyTanz\\_John+Preston+2.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_John+Preston+2.prn.pdf/$FILE/Conferences_CompetitionPolicyTanz_John+Preston+2.prn.pdf). [Accessed: 12 December 2011].

491 Ibid.

492 Teo, *Op. cit.* pp. 4-5.

493 Kolasky, W. US Department of Justice. *The Role of Competition in Promoting Dynamic Markets and Economic Growth*. [Online] 2002. Available from: <http://www.justice.gov/atr/public/speeches/200484.pdf>. [Accessed: 19 January 2012].

law will result in strong and healthy competition which will be beneficial for both consumers and producers.

Secondly, another benefit of competition law is that it encourages the sectors that lost competitiveness to restructure at the right time.<sup>494</sup> It has been proven that the competitive process is unbiased because it depends on economic market factors (demand, technologies, cost, etc.), rather than governments who are always under political pressure and restrictions.<sup>495</sup> Governments are not able to determine the right sector and the right time to restructure. Thus, due to competition for capital and other resources, such capital and other resources will be transferred from uncompetitive weak sectors to more competitive sectors, which in the end will lead to economic growth.<sup>496</sup>

Thirdly, a well implemented competition policy will promote productivity and efficiency.<sup>497</sup> It will lead such firms to adopt new techniques, not only to survive but also to gain more profits through investing in new technologies that will deliver products and services with cheaper and quicker methods and better quality for consumers, leading to economic growth.<sup>498</sup>

Fourthly, competition has a positive effect on innovation (see section 3.2.5). It promotes innovation since innovation results in new technologies for the purpose of production and creating new products.<sup>499</sup> It is obvious that ‘firms who do not innovate are left behind.’<sup>500</sup> Competition allows new competitors to enter markets, thus the existing competitors will be under pressure to find new methods and innovative technologies and create new products to carry on their previous success; otherwise, they will be left behind and lose international competitiveness.<sup>501</sup>

There have been several empirical studies carried out mainly in the developed countries, which have proved that welfare losses could be caused because of the competition restraints within an economy, and it does not matter whether such barriers were caused by governments or the private sector.<sup>502</sup> According to a survey, there was a

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494 Teo. *Op. cit.*

495 Kolasky, *Op. cit.*

496 Teo. *Op. cit.*

497 *Ibid.*

498 See Dutz M. *Competition policy issues in developing and transition markets*. OECD Discussion Paper CCNM/GF/COMP/WD 2002 p. 35; and Nickell, S. *Competition and Corporate Performance*. *Journal of Political Economy*. 1996. 104. 4, pp. 724-746.

499 Kolasky, *Op. cit.*

500 Teo. *Op. cit.*

501 Kolasky, *Op. cit.*

502 Mehta, S. & Nada, N. *Op. cit.* p. 3.

substantial “negative relationship between the level of per capita income and the size of mark-up ratios in 1985.”<sup>503</sup>

With regard to the developing economies, numerous case studies have underlined the relation between competition laws and extensive economic growth. A case study was conducted by Dutz and Hayri<sup>504</sup> which tested the strength of association between economic growth and economy-wide competition intensity.<sup>505</sup> The study “constructed three types of variables related to policy, structure and mobility.”<sup>506</sup> It concluded that the correlation between competition policy and economic growth is very strong and the effect is robust, which “goes beyond that of trade liberalisation, institutional quality and a generally favourable policy environment.”<sup>507</sup>

In another case study which was conducted between 1993 and 2002 in Tanzania, Kahyarara indicated that after implementing the *Fair Trade Practices Act 1994*, firms’ production increased by 50 per cent and investment increased by 100 per cent.<sup>508</sup> The study emphasised that firms’ productivity and investments had been positively affected through the different efforts made to tackle anti-competitive conduct, which in the end increased the economic performance.<sup>509</sup>

With regard to productivity, the correlation between productivity and competition is robust. A lot of evidence in the empirical literature shows that productivity could be an incentive for competition in a product market.<sup>510</sup> Firms would be under intense pressure due to strong competition in a product market that would lead to a decrease in cost prices.<sup>511</sup>

In order to demonstrate the effect of competition and entry on productivity growth,

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503 Gali, J. Monopolistic Competition, Endogenous Mark-ups, and Growth. *European Economic Review*. [Online] 1994. 38. pp. 748-756. Available from: <http://www.crei.cat/people/gali/monopol%20comp%20endogenous.pdf> [Accessed: 10 January 2012]. Also see: UNCTAD Secretariat. Empirical Evidence of the Benefits from Applying Competition Law and Policy Principles to Economic Development in Order to Attain Greater Efficiency in International Trade and Development. [Online] 1997. Available from: [http://www.unctad.org/en/docs/c2em\\_d10.en.pdf](http://www.unctad.org/en/docs/c2em_d10.en.pdf). [Accessed: 7 November 2011] p. 19.

504 Dutz, M & Hayri, A. Does More Intense Competition Lead To Higher Growth? 1999. *World Bank Policy Research Working Paper No. 2320*, p. 1.

505 The study included 100 countries over the period of ten years to determine to what extent competition policy could be considered as an element in long term economic growth.

506 Ibid.

507 Teo. *Op. cit.* p. 8.

508 Kahyarara, G. Competition Policy Manufacturing Exports, Investment and Productivity: Firm-level Evidence from Tanzania Manufacturing Enterprises. In: Brustick, P. & Alvarez, A. (eds.). *Competition, Competitiveness and Development: Lessons from Developing Economies*. New York: United Nations Conference on Trade and Development. 2004.

509 Ibid.

510 Buccirossi, P. et al. Competition Policy and Productivity Growth: An Empirical Assessment. Research project for the Directorate General for Economic and Financial Affairs of the European Commission [Online] 2011. Available from: <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/dusowinter11-12>. [Accessed: 17 January 2011] p. 2.

511 Laffont, J. Competition, Information, and Development. In Paper Prepared for Annual World Bank Conference on Development Economics. 20-21 April 1998. Washington D. C.

Griffith, Harrison and Aghion et al. used different policy variables as competition instruments. One of the instruments they used was the introduction of the EU single market programme. The different tests confirmed the positive effect of policies on competition and entry, which have increased productivity.<sup>512</sup>

It has been asserted that total productivity and growth could be affected by the level of competition.<sup>513</sup> Based on the results of several empirical studies, it has been recognised that firms' productivity performance would be reduced if there was any restriction on competitive pressures due to the regulation of the product market.<sup>514</sup>

It is important to point out that the practice and implementation of competition laws has a direct bearing on the economic growth of any economy.<sup>515</sup> Just as the effects of such laws were observed in the developed countries like the United States<sup>516</sup>, the developing economies, including the UAE, could be even better placed with the implementation of the laws.

An analysis of welfare gain by both producers and consumers also depicts how an efficient competition law can lead to economic growth by assessing the welfare losses by both the producers and consumers of goods and services that are avoided.<sup>517</sup> Studies carried out by various economists have pointed to deadweight loss as being caused by the exercise of market power by monopolies and some oligopolistic entities.<sup>518</sup> There are circumstances that a firm or an entity may find itself in an advantageous position to execute monopoly behaviour.<sup>519</sup> One of the ways is a situation in which a firm has strategic control over the resource requirements in the industry. In this case, the entity will simply prevent competition by restricting the supply of resources to the competitors, thus guaranteeing the fact that it remains the dominant player in the industry, which would have otherwise been served by many other competitive firms. Under this scenario, it is deemed necessary for

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512 See: Griffith, R. & Harrison, R. The link Between Product Market Reform and Macroeconomic Performance. ECFIN economic papers No. 209, European Commission. [Online] 2004. Available from: [http://ec.europa.eu/economy\\_finance/publications/publication652\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication652_en.pdf) [Accessed: 12 February 2012]. Also see: Aghion, P. et al. *The Effects of Entry on Incumbent Innovation and Productivity*. Review of Economics and Statistics. 2009. 91, pp. 20–32.

513 For a detailed theoretical and empirical analysis see: Aghion, P. & Griffith, R. *Competition and Growth*. Cambridge: Mass The MIT Press. 2005.

514 Crandall, J., Nicoletti, G. & Scarpetta, S. *Does Anti-Competitive Regulation Matter for Productivity? Evidence from European Firms. Discussion Paper No. 5511*. [Online]. 2011. Available from: <http://ftp.iza.org/dp5511.pdf> [Accessed: 16 February 2012].

515 World Trade Organization (WTO). *Regionalism and the World Trade System*. Geneva: WTO. 1995, p. 35.

516 Crandall, R.W. & Clifford, W. Does Anti-trust Policy Improve Consumer Welfare? Assessing the Evidence. *Journal of Economic Perspective*. 2003.17. 4. pp. 3-26(24).

517 OECD. *Trade and Competition Policies: Exploring the Ways Forward*. London: OECD Publishing, pp. 35-42.

518 Drache, D. Gertley, M.S. *The New era of global competition: state policy and market power*. London: McGill-Queen's Press – MQUP. 1991, pp. 26-50.

519 Barney, J. *Gaining and sustaining competitive advantage*. Canada: Pearson Education. 2010, p. 72.

the government and the judicial system to step in so as to provide conditions that ensure trading, fair competition and fair allocation of resources.<sup>520</sup>

### 3.3.5 Enhancing innovation and technologies

With regard to innovation, one of competition's aims is to promote innovation of new products and production processes since corporations need to remain competitive to survive and retain customers.<sup>521</sup> It is more likely that firms will tend to innovate and the competition in the product market will increase due to the fact that a firm will have the "incentive to acquire the market or increase its technological lead over its rivals."<sup>522</sup>

Many economists have claimed that companies would be forced out of the market by other competitors if those companies fail to innovate new products or fail to introduce new technologies which reduce costs, enhance quality and save time.<sup>523</sup> Moreover, feeling under pressure, especially from foreign firms, would lead domestic firms to innovate new technologies and products for their continuing existence in the market.<sup>524</sup>

On the other hand, innovations by individuals can only take place if there are intellectual property laws that protect their knowledge from going to waste. When such individuals realise that they can be actually benefited from innovations, they have an inducement to invest their resources in innovations.<sup>525</sup> The expected returns from investing in the project are also in turn determined by the possibility of the risks inherent in the process of investing in the project in question.<sup>526</sup> The absence of effective competition law that protects intellectual property renders investing in innovations a highly risky venture because such projects, ideas or knowledge could be hijacked by the competitors through unfair means.

The advancement in the level of technology in terms of the internet and other

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520 Ibid.

521 Department for Business Innovation and Skills. *A Competition Regime for Growth: A Consultation on Options for Reform. (Impact Assessment)*. [Online] 2011. Available from: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-758-competition-regime-for-growth-impact-assessment.pdf> [Accessed: 19 December 2011] p. 9.

522 Shahein, H. *Op. cit.* p. 28.

523 Clarck, G. Competition Policy and Innovation in Developing Economies: Empirical Evidence. *International Journal of Economics and Finance*. [Online] 2011. 3.3, p. 40. Available from: <http://www.ccsenet.org/journal/index.php/ijef/article/view/11661/8296>. [Accessed: 26 February 2012].

524 Carlin, W., Fries, S., Schaffer, M. & Seabright, P. A minimum of rivalry: Evidence from transition economies on the importance of competition for innovation and growth. *The B.E. Journal of Economic Analysis and Policy: Contributions to Economic Analysis & Policy*. 2004. 3.1, pp. 1-43.

525 This argument is specifically true because, in economic terms, the level of investment in any project depends on the expected returns from investing in said project.

526 Coad, A. *The growth of firms: A survey of theories and empirical evidence*. London: Edward Elgar Publishing. 2009, p. 19.

technologies is rendering the world a global village.<sup>527</sup> The methods of transactions, specifically payment techniques, have become more and more advanced. The transport sector across the world has also significantly changed. The globalisation activities call for new measures.<sup>528</sup> Thus, the efficient implementation of the competition laws is important so as to guide and regulate the activities that could abuse the gain in the advancements.

The impact of advancement in technologies in terms of transportation and communication also means that countries that fail to implement effective competition laws will find it hard in terms of both the cost and the technicalities to maintain the system and the laws in restraint of trade.<sup>529</sup> A good example is the mobile communication sector where whenever the companies in question confront each other in the market, some resort to the unfair practice of tariff wars.<sup>530</sup>

From the above it could be said that there is no doubt that a strengthened competition regime could be beneficial for the developing economies and the UAE in particular in the wider aspect.<sup>531</sup>

### **3.4 Reasons against implementing competition law**

The opponents of adopting competition law in developing economies have a fundamental objection. They argue that the rules of competition law are unnecessary due to the fact that markets are open and any threat of imports would lead to limiting domestic producers' power. The proponents of this view argue that small economies could be regulated through trade liberalisation instead of competition law. Thus, they view trade liberalisation as a desirable substitute for competition law.<sup>532</sup>

This view has been supported by some economists, such as Boner and Langenfeld. They claim that there is no need for competition law to regulate the markets in developing economies because the markets are too small. They argue that competition will be

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527 This is evident by the advancement in the communication technologies. The level of interactions by different individuals from many other countries through telecommunication devices has tremendously improved.

528 Ibid.

529 Take the example of a situation in which information is being traded online; if there are no laws that encourage fair competition within the information communication sector then it would be costly for the information communication firms that are aggrieved due to cybercrime, fraud or unfair competition practices by the competing firms.

530 Such is the case in some developing economies which have more than one network operator with weak information and communication regulatory institutions due to inadequate competition laws. See: The World Bank Group. *Information and Communication Technology: A World Bank Group Strategy*. Washington DC: The World Bank. 2002, p. 9.

531 The UK Impact Assessment (IA) 2011 has emphasised that by claiming that the efforts in restricting anti-competitive conduct would result in products with enhanced quality, better options and more product innovation which eventually result in economic growth. See: Department for Business Innovation and Skills. *Op. cit.* p. 21.

532 Blackhurst, R. *Trade policy is Competition policy*. Cooperation and Economic Development. Paris: OECD, 1991.

sufficiently encouraged once trade borders are opened in these countries through the elimination of import and export quantitative restrictions, convertible currency creation and reduction of the barriers of external tariffs.<sup>533</sup>

In addition, there is no need for any extra regulation because the trade liberalisation's additional competitive pressure will benefit the economy and consumers at the same time. In this view, firms are obliged to reduce the prices of products to benefit consumers and to advance their productivity.<sup>534</sup> However, for many reasons the argument for substituting competition law in developing economies with trade liberalisation policy is weak. There is an acknowledgement that trade liberalisation does not by itself insure appropriate competition levels. According to Gray and Davis, it has been noted that even in small economies with open trade policy, firms will remain engaged in anti-competitive conduct which will require authorities for additional observation in the market.<sup>535</sup>

Moreover, there is no guarantee that the elimination of import barriers, due to market liberalisation, will abolish anti-competitive practices and thus the conduct of market dominance will remain. For instance, it has been claimed that governments' regulation of non-tariff barriers does not benefit consumers as much as it benefits producers. Thus, this will harm the liberalisation objective by reducing competitiveness in the market.

In addition to the above, the private interest groups' role in trade liberalisation was totally ignored by the opponents of adopting competition laws in developing economies.<sup>536</sup> As a result, the point of view that free trade policies are not a substitute for competition law in developing economies is on the increase. Consequently, this objection will not be given consideration in what follows.

The next part shows the disadvantages of implementing competition law, such as the weak institutional system, long-term economic performance, reduced opportunities for investment.

### **3.4.1 Reduced investment opportunities**

The intensity of investment is one of the most important determinants of economic

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533 Boner, R. & Langenfeld, J. *Liberal Trade and Anti-trust in Developing Nations*. Regulation. 1992, pp.5-6.

534 Godek, P. *One US Export Eastern Europe Does not need*. Regulation. 1992. p. 21.

535 Gray, C & Davis, A. Competition policy in Developing Economies Pursuing Structural Adjustment. *Anti-trust Bulletin*. 1993. 38, pp. 425-426.

536. Rodriguez, A. E & Williams, M. D. The Effectiveness of Proposed Anti-trust Programs for Developing Economies. *North Carolina Journal of International Law and Commercial Regulation*. 1994. 19, pp. 209-224.

growth and development. This has made authorities in developing economies facilitate investment projects at an organisational level. However, when investment projects appear to be selective, implying that only specific industries are targeted, this may contradict the fundamentals of competition law.<sup>537</sup> Several developing economies share a common concern that competition laws negatively affect investment activity in their country. Evernett argues that, when developing economies fully implement competition laws, they tend to reduce the amount of resources available for Research and Development (R&D), new products and new technologies.<sup>538</sup> Moreover, organisations in developing economies lack enough resources, large amount of profits and collateral compared to firms from developed nations. Therefore, certain developing economies argue that some form of oligopolistic or monopolistic power is usually acceptable under special circumstances.<sup>539</sup>

Moreover, competition law exposes developing economies to the risk of reduced investment opportunities especially pertaining to FDI.<sup>540</sup> There are two major reasons raised pertaining to FDI, which argue against the implementation of a national competition policy. First, although FDI is a significant source of technological advancement and economic growth, implementation of competition laws could adversely affect the structure and inflow of FDI in developing economies.<sup>541</sup> In most of the developing nations, FDIs are given preferential treatment and this implies that the introduction of competition laws may inhibit continuation of this practice. In Poland, for instance, it was alleged that provisions which require the consent to the Anti-Monopoly Office for capital mergers negatively affect FDIs.<sup>542</sup> Therefore, developing economies have sought to draft competition laws which create a balance between continuance of FDI and competition.<sup>543</sup> Due to the perceived positive impacts of FDI, developing economies give a lower priority to competition laws compared to FDI.

The second claim argues that Multinational Corporations (MNCs) from industrialised nations are more powerful, such that if they are allowed to compete on the same playing field as the weaker domestic industries, they would ultimately dominate the host economy. The companies which would emerge as winners in this ‘unequal’

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537 OECD. *Op. cit.* p. 2.

538 Evernett, S.J. *Op. cit.* p. 6.

539 OECD. *Op. cit.* p. 2.

540 Motta, M. *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. 2004. p. 32.

541 *Ibid.* p. 33.

542 Anderson, R. D. & Jenny, F. *Competition Policy as an Underpinning of Development and Trade Liberalization: Its Relationship to Economic Restructuring and Regulatory Reform*, Paper prepared for presentation at the Seoul Competition Forum, Korea, pp.6-8, November. 2002, p. 7.

543 UNCTAD. 3

competition are MNCs and this implies that welfare losses of developing economies would accrue. Several reservations were held by the UNCTAD secretariat on behalf of developing economies, arguing against full liberalisation of their economies. Therefore, opening borders and fully liberalising foreign trade as a result of competition laws may adversely affect the welfare of developing economies.<sup>544</sup> It has been claimed that MNCs usually take advantage of free and open markets to dump standard goods into developing markets and this may have adverse effects for local consumers.

Motta argues that the main aim of FDI is to generate profits and maximise the economic impact of the foreign market.<sup>545</sup> However, profitability mainly depends on the preferential treatment given by the host country, such as tax cuts and competition reducing import restrictions. However, when these factors are considered, it becomes questionable if the host country is the major beneficiary or if it basically leads to inefficient allocation of resources.<sup>546</sup>

Theoretically, investment and capital accumulation enhance people's welfare and economic growth. In addition, developing economies that lack enough capital could prosper through the high intensity of investment. However, this may not be applicable in each case. Based on macroeconomic terms, each investment has an opportunity cost-related to decreased actual consumption. Economic theory argues that a free competitive market is the most appropriate mechanism that identifies welfare enhancing investment. Fox states that competition motivates firms to invest their capital in the most appropriate way.<sup>547</sup> Moreover, without competition, companies may lack an incentive to increase the level of their investments.

However, Correa argues that, since developing economies have missing and incomplete markets, competition that is not restricted could have ruinous tendencies leading to detrimental investment activities.<sup>548</sup> Therefore, an optimal degree of competition should be adopted in developing economies that provides sufficient rivalry to decrease inefficiency. High levels of competition, often stimulated by implementation of

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544 Motta, M. *Op. cit.* p. 65.

545 *Ibid.* 63

546 Motta, M. *Op. cit.* p. 70.

547 Fox, E. M. *In Search of a Competition Law Fit for Developing Economies. NYU Law and Economics Research Paper No. 11-04.* 2011. p. 11. Available from: <http://ssrn.com/abstract=1761619> or <http://dx.doi.org/10.2139/ssrn.1761619>. [Accessed: 3 March 2012].

548 Correa, C. M. Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing economies, *ICTSD Intellectual Property and Sustainable Development Series Issues Paper No. 21.* 2007, p. 4.

competition laws, can have negative effects on the propensity to invest.

However, the statements above are not necessarily true. Recent research has revealed that competition law in developing economies offers an avenue for a balanced framework of investment, with possible investors competing on successful grounds in an equitable manner. With an eligible legal framework that controls the scope with which corporations can carry out their operations, it becomes arguable that competition laws act as the basic bridge with which selective investment can be done across all the industries within the economy.<sup>549</sup> Thus, competition law is basically good for a well-coordinated investment process, especially for the UAE. For businesses, knowing that a law does exist, which provides a protection for them from anti-competitive behaviour<sup>550</sup>, would make them carry on their business with confidence and without any fear of any anti-competitive practices. It has been argued that, if competition law harmed undertakings, it wouldn't be possible for them in the first place to continue their businesses internationally as laws might be stronger and harsher. One might suggest that such firms have the knowledge and experience to deal with different regulations such as competition laws. In addition, firms will not be negatively affected by the law, because of the economic freedom principles of supply and demand that the UAE has adopted that the firms have the knowledge and experience to deal with.

### **3.4.2 Weak institutional structure**

The recent law and economic development literature shows that the effective operation of the law relies on the institutions supporting vitality.<sup>551</sup> Scholars argue that the arguments against implementation of competition laws in developing economies are attributed to weak institutional structures which lack the capacity to enhance a competitive business environment, thus competition enforcement will be unsustainable.<sup>552</sup> Most institutional structures in developing economies lack the capacity to effectively regulate the business environment. This implies that, due to the implemented competition laws, most domestic organisations lack a strong ground to compete with foreign investors due to the lack of efficient mechanisms to enhance appropriate business practices.<sup>553</sup> Competition

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549 Ibid. 5

550 Whether from international investors (for local firms) or from domestic businesses (for international firms).

551 Kovicac, W. Getting started: Creating New Competition Policy Institutions in Transition Economies. *23 Brook. Journal of Int'l Law*. 1997. 403, pp. 403-408.

552 Willig, R. D. Anti-Monopoly policies and institutions. In Clague, C. & Rausser, G. C. (eds.) *Emergence of Market Economies in Eastern Europe*. Oxford: Blackwell. 1992, pp. 187-195.

553 UNCTAD. *Handbook on Competition Legislation*. Trade and Development Board. Intergovernmental Group of Experts on Competition Law and Policy. 2007, p. 4.

laws seek to establish rules, which are different from regulation and thus minimise direct involvement by the government in businesses. However, most developing nations are yet to enact measures that will strengthen institutional structures to regulate competition. This implies that, instead of implementing competition laws, authorities should come up with certain rules that will strike a balance between stiff competition from international investors and the fragility of domestic organisations.<sup>554</sup>

The authorities should seek for measures which stabilise the domestic industries as well as enhancing economic growth.<sup>555</sup> Studies have revealed that, due to weak institutional structures, some of the biggest companies may implement barriers to internal markets through discriminatory policies, which would hinder competition.<sup>556</sup> Some scholars argue that liberalisation and deregulation are efficient in the promotion of a competitive business environment.<sup>557</sup>

However, a weak institutional framework has been termed by scholars as a leeway and a jargon to blindfold the interests of the few, with the elite part of the society benefiting beyond the average expected margin.<sup>558</sup> As this is not symbolically enough, the political institution has failed to create a legal framework that addresses competitiveness. Scholars on this point of concern have termed it as a mere tool to enrich themselves from the trickle-down effects of the weak institutional framework. The basic thing here should be modalities of governance that enhance competition both within and from the international community.<sup>559</sup>

In terms of the UAE, for many years - due to the policies that it has adopted - the country has proven a strong institutional structure that has the capacity to enhance a competitive business environment. Thus, the implementation of the competition law would not hinder its effectiveness.

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554 Ibid.

555 For instance, developing economies usually rely on the agricultural sector as their basis for economic growth, which implies that such sectors are of critical importance to the well-being of the local populations.

556 Qaqaya, G & Lipimile, G. *The effects of Anti-competitive Business Practices on developing economies and their Development Prospects*. [Online] 2008, p. 3. Available from: [http://www.unctad.org/en/docs/ditcclp20082\\_en.pdf](http://www.unctad.org/en/docs/ditcclp20082_en.pdf). [Accessed 3 March 2012].

557 Ibid.

558 Weak institutional framework has thus been used as jargon by the elite and the political regime, to secure themselves economic advantages both within the internal dimensions of the national economy and from the bargains of the curtails that come along from the international community. See: Qaqay & Lipimile, p. 4.

559 Ibid.

### 3.4.3 Lack of trust and weak judicial systems

Scholars have revealed that weak judicial systems in developing economies lack the capacity to enforce competition laws. Therefore, when such laws are implemented, powerful individuals in the government may be compromised to award certain companies better opportunities at the expense of their competitors. Due to a lack of trust on the rule of law, competition laws may not be applied to the latter, implying that a level playing field among companies may not be enhanced.<sup>560</sup> Despite the merits that have been stated by many studies on the role played by the competition laws in the growth of economies, lack of belief could make such laws turn out to be non-beneficial.<sup>561</sup>

Some argue that, as long as there are no mechanisms to create awareness among the citizens of the benefits of such arrangements, it is better to do without such competition policies in the meantime.<sup>562</sup> Developing economies lack adequate channels for raising awareness among their population of the benefits of the formulated competition policies and laws. Governments in developing economies should therefore collaborate with other stakeholders to establish mechanisms that will ensure a rapid reform in commercial justice so as to enhance the competitiveness of the business environment.

In addition, another challenge eminent with the developing economies is the fact that there are weak judicial mechanisms to tackle cases arising from the breach of such laws.<sup>563</sup> While most of the developed countries have set up special benches courts to deal with cases arising from the breach of such laws, most developing economies treat them like many other cases and they are thus not given special attention. The justice system is made even weaker by the fact that there is an inadequate number of competent persons to prosecute the offenders. The worst case scenario could be a situation where the law enforcement agencies that are charged with the responsibility of investigating are either compromised or simply incompetent. The absence of adequate evidence before the court results in a situation where those in breach of the competition laws go unpunished thereby rendering the law ineffective. The competition laws would not be effectively implemented owing to the incapacity of the system to handle such cases.<sup>564</sup>

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<sup>560</sup> Geradin, D. *Op. cit.* p. 17.

<sup>561</sup> Page, S. *Op. cit.* p. 52.

<sup>562</sup> This is because for the full benefit from the competition laws generated to be realised, the population in question must be willing and ready to invoke their rights to such laws.

<sup>563</sup> Page, S. *Op. cit.* p. 30.

<sup>564</sup> The incapacity as mentioned could be in terms of competent human capital. However, lack of resources in terms of the finances required by the relevant regulatory bodies to run and implement the laws could hamper the result. See: Page, S. *Op. cit.*

In addition, studies have revealed that a weak judicial system has been one of the greatest hindrances to investment. MNCs have been able to use the judicial system to seek for favours and unfair business practices.<sup>565</sup> It is believed that the judicial system in developing economies needs urgent reform, which will ensure that the rule of law is followed.

However, the weak judicial framework is just a weakness, a small concept that may just require a small adjustment to suit the broad economic interest of the nations. The judicial system should thus be changed to appreciate the need for an environment that offers competition. The benefits of competition laws significantly surpass the underlying threshold of a weak judicial system. Even with modulations in the legal framework, competition laws would act to enhance wider economic benefits. Thus, the need for effective competition laws entails the need to re-formulate weak judicial systems.<sup>566</sup> With regard to the UAE, the judicial system has proven its effectiveness. The system is strong and independent that does not allow any interference with or influence over the court's decisions.<sup>567</sup> It should be noted that these arguments are general criticisms and not applicable solely to competition law. These arguments are based on the lack of basic prerequisites for the successful enforcement of any law.

#### **3.4.4 Innovation, Research Development and intellectual property rights**

Several analysts have argued that implementation of competition laws in developing economies tends to minimise the intensity of R&D at the organisational level.<sup>568</sup> Therefore, for R&D to be maximised, it is important to allow some form of cooperative behaviour. These claims made Indonesia and Taiwan remove certain provisions of the competition laws from issues pertaining to inter-firm efforts. However, experts warn that when competition laws are used to exempt cooperative behaviour for R&D, there is a high possibility of creating anti-competitive practices.<sup>569</sup>

It has been argued that even problematic behaviour relating to huge organisations

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565 Holscher & Stephan. *Op. cit.* p. 324.

566 Qaqay & Lipimile, *Op. cit.* p. 9.

567 The Government has taken serious steps to improve the efficiency and effectiveness of the judicial system by attracting qualified judges, enhancing judicial inspection, modernising judicial services through improving systems and procedures and many other steps. See: [http://planipolis.iiep.unesco.org/upload/United%20Arab%20Emirates/United%20Arab%20Emirates\\_Gouvernement\\_strategy\\_2011-2013.pdf](http://planipolis.iiep.unesco.org/upload/United%20Arab%20Emirates/United%20Arab%20Emirates_Gouvernement_strategy_2011-2013.pdf) p. 14.

568 Authorities in Egypt once argued that competition laws limited cooperation in the field of R&D. See: Acemoglu, D., Aghion, P. & Zilibotti, F. Distance to Frontier, Selection and Economic Growth" *Journal of the European Economic Association*. 2006. 4:1, p. 37.

569 Ibid.

may not be considered abusive when they play a significant role in enhancing technical progress. In addition, profits from monopolies may be used to create new products and stimulate innovation while state aid can be used to stimulate R&D.<sup>570</sup> However, when all the requirements of competition laws are implemented in developing economies, all these benefits may actually go to waste since all companies may be required to operate on the same playing field.

According to Williams, a monopoly or dominant position of a single organisation may not necessarily lead to adverse effects on the economy.<sup>571</sup> Organisations constantly engage in competitive behaviour through the introduction of new products and innovations to enhance efficiency and this may create a competitive advantage for their rivals. Therefore, firms that emerge the best can attain a monopolistic or dominant position at some time and thus be enabled to reap extraordinary profits.<sup>572</sup> However, this may go on for a specific amount of time until other competitive companies emerge and overtake them. This implies that the desire to make some monopolistic profits may act as an incentive to organisations to innovate and thus lead to economic growth.<sup>573</sup> Therefore, when competition laws are introduced in developing economies, organisations may lack an incentive to innovate and thus reduce the possibility of attaining economic development.

However, scholars have opposed this view on the basis that this view is one-way ended and lacks the balance. In contrast, however, they have argued that competition law is the main tool to soothe the need for extensive investments in R&D, by all the stakeholders, both the governments and the private organs.<sup>574</sup> In fact, they have hypothesised the need to create a framework of workable competition laws that would foster coordinated support for R&D. They have argued that the need to improve quality and increase the production by corporations can only be facilitated by a competitive environment instigated by strict competition laws.

### **3.5 Conclusion**

This chapter has established that, compared to developing economies, developed economies have for several years implemented competition laws to protect their industries

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<sup>570</sup> Ibid. p. 39.

<sup>571</sup> Williams, M. *Competition Law in China Hong Kong and Taiwan*. Cambridge: Cambridge University Press. 2006, p. 40.

<sup>572</sup> Ibid. p. 40.

<sup>573</sup> Acemoglu, Aghion & Zilibotti. *Op. cit.* p. 41.

<sup>574</sup> Ibid. 42.

and enhance economic growth. Despite the arguments against the adoption of competition laws in developing economies, economic experts believe that countries can reap huge benefits when they create a level playing field in their economies.<sup>575</sup> Competition policies create sustainable economic growth by ensuring that firms are innovative in a free market that is not dominated by cartels and monopolies.<sup>576</sup> Moreover, competition laws enhance the competitiveness of a market by curtailing different forms of harmful business practices such as mergers and acquisitions.<sup>577</sup> In addition, adopting and enforcing competition laws in developing economies will help protect the market economy and consumers through eliminating the harmful practices of international cartels and controlling other anti-competitive practices, such as mergers.

This positive effect, however, results from effective implementation of the rules contained in the competition laws. It follows, therefore, that the extent of the effectiveness of the competition laws could depend on the capacity of the jurisdiction to handle the implementation. Some analysts believe that the creation of a level playing field may hurt domestic industries since they lack enough finance and technological innovation compared to MNCs.<sup>578</sup>

In the context of the UAE, the benefits to be derived from implementing the competition laws significantly outweigh the negative effects of implementing the laws in the country. Some lessons could be drawn for those who have reservations about the adoption of competition laws in developing economies in general and the UAE in particular. Economic benefits could be achieved if enforcement of competition law occurs while the judiciary system was independent and rule of law exists. Furthermore, R&D would be able to increase production and improve quality through a competitive environment that is guided by strict competition laws.

From the above it can be said that the benefits of competition laws far outweigh the negative attributes and thus developing economies in general and the UAE in particular would benefit from the implementation of competition laws to enhance the economy.

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575 Research and Innovation. *Op. cit.* p. 3.

576 *Ibid.* p. 2.

577 Stephan. *Op. cit.* p. 105.

578 *Ibid.* 106.

# Chapter Four: Anti-competitive Agreements and Abuse of Dominant Position

## 4.1 Introduction

One of the significant elements of competition law is the control of anti-competitive agreements. Anti-competitive agreements include any arrangement that involves collusion between two parties with the aim of restricting competition in the market. An obvious example of such collusion can be seen in cartel agreements.<sup>579</sup> Thus, competition law includes specific rules with the objective of protecting consumers and small entities from anti-competitive conduct. The UAE's competition law includes such provisions, which control anti-competitive agreements and prohibit such practices between undertakings. Such rules are found under Article 5 of the UAE's competition law.

In addition, another important part of competition law is the control of abuse of dominance. Competition law includes rules that prohibit undertakings from hampering competition and harming consumers and other competitors through the abuse of their dominant position. Through dominant position, undertakings are granted extra power against other competitors. Such power could be abused through, for example, refusing to deal with other firms. The UAE competition law includes provisions that aim to prevent the abuse of dominant position found under Article 6.

This chapter aims to evaluate the provisions regarding anti-competitive behaviour in the UAE and compare it with the similar provisions of the EU competition law. To do so, the provisions regarding the prohibition of anti-competitive agreements in the EU will be illustrated first. Then the UAE provisions will be illustrated and evaluated in the light of the EU provisions. In addition, this chapter will demonstrate and evaluate the provisions that regulate the control of dominant position in the UAE in the light of the similar EU competition law.

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<sup>579</sup> Dabbah, M., (2004), *EC and UK Competition Law Commentary, Cases and Materials*, Cambridge: Cambridge University Press.

## **4.2 Key legislation of the EU competition law. Articles 101 TFEU and 102 TFEU**

The key legislation of the EU competition law consists of Articles 101 TFEU and 102 TFEU. The fundamental essence of these Articles stems from the fact that they are applied directly while the European Commission ensures their enforcement.<sup>580</sup> Also, it should be taken into consideration that the fundamental essence of the above-mentioned Articles stems from the fact that they were the first legal provisions of the EC competition law (originally adopted as Articles 85 and 86 of the Treaty of Rome) which prescribed prohibitions of various practices and undertakings restricting or impeding competition.<sup>581</sup>

As far as Article 101 of the TFEU (former Article 81 of the EC Treaty) is concerned, it needs to be stated that its legal provisions prohibit all practices which may influence trade between Member States by way of preventing, restricting or distorting competition inside the internal market,<sup>582</sup> such as price fixing, control over production, investment, etc., sources of supply or share markets, anti-competitive conditions, and unfair complementary obligations.<sup>583</sup>

As far as Article 102 of the TFEU (former Article 82 of the EC Treaty) is concerned, it needs to be elucidated that its legal prescriptions prohibit any abuse connected with a dominant position within the internal market, especially those which lie in the imposition of unfair trading conditions, restriction of production or technical development to the detriment of customers, dissimilar conditions in terms of equivalent trading relationships, and unfair complementary obligations.<sup>584</sup>

### **4.2.1 Control of anti-competitive agreements**

#### **4.2.1.1 Introduction**

It is very important to illustrate the objective of Article 101 (1) of the TFEU. This article prohibits agreements between firms, concerted practices and decisions adopted by association of companies which: affect the internal market trade between states; and their object or effect is a distortion or restriction of competition in the internal market. Article 101 further specifies the kinds of prohibited conduct in a so-called non-exhaustive list:

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580 Audia, Tamussino, & Hull, *Op. Cit.*

581 *Consolidated Version of the Treaty Establishing the European Community, Op. Cit.*

582 *Consolidated version of the Treaty on the Functioning of the European Union*. 2008. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF> [Accessed: 9 March 2013].

583 *Ibid.*

584 *Ibid.*

(a) direct and indirect price fixing (whether sale or purchase price); (b) restricting and controlling markets, production, investments or technical development; (c) sources of supply or markets sharing; (d) application of disparate conditions to equivalent transactions and thus, putting them in a competitive advantage; (e) linking the conclusion of contracts to acceptance by other parties, of additional obligations, which in their character or in accordance with commercial usage are not connected with the subject matter of the contracts.<sup>585</sup> Thus, one may observe that Article 101 provides non-exhaustive examples of anti-competitive agreements and practices.

Article 101 (2) mentions that any agreement or decision that infringes the prohibitions will lead to an automatic voiding of these agreements or decisions. At the same time, Article 101 (3) provides certain defences against anti-competitive practices. Thus, Article 101 (3) provides that the provisions of Article 101 (1) can be declared inapplicable in the following cases: if an agreement between firms, decision of association of companies and concerted practices contribute to the improvement of production or distribution of goods or promote economic and technical progress. Such agreements can be held valid if they allow benefits to consumers. Furthermore, such agreements, decisions and practices should not impose restrictions on the undertakings concerned.<sup>586</sup> Finally, such agreements, decisions and practices should not afford the possibility to restrict competition in regards of the considerable part of the product concerned.<sup>587</sup>

It is worth mentioning that Article 101's prohibitions are construed very broadly so as to capture all types of arrangements between companies that aim at or lead to restriction or distortion of competition in the internal market. The EU competition rules, including Article 101, are based on the presumption that every undertaking is an independent economic operator which autonomously defines and pursues its commercial policies.<sup>588</sup> Therefore, there should not be any coordination, perhaps with a few exceptions, of commercial policies of different companies.<sup>589</sup> The most common forms of anti-competitive agreements are cartels, price fixing, limitation of production, share markets or customers, and resale price fixing (between a producer and its distributors). These agreements and practices are considered in detail in the following parts.

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585 The Treaty on the functioning of the European Union of 2010.

586 *Ibid.* Article 101 (3).

587 *Ibid.*

588 Van Bael & Bellis. *Competition Law of the European Community*. 4th ed. Kluwer Law International, 2005, p. 386.

589 *Ibid.* p. 387.

#### **4.2.1.2 Cartels, price fixing, limitation of production, market sharing, and resale prices fixing**

According to Nolo's English Law Dictionary, the term "cartel" should be understood as a conglomeration of independent business entities which is formed to either control distribution, or fix prices, or diminish competition.<sup>590</sup> Similarly, Black's Law Dictionary defines the concept of "cartel" an agreement between undertakings, whether formal or informal, "in an industry or market" in order to limit competition through "setting minimum price levels or maximum output quotas, and/or by segregating products or markets."<sup>591</sup> Even though a cartel is likely to "lead to profit growth in the short run, members may find it difficult to monitor each other."<sup>592</sup> These two legal definitions help to make the inference that a cartel is an association of business entities which seek to control prices, production and other facets of competition.

In the context of EU competition law, the term "cartel" means a collective conglomeration whose participants arrange an agreement to impede competition among themselves.<sup>593</sup> This definition emphasises the endeavours of the participants of a cartel to impede competition between them. Also, the aforesaid conception of cartels is incorporated into the EU anti-cartel policy. Both Geradin, et al.,<sup>594</sup> and Slaughter and May<sup>595</sup> are disposed to think that Article 101 of the TFEU underlies the EU anti-cartel policy as it prohibits conglomerations of business entities which aim to suspend competition.

The EU Commission explains that cartel refers to a group of similar, independent undertakings which join together to share markets or customers between them, to fix prices or to restrict production.<sup>596</sup> Thus, one may observe that cartels are horizontal agreements. There is no doubt that the concept is covered by Article 101 since the latter specifies that price fixing, sharing markets and limiting production are prohibited forms of conduct.

*The Rhône-Poulenc* case is one of the landmark cartel cases. In this case the Court

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590 Hill, G N., & Hill, K T. *Nolo's Plain-English Law Dictionary*. Nolo. 2009, p. 29.

591 The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. [Online] Available from: <http://thelawdictionary.org/letter/c/page/29/> [Accessed: 15 March 2014].

592 Ibid.

593 Geradin, D., Layne-Farrar, A., and Petit, N. *EU competition law and economics*. Oxford: Oxford University Press. 2012, p.iv.

594 Ibid. p. iv.

595 Slaughter and May. *The EU Competition Rules on Cartels: A Guide to the enforcement of the rules applicable to cartels in Europe*. [Online] 2012. Available from: <http://files.teneoevents.eu/media/emailings/pdf/the-eu-competition-rules-on-cartels.pdf> [Accessed: 9 March 2013] p. 2.

596 European Commission. *Cartels*. [Online] 2012. [http://ec.europa.eu/competition/cartels/overview/index\\_en.html](http://ec.europa.eu/competition/cartels/overview/index_en.html) [Accessed: 22 March 2013].

upheld that the regular meetings of polypropylene producers at which target sales volumes were determined constituted a cartel.<sup>597</sup> In addition, the Court drew attention to the fact that polypropylene producers regularly, for a certain period, discussed matters of sales volume targets and exchanged information about sales.<sup>598</sup> Therefore, the principle established by Rhône-Poulenc suggests that the cartel may operate in the form of meetings of its members and of exchange of pricing information. To form a cartel it is not necessary to conduct institutionalised meetings among the participants.

Secret meetings also may give a rise to a cartel, as was the case in *Europa Carton AG v Commission*.<sup>599</sup> Slaughter and May assert that cartels are usually secret arrangements between competitors which seek to fix prices, share markets, restrict output, etc. In light of this, the practices of cartels, such as price fixing, restrictions of production, sharing of markets or customers, and fixing of resale pricing, should be viewed as the kind of impediments on competition which are prohibited under Article 101 of the TFEU.

In *Hercules Chemicals v Commission* the Court established a principle according to which even if the company was present at the meeting conducted with an anti-competitive object and publicly desists from such a meeting, such a company can be held as participating in the cartel concerned in case it gave the impression to the participants that it is bound by the result of the meetings.<sup>600</sup> This principle was reaffirmed on a number of occasions, for instance in *JFE Engineering v Commission*<sup>601</sup> and *Corus UK v Commission*.<sup>602</sup> Therefore, the intention not to participate in a cartel is irrelevant unless publicly expressed at the cartel meeting.

Overall one may observe that the ECJ regards a cartel as an informal organisation, which operates through meetings at which the anti-competitive objects are pursued. The mere innocent participation in such a meeting may give rise to allegations of participation in a cartel.

To recall, Article 101 of the TFEU explicitly prohibits price fixing when it impacts the trade between member states and restricts or distorts competition in the internal market. The CJEU has considered on a number of occasions what may constitute price fixing. In

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597 Rhône-Poulenc SA v Commission [1991] ECR II-00867

598 Ibid.

599 *Europa Carton AG v Commission of the European Communities* (Competition) [1998] EUECJ T-304/94

600 *Hercules Chemicals v Commission* (Competition) [1999] EUECJ C-51/92P

601 *JFE Engineering v Commission* (Competition) [2004] EUECJ T-67/00

602 *Corus UK v Commission* (Competition) [2004] EUECJ T-48/00

the framework of the EU's competition law, the practice of price fixing means either direct or indirect fixing of purchase or selling prices.<sup>603</sup> The fact is that the protection of price competition is one of the core objectives of the European competition policy.<sup>604</sup>

That is why any practice impeding this form of competition is prohibited under the EU competition law. Apart from direct and indirect price fixing, the EU competition law also prohibits horizontal and vertical price fixing.<sup>605</sup> Thus, price-fixing, like any practice infringing on competition, is conducted through the agreement between competitors who seek to fix their resale or sale prices.

It follows from *A. Ahlstrom Osakeyhtio and others v Commission of the European Communities*<sup>606</sup> that price fixing should necessarily arise out of concerted action. If there is no concerted action, price fixing cannot be established. Furthermore, *Ahlstrom Osakeyhtio* suggests that parallel conduct is not necessarily evidence of concerted action. In this case the undertakings announced their prices and at the same time to be found that other prices were similar. Because of this, the Commission argued that there was a concerted action to fix prices. The Commission treated the parallel conduct as the evidence of concerted action. However, the Court pointed out that “the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods.”<sup>607</sup> The Court further rejects that in this case parallelism is an indication of the concerted action.

In *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid & Ors v Commission of the European Communities*<sup>608</sup> the court ruled that joint fixing of price increase by participants of the tendering procedure was an infringement of Article 85 (1) (a), which is now Article 101 (1) (a) – direct and indirect price fixing. The Court specifies that such joint increase constitutes fixing the part of the price and it restricts the competition between companies, as far as their calculation costs are concerned. Finally, the Court notes that fixing of price increase results in a general rise in prices.<sup>609</sup>

Another case, in which the Court clarifies what may constitute price fixing, which

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603 *Consolidated version of the Treaty on the Functioning of the European Union, Op. Cit.*

604 Van Bael and Bellis. *Competition law of the European Community*. Kluwer Law International. 2004, p. 388

605 *Ibid.*

606 *A. Ahlstrom Osakeyhtio and others v Commission of the European Communities. (Competition ) [1988] EUECJ C-129/85*

607 *Ibid.*

608 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid & Ors v Commission of the European Communities. (Competition) [1995] EUECJ T-29/92*

609 *Ibid.*

violates the EU competition law, is *Deutsche Bahn AG v Commission*.<sup>610</sup> In this case, the German national railway company attempted to establish with other EU national railway carriers a common administration for tariffs and prices for carriage of maritime containers from the territory of one member state to the territory of another one. The Court ruled that the establishment of the common administration of prices and tariffs constituted an infringement of then Article 85 (1) (a) of the Treaty of Rome, now Article 101 (1) (a) TFEU.

Thus, it could be said that in order to be illegal price fixing it should: (1) arise out of concerted action or concerted arrangements (mere parallelism in prices and their announcement is not enough to establish price fixing, as was the case in *Ahlstrom Osakeyhtio*); (2) restrict or distort competition in the internal market (as was the case in *Vereniging van Samenwerkende Prijsregelende Organisaties*); (3) have an impact on the trade between member states (as was the case in *Deutsche Bahn*).

To proceed further, the limitation of production or sources of supply is another type of practice prohibited by Article 101 of the TFEU. This practice is intrinsic to the activities of cartels. The European Commission, coupled with the European Court of Justice, has found over and over again that the sharing of production quotas among competitors constitutes a serious encroachment on the EU competition law.<sup>611</sup> Article 101 (3) (b) prohibits agreements between companies, decisions of associations of companies and concerted practices which limit or control production. Thus, the important question is what kind of conduct may constitute or give rise to limitation of production.

One of the important cases clarifying the meaning of Article 101 (3) (b) is *Wouters v Algemene Raad van de Nederlandse Ord van Advocaten*. In this case the Court points out that *per se* a prohibition of multidisciplinary partnership between members of the Dutch Bar and accountants limits production and technical development within the meaning provided by Article 81 (1) (b) of the Treaty of Rome, now Article 101 (3) (b) TFEU.<sup>612</sup> At the same time, the Court made a reservation that prior to deciding whether such a prohibition violates Article 81 (1) (b), one should look at the purpose and the whole context of the prohibition.<sup>613</sup> Then the Court specified that the prohibition was enacted so as to

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610 *Deutsche Bahn AG v Commission of the European Communities*. (Competition) [1997] EUECJ T-229/94

611 *Ibid.* p. 413.

612 *Wouters v Algemene Raad van de Nederlandse Ord van Advocaten* [2002] EUECJ C-309/99

613 *Ibid.*

avoid conflicts of interest. The Court found that it was a legitimate reason to uphold the arrangement which resulted in limitation of production and technical development.

However, in another case, the Court took a more rigid approach. In *Beef Industry Development Society & Barry Brothers*<sup>614</sup> the association of beef processors decided to take measures to reduce the number of processors because there was an overcapacity in the Irish processing industry. Such a decision was taken in the wake of the conclusions of a market study commissioned by the Irish government.<sup>615</sup> The study concluded that the efficiency measures (e.g. reduction of processors) may result in cost benefits of IEP 14 million. The association planned to reduce the capacity of the processing industry by 25 per cent within one year.<sup>616</sup> The question was whether such an arrangement would infringe Article 101 of the TFEU because its effect was a limitation of production. The ECJ ruled that such an arrangement would be incompatible with Article 101 of the TFEU. Thus, this case suggests that measures to limit or control production, notwithstanding their efficiency goals, infringe EU competition law.

The allocation of markets or customers constitutes the next infringement of the EU's competition law. Some scholars express confidence that the sharing of the market may take place not only as a geographical division of market and production restrictions, but also as the division of consumers or certain products.<sup>617</sup> Market sharing arrangements may take various forms. In particular, market sharing can be set forth in agreements to abstain from exporting goods from domestic markets, in agreements to provide sales only through the domestic manufacturer, and in agreements to confine sales to domestic markets and in agreements by EU and non-EU companies to protect the internal market from low-priced imports.<sup>618</sup> Sometimes, market sharing may take industry specific forms. For instance, in *Scandinavian Airlines System v Commission*<sup>619</sup> it took the form of a code-share agreement (SAS and Maersk Air shared a number of Maersk's domestic and international routes) and sharing the frequent flyer programme.

Also, there are cases when market-sharing arrangements were directed at the restriction of trade with member states. For example, in *Cimenteries CBR SA v.*

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614 Competition Authority vs Beef Industry Development Society & Barry Brothers (Competition) [2008] EUECJ C-209/07

615 Ibid.

616 Ibid.

617 Ibid. p. 415.

618 Deutsche Bahn AG v Commission of the European Communities. (Competition) [1997] EUECJ T-229/94

619 Scandinavian Airlines System v Commission (Competition) [2005] EUECJ T-241/01

*Commission*, cement producers divided markets between them on the ground of domestic market principle: they refrained from exporting to other member states so as to secure their home markets.<sup>620</sup> The same pattern of market sharing can be found in Peroxygen Products: the manufacturers of hydrogen peroxide agreed to limit their operations to their home markets.<sup>621</sup> In these cases, market share is based on a purely geographical principle, which, in simple terms, can be described as follows: I do not intervene in your territory, you do not intervene in mine.

Another type of market sharing is sharing on a customer-based principle. For instance, in Methylglucamine the companies agreed not to compete for each other's customers. Thus, the companies divided the customer market.<sup>622</sup> Similar arrangements can be found in *Synthetic Rubber and Kaucuk v Commission*.<sup>623</sup>

Resale price fixing is another practice prohibited by Article 101 (1) of the TFEU. It refers to a restriction according to which the manufacturer defines the final price to be charged by the retailer to consumers.<sup>624</sup> Thus, one may observe that resale price fixing is a vertical arrangement since it exists between the companies situated at different levels of a supply chain.

Although there is a view that vertical arrangements are less harmful to competition than horizontal ones, the Commission still takes resale price fixing very seriously. Thus, in the case of Volkswagen the Commission imposed a fine in the amount of € 30.96 million on Volkswagen for resale price fixing in Germany.<sup>625</sup> Also, in Yamaha the Commission imposed fines for resale price maintenance.<sup>626</sup>

### **Significant cases:**

The phenomenon of price fixing is particularly analysed in *Imperial Chemical Industries Ltd. v Commission* of the European Communities (hereinafter referred to as the Dyestuffs case). In this case, the European Court of Justice held that the contrived fixing of prices by dyestuff producers aimed at substituting the risk of competition by

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620 Jones A. & Sufrin, B. *Op. cit.* p. 892.

621 Ibid.

622 Ibid. p. 893

623 Ibid

624 Rey, P. & Vergé, T. Resale Price Maintenance and Horizontal Cartel. Leverhulme Centre for Market and Public Organisation, University of Bristol, Department of Economics [Online] 2004, p. 2 Available from: <http://www.sfb504.uni-mannheim.de/~oliver/fsem/188.pdf> [Accessed: 26 February 2013].

625 Jones A. & Sufrin, B.E. *EC Competition Law: Text, Cases, and Materials*. 3d ed. Oxford University Press, 2008, p. 167.

626 Ibid. p. 718.

collaborative concerted practice was forbidden under Article 81 (1) of the TEC.<sup>627</sup> Also, the Court found that the amount of the fine was consistent with the gravity of the infringement of the EC rules on competition.

To proceed further, in the *Graphite Electrodes* case, the European Commission ruled that eight producers of graphite electrodes made an agreement on deliberate and joint increases in price. Also, the Commission indicated what producer led the price increases in every national market through the circulation of current and future target prices in order to coordinate the general increase in the Community.<sup>628</sup>

Similar findings and responses were adopted by the European Commission in the *Vitamins* case and the *Carbonless Paper* case. In the *Vitamins* case, the Commission unmasked eight producers of vitamins which participated in eight distinct cartels fixing the prices of various vitamin-related products.<sup>629</sup> In like manner, in the *Carbonless Paper* case, the Commission exposed the manufacturers of carbonless paper which had participated in a secret Europe-wide cartel aimed at encouraging the profitability of its participants through arrangements concerning joint price increases.<sup>630</sup>

After the case law concerning price fixing has been discussed, it is the right time to gain an insight into the cases of limitation of production or sources of supply. In all respects, the most noteworthy case is the case of the *International Quinine Cartel*. This is the case of multiple oral arrangements (gentlemen's agreements) among German, French, Dutch and British manufacturers which forbade the British and French parties from producing quinine without the consent of the other parties, in exchange for territorial protection of their respective markets.<sup>631</sup>

To proceed further, in the *Italian Cast Glass* case, the European Commission judged and disapproved of the practice of production quotas exercised by Italian producers of glass, detecting that the quotas were deemed to keep safe each company's respective market share.<sup>632</sup> Thus, it was disclosed in the case that, by restricting their production, the

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627 The European Court of Justice. Judgment of the Court of 14 July 1972. *Imperial Chemical Industries Ltd. V Commission of the European Communities*. Case 48-69. Available from: [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0048&lg=en) [Accessed: 9 March 2013].

628 *Tokai and Others v Commission of the European Communities*. [2005]. ECR II-10.

629 European Commission. *Vitamins*. OJ 2003 L6/1.

630 European Commission. *Carbonless Paper Cartel*. OJ 2004 L115/1.

631 ACF Chemiefarma v Commission. [1970]. ECR 661; Buchler v Commission. [1970]. ECR 733; Boehringer Mannheim GmbH v Commission. [1970]. ECR 769.

632 European Commission. *Italian Cast Glass*. OJ 1980. L383/19.

parties were no longer eager to decrease their prices to conquer a larger market share in order to cease the opportunity of drawing the maximum advantage from their production quotas.

As far as the practice of allocation of customers or products is concerned, one of the most noticeable cases exemplifying the practical dimensions of this prohibited activity is the *BP Kemi-DDSF* case.<sup>633</sup> According to this case, BP Kemi made an agreement with DDSF that the latter would enjoy the exclusive entitlement to sell ethanol in Denmark, with the exception of this practice being condemned by the European Commission as unacceptable under the EU competition law because it assigned which consumers were to be supplied by each party and thus removed the incentive of BP Kemi to sell ethanol to new consumers.

#### 4.2.1.3 Exemptions

Exemptions from the EU competition rules are called block exemptions and cover various types of restrictive agreements which correspond with every one of the four conditions of Article 101 (3) of the TFEU.<sup>634</sup> These exemptions cover the following: a) vertical agreements; b) horizontal cooperation agreements; c) technology transfer agreements; d) insurance; e) motor vehicles; f) transport.

In addition to this, Article 106 (2) of the TFEU establishes the general interest exception, providing for a narrow exception, equalising the public interest issues and the competition provisions of the Treaty. Article 106 (2) of the TFEU provides three reciprocal conditions under which the exception will have effect. The first condition is the requirement for the company to be in charge of the “operation of a service of general economic interest”. The second condition is the causal nexus. The third condition is proportionality.

Also, for the purpose of the current research, it is necessary to gain insight into one of the block exemptions covered by Regulation No. 330/2010. The EU Commission Regulation 330/2010 deals with the application of Article 101 (3) of the TFEU to categories of concerted practices and vertical agreements.<sup>635</sup> This Regulation enumerates

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633 *BP Kemi/DDSF*, [1979] OJ L286/32

634 Van Bael & Bellis. *Op. Cit.* p. 99.

635 European Commission. *Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices L 102/1.*  
Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF> [Accessed: 9

conditions under which vertical restrictions are released from the prohibition on anti-competitive agreements as defined in Article 101 (1) of the TFEU.

The diligent analysis of Regulation No 330/2010 reveals that the Regulation introduces a large number of novelties, such as (1) new market share thresholds necessary to have recourse to the “safe harbour” exemption, (2) the elucidation of the allowed restraints to sales via the Internet, (3) the alteration of the definition of selective distribution, and (4) the interpretation of the Commission’s opinion concerning the legal effects stemming from the incorporation of hardcore restrictions in agreements on distribution.<sup>636</sup>

In addition, a number of empowering regulations have been published by the Council to grant block exemptions. Council Regulation 19/65<sup>637</sup>, which was amended by Regulation 1215/99<sup>638</sup>, authorises the Commission to grant block exemption to intellectual property bilateral licences (Regulation 772/2004 on technology transfer agreement)<sup>639</sup> and vertical agreements (Regulation 330/2101 on vertical agreement)<sup>640</sup> as was discussed above. Regulation 461/2010<sup>641</sup> also grants the Commission the authority to issue block exemptions on vertical agreements in the motor vehicle sector.

Moreover, the Commission can grant block exemptions in respect of research and development agreements, standardisation agreements and specialisation agreements based on Council Regulation 2821/71.<sup>642</sup> The Commission has passed the following Regulations in this regard: Regulation 1217/2010<sup>643</sup> and Regulation 1218/2010.<sup>644</sup>

Regarding the insurance sector, Council Regulation 1534/91<sup>645</sup> allows the Commission to grant block exemptions. In this regard, Commission Regulation 267/2010<sup>646</sup>, which amended Regulation 358/2003, was passed. With regard to agreements between small and medium-sized undertakings, Council Regulation 169/2010<sup>647</sup> authorises the Commission to grant block exemptions. However, there are no Commission

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636 *Ibid.*

637 *Council Regulation 19/65 JO* [1965].

638 *Council Regulation 1215/99 OJ* 1999 L148/1.

639 *Commission Regulation 772/04 OJ* [2004] L 123/11.

640 *Commission Regulation 330/2010 OJ* [2010] L 102/1.

641 *Commission Regulation 461/2010 OJ* [2010] L 129/52.

642 *Council Regulation 2821/71 JO* [1971] L 285/46.

643 *Commission Regulation 1217/2010 OJ* [2010] L 335/36.

644 *Commission Regulation 1218/2010 OJ* [2010] L 335/43.

645 *Council Regulation 1534/91 OJ* [1991] L 143/1.

646 *Commission Regulation 267/2010 OJ* [2010] L 83/1.

647 *Council Regulation 169/2009 OJ* [2009] L 79/1.

Regulations allowing block exemption under the Council Regulation.

Council Regulation 246/2009<sup>648</sup> allows the Commission to grant block exemptions to consortia between liner shipping corporations. Regulation 906/2009<sup>649</sup> was adopted by the Commission in order to grant block exemptions in this regard. Furthermore, for certain agreements in the air transport sector, the Council has adopted Regulation 487/2009<sup>650</sup> in order to authorise the Commission to grant block exemptions in this area. However, there are no regulations adopted by the Commission yet. It is worth mentioning that there is an expiry date for each block exemption regulation. For example: on 31 May 2022 Regulation 330/2010 will expire.

## **4.2.2 Control of abuse of dominant position (Article 102 TFEU)**

### **4.2.2.1 Introduction**

Control of abuse of a dominant position is one of the key anti-trust provisions of the TFEU. As has been mentioned in the previous chapter, dominant position is not punishable *per se*. If the company has a dominant position in a market and does not pursue anti-competitive conduct, such as, for example, predatory pricing, there are no grounds to punish the company. However, if the company abuses its position, it may infringe the relevant provisions of the TFEU. In such a case, the Commission may start prosecuting the company. The main objective of this part of the present research is to conduct an in-depth analysis of the phenomenon of dominant position and its regulation under EU competition law. For this purpose, the research will provide an overview of the TFEU provisions designed to prevent abuse of dominant position based on providing a comprehensive answer to the following question: *What are the main regulative specificities of Article 102 of the TFEU in controlling the abuse of dominant position?*

### **4.2.2.2 Dominant position**

Article 102 of the TFEU prohibits the abuse of dominant position. In order to find out whether the Article is applicable to a given case, one should first define the dominant position. Traditionally, the dominant position is associated with substantial market power. The economist would say that an undertaking has a dominant position if it has the ability

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648 Council Regulation 169/2009 OJ [2009] L 61/1.

649 Commission Regulation 169/2009 OJ [2009] L 265/31.

650 Council Regulation 169/2009 OJ [2009] L 148/1.

to raise prices above the competitive level without losing sales to competitors and without attracting new entrants to the market.<sup>651</sup> Under US law, the company has a monopoly if it has the power to control prices or exclude competitors.<sup>652</sup>

The main shortcoming of Article 102 of the TFEU lies in the fact that it does not define the term “dominant position”. Nonetheless, the concept of dominant position has been elucidated and construed in the practice of the European Commission and the European Court of Justice. In *United Brands Company and United Brands Continental BV v Commission*, the European Court of Justice illustrates that a trader may enjoy a dominant position only if that trader has gained a large part of the market. Thus, the Court associates a dominant position with market share.<sup>653</sup> Furthermore, the Court observes that the dominant position “relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”<sup>654</sup>

The same position is expressed in *Hoffmann-La Roche & Co. AG v Commission*. In that case, the Court specifies that the dominant position does not preclude some degree of competition.<sup>655</sup> The company which enjoys a dominant position has “an appreciable influence on the condition under which that competition will develop.”<sup>656</sup> Alternatively, the Court assumes that the company having a dominant position may disregard the competition situation in the market so long as the situation does not become detrimental to the company.<sup>657</sup>

Subsequent cases have proved that the aforesaid definition of the term “dominant position” is the standard legal criterion for the application of Article 102 of the TFEU. The circumstantial analysis of *United Brands* and other cases will be made in the next section of the present chapter.

Summarising the legal definition of “dominant position”, it needs to be iterated that this concept includes the following distinguishing characteristics: a) the economic strength

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651 Jones A. & Sufrin. *Op. cit.* p. 303.

652 *Ibid.*

653 *United Brands Company and United Brands Continental BV v Commission of the European Communities*. [1976] EUECJ C-27/76R

654 *Ibid.*

655 *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*. [1978] EUECJ R-102/77

656 *Ibid.*

657 *Ibid.*

and superiority of one business entity to the rest of the competitors in the market; b) the real possibility to both make business decisions and implement them independently from competitors, customers and consumers.

After the definition of dominant position has been given, it is prudent to discuss the ways to assess the instances of dominant position in practice. According to Van Bael and Bellis, before making any deliberations concerning the criteria and assessment of a dominant position, it is importantly to define the relevant market.<sup>658</sup> The concept of relevant market is particularly explained in the *London European-Sabena* case. In this case, the European Commission delineated two aspects of the relevant market: a) the provision of services by an operator to one or more air carriers; b) the supply of such services by the operator to travel agencies. In the ultimate analysis, the Commission arrived at the conclusion that it was necessary to ascertain whether the business entity in question held a dominant position in all segments, which altogether constituted one relevant market, in order to determine whether this business entity had infringed on Article 102 of the TFEU.<sup>659</sup>

After the relevant market is identified, it is possible to assess dominance under such criteria as the market share in relation to all segments of the relevant market.<sup>660</sup> Thus, the assessment of the market share in relation to all segments of the relevant market may provide the most complete information about the dominance. The criterion of the market share underlies the legal assessment of such a phenomenon as “super-dominance”. In the *Cewal* case, the European Court of Justice defines super-dominance as an overpowering dominance which verges on monopoly as its market share constitutes more than 90 per cent.<sup>661</sup>

#### **4.2.2.3 Abuse of Dominant Position**

Having defined the main features of a dominant position, it is now necessary to explore what constitutes an abuse of dominant position. Article 102 of the TFEU exemplifies that abuse of dominant position may consist of:

“(a) directly or indirectly imposing unfair purchase or selling prices or other

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658 Van Bael and Bellis, *Op. Cit.* p. 118.

659 European Commission. *London European-Sabena*. OJ 1988. L317/47, pp. 13-15.

660 Van Bael and Bellis, *Op. Cit.* p. 119.

661 The European Court of Justice. *Compagnie Maritime Belge Transports v Commission*. [2000]. ECR I-1365.

unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”<sup>662</sup>

This list is not exhaustive and there can be other types of conduct which can be treated as abuse of dominant position.

Depending on the number of undertakings involved, dominant position can be either individual or collective. Individual dominant position, as its name suggests, occurs when one company has a dominant position in a given market. As far as a collective dominant position is concerned, in *Airtours plc v Commission*<sup>663</sup> the Court reveals the conditions necessary to establish it. In particular, the Court points out that, in order to create a collective dominant position, the following conditions should be met: (1) each member of the dominant oligopoly should be able to know how other members are behaving so as to monitor whether they adopt a common policy; (2) tacit coordination should be sustainable over time; (3) the anticipated reaction of current and future competitors would not jeopardise the results expected from the common policy.<sup>664</sup> If at least one of these conditions is not met, it is almost impossible to establish a collective dominant position. Thus, in *Impala v Commission*<sup>665</sup> the Court found no collective dominant position because a lack of market transparency did not allow the market participants to monitor each other’s conduct so as to monitor whether they had adopted a common policy.

In a word, a collective dominant position can be defined as a position sustained over time, maintained by two or more undertakings that are able to monitor each other’s behaviour in order to control the adoption of a common policy, and safe against the reaction of current and future competitors.

### **Legal cases (critical discussion of significant legal cases)**

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662 The Treaty on the functioning of the European Union of 2010. Article 102.

663 *Airtours plc v Commission of the European Communities*. (Competition) [2002] EUECJ T-342/99

664 *United Brands Company and United Brands Continental BV v Commission of the European Communities*. [1976] EUECJ C-27/76R

665 *Impala v Commission (Competition)* [2006] EUECJ T-464/04

After the theoretical dimensions of dominance have been pointed out, it is possible to critically discuss some noteworthy cases involving abuses of dominance. One such case is the United Brands case. In the United Brands case, the European Commission arrived at the conclusion that the United Brands had contravened Article 82 of the TEC (currently Article 102 of the TFEU) by way of charging, among other things, redundant prices for the branded Chiquita bananas in the Netherlands, Luxembourg, Germany and Belgium.<sup>666</sup>

The decision of the European Commission in the aforesaid case was underpinned by the following arguments: a) the comparison of prices charged by United Brands in Ireland and other countries showed a very big discrepancy which proved that United Brands had produced a “very substantial profit”; b) the differential between the two grades of bananas was not justifiable under the criteria of cost and quality differences; c) the Commission found out that the prices of competing brands were much lower than those of Chiquita bananas.

As a result, the United Brands case is based on the comparative analysis of different brands and competitors leading to the finding that the dominance of United Brands infringed on the competition in the market of bananas. The European Commission correctly determined that United Brands had abused its dominant position. At first, the Commission defined the relevant market in order to prove that United Brands occupied the dominant position in that market - the market for bananas. Second, the prices of various competitors were compared in order to show that United Brands charged 100 per cent higher prices than other companies producing bananas of the same quality. In the ultimate analysis, it should be conceded that the European Commission’s decision on the abuse of United Brands corresponds with Article 102 of the TFEU, which clearly articulates that an abuse of a dominant position particularly consists in direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions.<sup>667</sup>

Despite this, the European Court of Justice ruled against the decision of the European Commission in the United Brands case. The decision of the Court was based on the finding that there was no evidential support for the Commission’s claim that United Brands had gained a “very substantial profit” as United Brands suffered losses in Ireland. Also, the Court mentioned that the differences in prices between Member States can be presented as

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<sup>666</sup> European Commission. *Chiquita*. OJ 1976 L 95/1.  
<sup>667</sup> TFEU, *Op. Cit.* Article 102.

evidence of unfair pricing only if the markets in the Member States are objectively comparable.<sup>668</sup> Thus, the concept of “objective comparability” became a new criterion for the assessment of a dominant position.

The aforementioned decision of the European Court of Justice seems to be dubious and uncertain. The term “objective comparison” does not settle the issue in question but gives birth to new uncertainties and encourages further abuses of dominance. The Court meant that it would not be unfair if the company could justify excessive prices with pertinent and objective divergences in the management in one Member State as compared to other Member States. However, the Court failed to acknowledge that Article 102 of the TFEU had no legal provision concerning management of pricing but unconditionally emphasised both direct and indirect imposition of unfair prices.

Another instance of the abuse of a dominant position may be exemplified with the European Union Microsoft competition case. This case started as a complaint from Novell over Microsoft’s practices of licensing in 1993. The decision was reached in 1994, bringing to an end some of Microsoft’s licence practices.<sup>669</sup> Afterwards, Sun Microsystems raised a complaint concerning the lack of disclosure of certain interfaces to Windows NT. The examination of streaming media technologies and their integration with Windows widened the case. The main specificity of the Microsoft case is the fact that it involved the trilateral negotiations between Microsoft, the US federal authorities and the EU authorities. The case unfolded the shortcomings of cooperation between the US and EU.<sup>670</sup> Another peculiarity of the Microsoft case was the fact that this case involved two jurisdictions and thus two systems of competition law: the EU competition law and US competition law.

The abuse of a dominant position by Microsoft consisted in the lack of disclosure of the interfaces to Windows NT, which prevented other competitors from creating alternative competing networking software to fully interact with Windows servers and desktops.<sup>671</sup> As a result, the European Union ruled against Microsoft, ordering it to pay €497 million as a fine. In light of this, it is possible to agree with the European Commission that Microsoft jeopardised open source and open standards in the domain of information technologies.

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668 *United Brands Company and United Brands Continental BV v Commission*. [1976]. ECR 425

669 Lamia, A.-H. Microsoft investigated in Europe. *CNET News.com*. [Online] Available from: [http://news.cnet.com/2100-1023\\_3-204317.html](http://news.cnet.com/2100-1023_3-204317.html) [Accessed: 9 March 2013].

670 European Commission. *Microsoft. Case C-3/37.792*.

671 Fried, I. EU closes in on Microsoft penalty. *CNET News.com*. [Online] 2003. Available from: [http://news.cnet.com/2100-1016\\_3-5060463.html](http://news.cnet.com/2100-1016_3-5060463.html) [Accessed: 6 March 2013].

Moreover, the EC correctly stated that Microsoft had abused its dominant position by limiting the ability of other competitors to innovate in Windows. The actions of Microsoft were prohibited under Article 102 of the TFEU as an abuse limiting technical development to the detriment of consumers. The main drawback of the EC's decision in the case was the restriction of dominant companies to innovate.

It should be noted that, unlike anti-competitive agreements and practices, such violation as abuse of dominant position does not have exemptions. Thus, in *Tetra Pak Rausing SA v Commission*<sup>672</sup> the Court clearly stated that the exemptions provided by Article 101 (3) are not applicable to the abuse of dominant position. In particular, the Court observed that article 102 “by reason of its very subject-matter (abuse), precludes any possible exception to the prohibition it lays down.”<sup>673</sup> In this case the Court ruled that when a block exemption is granted on the basis of Article 101 (3), Article 102 still applies. In a word, the block exemption obtained pursuant to Article 101 (3) does not exempt the company from the liability for abuse of dominant position.

#### **4.2.2.4 Concluding Remarks**

After everything has been given due consideration, it should be generalised that the abuses of a dominant position are prohibited under Article 102 of the TFEU. Also, it has been ascertained that the TFEU provides only general regulation of a dominant position, while the criteria for the assessment of dominance are established through the case law of the European Commission and the European Court of Justice.

Dominant position refers to a position in the market that allows the company to influence the market substantially and, to a certain extent, disregard the competitors. There can be individual or collective dominant positions. The examples of dominant position are: limitation of production and technical progress, imposing unfair sale prices, applying dissimilar conditions for the equivalent transactions, and making conclusions of contract subject to acceptance by other parties of restrictive obligations. The prohibition of abuse of a dominant position is strict and does not foresee any exemptions.

### **4.3 Key Provisions of the UAE Competition Law**

Until the enactment of the competition law, the UAE had no law that

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<sup>672</sup> Tetra Pak Rausing SA v Commission of the European Communities. (Competition) [1990] EUECJ T-51/89  
<sup>673</sup> Ibid.

comprehensively addressed anti-competitive behaviour.<sup>674</sup> This statement notwithstanding, there was some considerable regulation of anti-competitive behaviours through provisions that were scattered across various legislation. These include *Federal Law No. 18 of 1993* (commonly referred to as the Commercial Code), and *Federal Law No. 4 of 1979* (also known as the Suppression of Fraud in Commercial Transactions Law). These laws guarded (they still do) against poaching of workers from a competitor and spreading of false information about a competitor's product with the aim of attracting customers to their product. Additionally, there were provisions guarding against monopolistic tendencies and the sale of defective products to consumers.<sup>675</sup> The EU can be said to have crossed this bridge (regulation of anti-competitive practices) much earlier than the UAE. The EU's journey towards a robust legal framework aimed at curbing anti-competitive practices has also been long and arduous,<sup>676</sup> culminating in the creation of the EC Treaty and eventually the TFEU.

Investors, business proprietors and consumers entirely agree that the new UAE competition law is more comprehensive than the earlier pieces of legislation. This is because it contains key provisions which are essential for curbing anti-competitive practices. These include merger control, banning of restrictive agreements and abuse of dominance. Additionally, the law contains provisions for the exemption of various sectors from the application of its provisions.<sup>677</sup> These three distinct areas are also contained in Article 101 of the TFEU. The difference between the UAE competition law and the EU's competition rules is in their detail. The EU regime is quite elaborate compared to the UAE competition law. However, it is expected that the details on this law will be clear when the implementing regulations are published.<sup>678</sup>

### **4.3.1 Control of anti-competitive agreements and exemptions**

#### **4.3.1.1 Introduction**

Generally, the UAE Government has adopted a free market policy, which implies that the prices of services and goods are set according to the supply and demand principle

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674 Kelly, R. & Chicken, L. *United Arab Emirates: The New Federal Competition Law in the UAE*. [Online] 2012. Available from: <http://www.mondaq.com/x/210852/Anti-trust+Competition/The+New+Federal+Competition+Law+in+the+UAE> [Accessed 28 May 2013].

675 Ibid.

676 Kovacic, W. *Competition Policy in the European Union and the United States: Convergence or Divergence?* Washington D.C: U.S Federal Trade Commission. 2008. p. 2.

677 Shah O. et al, *How New UAE Competition Law will Impact Businesses*. London: Latham & Watkins LLP, 2013.

678 Gillespie, B. Milligan J. & Stevens, O. *The New UAE Competition Law: Merger and Acquisition Control: Stay Ahead of the Competition!* London: Clyde & Co. 2013.

in the market. Most of the prohibition of anti-competitive agreements has the objective of safeguarding the market and guaranteeing a free market in products.

Several anti-competitive practices are prohibited under the new UAE competition law. The most notable prohibition is that of restrictive agreements. Article 5 of the UAE competition law is extremely important because it forbids agreements between undertakings whose aim is to affect commercial activities in the market.

Article 5 of this law defines such agreements as those whose objective is to distort, contain, eliminate or reduce competition.<sup>679</sup> Some of the practices targeted by this law and which may be the subject of restrictive agreements include fixing of prices above the usual market levels, selling below the normal cost with the aim of frustrating competitors, agreements restricting the supply of goods or services to certain businesses, and refusal to sell to certain businesses.<sup>680</sup> Additionally, practices such as colluding to obtain tenders and bid rigging are considered to constitute a restrictive agreement and therefore outlawed by the competition law. Agreements between or among enterprises whose objective is to assign markets to such enterprises in terms of geographical locations are also considered restrictive and thus prohibited under this law.<sup>681</sup>

#### **4.3.1.2 Non-exhaustive list:**

Several practice and agreements are prohibited under Article 5. However, such prohibitions are for examples only, which are included in the non-exhaustive list as follows:

##### **4.3.1.2.1 Prohibitions under Article 5 (1)**

Price fixing is the first prohibition under Article 5 (1)(a) of the UAE competition law. It concerns the control of goods and services prices. The Article prohibits any agreement between establishments that directly or indirectly controls the selling or buying prices of goods or services through creating the increase, decrease or stabilisation which affects competition. Price fixing is common behaviour in the UAE. Thus, the legislators

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679 Thomson and Reuters, *op. cit.* 3.

680 Momany, O. *UAE Legislative Update – The UAE Promulgates a Competition Law*. [Online] 2012, p. 1. Available from: [http://m.klgates.com/files/Publication/8fb60dfe-1eb2-445c-8436-a05db8ff0caf/Presentation/PublicationAttachment/77d13ff9-6786-49e4-b641-a82e71330e6b/UAE\\_legislative\\_update%E2%80%93The\\_UAE\\_Promulgates\\_a\\_Competition\\_Law.pdf](http://m.klgates.com/files/Publication/8fb60dfe-1eb2-445c-8436-a05db8ff0caf/Presentation/PublicationAttachment/77d13ff9-6786-49e4-b641-a82e71330e6b/UAE_legislative_update%E2%80%93The_UAE_Promulgates_a_Competition_Law.pdf) [Accessed: 28 June 2013].

681 Guerrero Preze, A., Phale, H. S., Sullivan, P. & Wood D., *New UAE Anti-trust Legislation in Force from February 23, 2013—Six – Month Grace Period before Enforcement* (Los Angeles: Gibson, Dunn & Crutcher, [Online] 2013. Available from: <http://www.gibsondunn.com/publications/pages/NewUAE-Anti-trustLegislation-fromFebruary23-2013-SixMonth-Grace-Period.aspx> [Accessed: 28 June 2013].

aim to gain control over the pricing (regulate pricing).

Undertakings aim to control the supply of goods and services so that the prices increase, which will result in a high profit. Through such behaviour, consumers will be affected and will not enjoy the benefits of fair competition. It should be noted that the law not only includes the direct actions of the undertaking in fixing prices; it also includes indirect conduct. Whether the Committee will be able to discover and punish such behaviour will depend on the Implementing Regulation that will be issued sometime later this year. The law also prohibits any conditions on buying, selling or performing of services and the like, which is found under Para (b) of Article 5(1). This prohibition is similar to the one found under Article 101 (1)(d) of the TFEU. The determination of such trade conditions would cause prices to rise, which would affect the principle of fairness of competition leading to harm to consumers.

The third prohibition under Article 5(1) is so-called bid-rigging. Para (c) prohibits any conspiracy between establishments “in tenders or offers in bids, tenders, practices and all supplying offers.”<sup>682</sup> It should be noted that there is no similar provision under the TFEU.

In addition, Article 5 (1)(d) prohibits the restriction or freezing of the operations of manufacturing, development, distribution or marketing, and all other investment aspects, or limiting it. Similar prohibition is found under Article 101 (1)(b) of the TFEU. *Wouters v Algemene Raad van de Nederlandse Ord van Advocaten* is a significant case regarding the restriction of production.<sup>683</sup>

Furthermore, Article 5 (1)(e) consists of what is called ‘refusal of supply’. The aim of this Article is to prevent a practice which aims to prevent goods and services in the market from a competitor (establishment), leading to causing damage to that firm. According to the Article, the practice of refusing to buy, supply or sell from certain establishment/s in order to damage that establishment/s is prohibited. It is worth mentioning that not preventing such actions would lead to putting the refusing party in a powerful position, eliminating other competitors from the market and creating a monopoly.

Article 5 (1)(f) prohibits the control or limitation of goods and services from or to

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682 Article 5 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

683 *Wouters v Algemene Raad van de Nederlandse Ord van Advocaten*, *Op. cit.*

the market. Such limitation or control could be seen in the example of hiding or unlawfully storing products. However, the meaning of unlawful storing is not explained under the law. It has been indicated that the meaning is that the competitor, in order to restrict supply, would store only necessary products rather than excess amounts. The latter would lead to a monopoly position which is not the aim of this Paragraph. Moreover, this Paragraph aims to restrict the sudden abundance of products in the market which could lead to an increase in product quantity that will affect prices through a decrease in prices.

#### **4.3.1.2.2 Prohibitions under Article 5 (2)**

Market sharing under the UAE's competition law is prohibited. Article 5 (2)(a) prohibits any agreements between undertakings that divide markets or consumers based on consumers' category, geographic areas, seasons and time periods, distribution centres or any other basis that may affect competition. On the other hand, the EU's competition law provides a similar prohibition. As has been discussed earlier in this chapter under the EU competition law, *Cimenteries CBR SA v. Commission* and the Peroxygen Products case are good examples.

Moreover, Article 5 (2) (b) prohibits any restriction on the entrance of establishments to the market, its exit from or its joining to existing agreements or coalitions. Although this prohibition allows for a free market which is a condition of perfect competition theory, the existing commercial regulations create legal barriers to entering the UAE market. For example, the telecommunication regulation prevents rivals (other than Etisalat and DU) from entering the market, which possibly creates an oligopoly situation. Another example is the Nuclear Energy Law which requires a firm to obtain a licence to be able to operate in the commercial field. Such barriers are not mentioned in the competition law, which creates an ambiguity in the application of the law.

#### **4.3.1.2.3 Non-exhaustive list exemption**

Article 5 (3) provides an exemption from the non-exhaustive list. According to this Article, with the exclusion of Paragraph 1/A and Paragraph 2/A, the provisions of this Article do not apply to the agreements that have a weak impact on the economy in “which the total share of establishments party thereto fail to exceed the percentage specified by the Cabinet of the total transactions in the relevant market.”<sup>684</sup> Based on a proposal presented

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684 Article 5 (3), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

by the minister, the Cabinet may increase or decrease the percentage according to the economic situation requirements.

#### **4.3.1.2.4 Non-exhaustive list issues:**

Even though the non-exhaustive list prohibits any anti-competitive agreements between undertakings that aims to restrict, limit or prejudice competition, it includes many issues which might affect the regulation of anti-competitive agreements.

The competition law provides that the preventions of the non-exhaustive list in Article 5 (1) and (2) are merely to be used as examples. Under Article 5 (1) there are six prohibitions and under Article 5 (2) there are two. These prohibitions, such as market sharing and price control, are related only to horizontal agreements. It could be noticed that the current law did not include any provision that prohibits vertical agreements, such as resale prices fixing.<sup>685</sup>

Moreover, the non-exhaustive list provides that the practice of a firm to restrict others from entering, exiting from the market, or entering into an existing coalition or agreement is prohibited. However, there are many obstacles to entering the UAE market, which illustrates the conflict between the government policy and the competition law. In order to enforce the non-exhaustive list, the Committee, which represents the enforcement mechanism, must have the required authority as in its independence. Unfortunately, the Committee lacks that power; this will be discussed in Chapter Eight.

Unlike other Competition systems, the UAE still lacks the implementing regulation. The current competition law does not provide any guidelines that could include other non-exhaustive lists of anti-competitive practices that might affect competition. In the United Kingdom (UK), the Office of Free Trade (OFT) provides extra examples of anti-competitive agreements that may harm competition. For instance, joint purchasing or selling, restricting advertising and exchanging price information.<sup>686</sup>

It has been claimed that the UAE market is considered an oligopolistic market. Only very few undertakings exist in the market, which provide similar products. The telecommunication sector is one of the markets that is considered an oligopolistic market. Only two firms exist which provide very similar products (DU and Etisalat). Also, the civil

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685 Graham, C. *EU and UK Competition Law*, Essex: Pearson Education Limited. 2010, pp. 108-109.

686 Chapter I Prohibition (OFT Guideline 401), para 3.3.

aviation sector is another sector. Such oligopolies exist because of the high legal obstacles to entering the market. For an oligopoly to exist it does not require the establishing of any agreement between the market competitors, only tacit collusion<sup>687</sup>, which is not prohibited under the UAE's competition law.

The approach that the Committee or the Ministry of Economy apply to anti-competitive conduct is still unclear, since the implementing regulation has not been issued. However, since the law includes certain prohibitions, it is obvious that a *per se* prohibition approach would be applicable to anti-competitive behaviour, such as bid-rigging, predatory prices, price fixing and entry or exit barriers. Whether the Committee will apply the rule of reason prohibition will only be clear when the implementing regulation is passed, although it is most likely that this rule will be applied to anti-competitive agreements, such as market sharing. However, it has been noticed that there is no criminal offence regarding these anti-competitive agreements.

However, the EU competition law does not provide any criminal offence regarding cartel practices; the UK has adopted a new criminal offence for cartel practice. The UK Enterprise Act 2002 provides, under section 188(2) of Part 6, five types of agreement: production limitation, supply limitation, bid-rigging, price fixing and market sharing.<sup>688</sup> Accordingly, all arrangements of cartel agreements are prohibited *per se* under the Act.

#### **4.3.1.3 Critical Issues**

In general terms, Article 5 prohibits the conduct of anti-competitive agreements that aim to restrict commerce and fair competition in the market. These prohibitions illuminate that the market activities must be regulated according to the supply and demand principle and that the aim of it is to prohibit predation prices of goods and services and prevent monopoly. However, Article 5 of the Competition Law shows a lack in control of anti-competitive agreements.

##### **4.3.1.3.1 Associations of undertakings**

Unlike the EU's competition law, the UAE competition law does not include any rule or provision regarding the association of undertakings. In the UAE, the Federation of UAE Chambers of Commerce and Industry has a similar function regarding trade

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<sup>687</sup> Jones, A. and Sufrin, B. *Op. cit.* pp. 818-819.

<sup>688</sup> Furse, M. and Nash, S. *The Cartel Offence*, Oxford: Hart Publishing, 2004.

associations in general terms. The Federation aims to encourage the private sector's players to invest and develop the UAE economy. The Federation consists of four bodies: the General Assembly, the Board of Directors, the General Secretariat and the Legal Administration. Moreover, the Ministry of Economy and the local departments of economic development have a similar role.

On the other hand, the EU's competition law does not define 'associations of undertakings', allowing the phrase to cover all types of associations. For example, the UK Office of Free Trade 'OFT' guidelines illustrate the application and enforcement of both Article 101 of the TFEU and prohibitions under Chapter I of the UK Competition Act in regards to trade associations.

#### **4.3.1.3.2 Concerted practices**

The UAE competition law does not include any provisions to regulate concerted practices. Unlike the situation in the UAE, the EU competition law regulates concerted practices, even though the term 'concerted practices' has not been defined under the TFEU or under Law no. 21/96. However, concerted practices have been defined by the ECJ as: a type of co-ordination between undertakings which, "without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."<sup>689</sup>

Prior to the enactment of the new UAE competition law, the country had been facing serious anti-competitive behaviour from the Dairy and Juice Association represented in the higher prices of dairy products. With the new competition law being enacted, such behaviour should clearly be banned. Otherwise, this type of behaviour could be repeated by different types of trade association.

The OFT has followed the EU guideline in setting up its guideline regarding concerted practices. The OFT guideline included examples of concerted practices, such as intentionally entering into a practical collaboration with direct or indirect impact on the market.<sup>690</sup> The OFT found in *Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd* that those undertakings had concerted practice and collusion between them. The collusion and

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689 *Imperial Chemical Industries Ltd. v Commission* 48/69, [1972] ECR 619, [1972] CMLR 557, para 64.

690 Chapter I Prohibition (OFT Guideline 401), para. 2.13.

concerted practices was considered to be violating the UK Competition Act.<sup>691</sup>

#### **4.3.1.3.3 Assessment of the prohibition rules**

Another drawback in the law is that it does not include any guideline on how the Competition Regulation Committee (hereafter referred to as Committee) or the Ministry of Economy will apply these rules on prohibited conduct. In other words, what are the criteria that such an enforcement authority will use to assess anti-competitive agreements? The EU seems to have overcome this stage with the guidelines provided. The Competition Commission has the authority to assess an agreement in its economic context. According to the EU guideline, the Commission will assess if an agreement has an anti-competitive objective, or potential or actual restrictive effects on competition. If the agreement is found not to restrict competition, then it will not be considered to affect competition.<sup>692</sup> However, in case that the agreement is found to be restricting competition within the meaning of Article 101 (1), a second step will be initiated with the aim of determining “the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition.”<sup>693</sup> In case that the pro-competitive effects are found not to outweigh the restriction on competition then the agreement shall be void according to Article 101 (2).

#### **4.3.1.3.4 Voiding of prohibited actions**

In contrast with the EU competition law, the UAE’s competition law does not provide any provision with regard to the prohibited practices to be void. The EU competition law mentions that any agreement or decision that infringes the prohibitions will be automatically void. However, it should be mentioned that the law is silent with regard to concerted practices. The General Court ruled that nullity under Article 101(2) TFEU is not applicable to prohibited concerted practices.<sup>694</sup>

#### **4.3.1.4 Exemptions**

Companies can be allowed to engage in the above activities under certain circumstances even though they are prohibited. Articles 7 and 8 provide the basis of such

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691 Ibid. para 2.8.

692 European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*. Notices from European Union Institutions, Bodies, Offices and Agencies. [Online] 2011, p. 7. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF> [Accessed: 16 July 2013].

693 Ibid.

694 *Artisjus v. Commission*, 2008 ECR II-270, para. 46.

exemptions. All that the companies need to do is apply to be exempted from the applications of the specific provisions of the competition law. The application should be made to the Minister of the Economy who has the power to reject or approve the exemption within 90 days, which might be extended by another 45 days. In case there is no decision made by the minister, the application “shall be deemed as an implicit acceptance of such restrictive agreements.”<sup>695</sup> In order to be exempted, the applicant enterprise must prove that its business will promote economic growth, enhance competition in the long run and ultimately benefit the consumer.<sup>696</sup> More detail about this category of exemptions is expected to be published in the implementing regulations.

Articles 7 and 8 explain the procedure that the undertakings have to follow in order to request such an exemption. First, firms and establishments must apply for exemption to the Ministry of Economy in writing and include supporting documents, which will be specified in the implementing regulation. Second, the establishments must prove that their anti-competitive agreements would enhance economic development; or the competitive ability of the establishment through improving its performance; or the “development of production or distribution systems or achievement of certain benefits for the consumer.”<sup>697</sup> In case the establishment was granted an exemption and there were potential amendments to the anti-competitive agreements, the Ministry of Economy must be notified within 30 days of the amendments.<sup>698</sup> The organisational unit concerned with the implementation of the provision of this law is not set up yet. The implementing regulation will establish such a unit.<sup>699</sup>

It is worth mentioning that the minister has many authorities under the competition law. For instance, he may approve the anti-competitive agreements for 30 days only until the final resolution is issued.<sup>700</sup> He also has the authority to cancel an approval through issuing a resolution in any of the following situations:

a) if the circumstances no longer exist, which based on it the establishment was granted approval; b) failure in meeting with the conditions upon which the establishments were granted the approval; c) if it is discovered that the information was incorrect or

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695 Article 8 (1), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

696 Bryceland, M. & Singh, M. *Competition Law in the UAE*. [Online] 2013. Available from: <http://www.brownrudnick.com/news-resources-detail/2013-05-uae-competition-law---an-overview> [Accessed: 28 May 2013].

697 Article 7 (1)(b), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

698 Article 7 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

699 Article 7 (3), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

700 Article 8 (2), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

misleading which based on it the establishment was granted approval.<sup>701</sup>

Critics of the exemption provisions in the UAE law argue that the powers given to the minister could prove problematic in the end. This is because the law gives the minister up to 135 days to scrutinise and decide on an exemption application. This is too much time wasted and businesses cannot afford it. Further, this has the potential to create a backlog of applications in the minister's office. Besides, this system has previously been tried in the EU and it proved ineffective.<sup>702</sup> Therefore, businesses should be advised to consult professional legal advisors who would direct them on how to form businesses which are compliant with the new law.

The EU's anti-cartel legislation is reasonably comprehensive. Cartels also fall under restrictive agreements and the EU aggressively combats cartel practices both at the union level (through the European Commission), and at the individual member states' level (through the National Competition Authorities, NCAs).<sup>703</sup> Article 101 of the TFEU provides that any clandestine pact or understanding between commercial competitors whose aim is to fix prices, limit production, illegally divide markets and customers amongst themselves or limit the sources of supply should be considered as restrictive agreements<sup>704</sup>, because their aim is to prevent or restrict competition in the market.<sup>705</sup> On the other hand, Article 5 of the Competition Law allows the minister to exempt any kind of anti-competitive agreements, which includes price fixing and market sharing. Such agreements definitely harm competition in any given market and ought to be declared illegal. In fact, they are construed as constituting very grievous infringements of the EU's competition rules and attract very heavy fines from the European Commission and the NCAs.

Further, Article 101 permits the European Commission to cooperate with third party countries in dismantling cartels if their activities directly and negatively affect competition within the EU. This means that the Commission can go after companies that are based outside the EU and which have entered into restrictive agreements with EU-based firms. The UAE's competition law appears a little more flexible or, as some would prefer to put

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701 Article 8 (7), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

702 M. Bryceland & M. Singh, *Op. cit.*

703 Slaughter W. & May, W. *Op. cit.* p. 2.

704 *Ibid.* 2.

705 Graham, C. *Op. cit.* 2010, pp. 108-109.

it, somewhat more lenient compared to the EU's rigid rules on restrictive agreements.

Although the anti-cartel rules contained in the UAE competition law bear a lot of similarities with those found in Article 101 of the TFEU, Paragraph 3 Article 5 of the UAE competition law provides for the exemption of so-called "weak-impact agreements".<sup>706</sup> That is, restrictive agreements whose negative elements do not have much weight on the competition matrix in the relevant market. Therefore, it can be accurately argued that when it comes to dealing with cartels, the EU rules are much stricter than the UAE competition law. The UAE is primarily concerned with the magnitude of the restrictive agreements, unlike the EU which seems to generally outlaw restrictive agreements.

### **4.3.2 Control of abuse of dominant position and exemptions**

#### **4.3.2.1 Introduction**

Another important element of competition law is the control of abuse of dominant position. Undertakings, through dominant position, benefit from the additional power against other rivals in the market. However, such power may be abused, for instance, through refusing to deal with other undertakings. Like any other competition regime, the UAE competition law prohibits any establishment from abusing its dominant position, which might affect competition in the market. Article 6 provides for the regulation of dominant position.

#### **4.3.2.2 Dominance Position and relevant market**

Dominance, under the UAE competition law, is defined as a position whereby an enterprise can, on its own or in cohort with others, control or significantly affect the relevant market. However, the definition does not state an amount of the controlling percentage. A company achieves a dominant position if its market share surpasses the threshold set by the UAE Cabinet.<sup>707</sup> Article 6 of the Competition Law prohibits firms that hold a dominant position from engaging in acts or conduct which may be considered as an abuse of such a position, thereby resulting in the reduction or elimination of competition in the relevant market.

As in the EU's competition law, the relevant market has been defined under the

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<sup>706</sup> Thomson and Reuters, 4.

<sup>707</sup> Shah, A., Dehghani P. & Nayani, M. Competition Law in the United Arab Emirates. [Online] 2013. Available from: [http://www.fichtelegal.com/en/news\\_article.php?news\\_id=254](http://www.fichtelegal.com/en/news_article.php?news_id=254) [Accessed: 28 May 2013]

UAE's competition law. Relevant market consists of the goods or services or the number of goods and services upon whose characteristics, usage and price aspects "shall be replaceable by others to meet a certain need of the consumer in a certain geographic area."<sup>708</sup> There are three factors of commodities or services to be interchangeable in the same market, which can be drawn from this definition: characteristic, intention of usage and price. However, the law does not define the geographic market.

#### **4.3.2.3 Critical Issues**

The UAE's competition law does not prohibit having a dominant position itself. The law only prevents the abuse of the power of dominant position. This is the same situation as with the EU competition law. In addition, dominance is a wide expression that covers other terms, such as monopoly and oligopoly.<sup>709</sup>

The UAE has been facing some serious monopolistic behaviour which is considered crucial to the fairness of competition. There are two types of monopoly: natural monopoly and legal monopoly. In regards to legal monopoly, it occurs when the UAE government monopolises, through regulations, certain sectors of the market, such as telecommunications, oil and petroleum and aviation. On the other hand, a natural monopoly occurs through the monopolisation behaviour from an undertaking over special products that have privileges, such as lower prices or better quality over the products of other rivals.

The government policies in the UAE regarding market regulation point to serious issues: The Commercial Agency Law 1981 allows private monopoly. Firms are allowed to monopolise products (goods or services) through the creation of 'exclusive agents.' Moreover, the government policies allow them to, partially or completely, monopolise goods or services, which might lead to lower quality or higher prices. An example of this is the government monopoly of 100 per cent of Emirates Airlines (Dubai Government) and Etihad Airlines (Abu Dhabi Government). In addition, the government allows market oligopolies. For example, the telecommunications sector is oligopolised through two competitors, Etisalat (in which the government owns large shares), and DU (which is a private competitor). It should be pointed out that the UAE government has failed to prevent the private monopolies that occur in the market, leading them to abuse their dominance

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708 Article 1, UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

709 Korah, V. *An Introductory Guide to EC Competition Law and Practice*. 8th ed. Oxford: Hart Publishing, 2004.

position and harm the economy.

As was pointed out above, the law does not state the percentage of market share of an establishment for it to be considered to have a dominant position. However, it is believed that the percentage should be based on the nature of the market as the market power is different in each market.

#### **4.3.2.4 Abuse of dominant position**

It is worth mentioning that the competition law does not define the abuse of dominant position. The conduct contemplated under Article 6 as constituting an abuse of dominance includes selling goods or services at lower prices than the current market level with a view to blocking the entry into that market of other establishments. Dominant establishments also use lower prices to expose competitors to losses which eventually edge them (the competitors) out of the market in question. Additionally, this abuse could result from forcing customers to cease purchasing or dealing with competitors as well as withholding goods in order to create an unwarranted shortage of the same (hoarding). Further, refusal to conclude a contract on the sale or purchase of goods and services unless the other party agrees to other terms which are unrelated to the contract at hand is also tantamount to an abuse of dominance. In addition, the refusal to conduct business with a competitor under the usual business terms is recognised by Article 6 as constituting abuse of dominance.<sup>710</sup>

##### **4.3.2.4.1 The types of abuse of a dominant position:**

Article 6 of the Competition Law specifies the kinds of practices that are deemed to be considered as abuse of dominant position. It is obvious that the prohibition of agreements for abuse of dominant position under this Article follows the same method as for anti-competitive agreements under Article 5, through providing examples in the form of a non-exhaustive list.

Article 6 (1)(a) prevents any direct or indirect restraint on the reselling of products that aims to prejudice, limit or prevent competition in the market. Article 6 (1)(b) prohibits any unfair practices by any undertaking that is in a dominant position through abusing its power of dominant position in order to prevent other competitors from entering the market, eliminating them from the market, or causing them heavy losses so as to prevent them from

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<sup>710</sup> Steyn, W. New Competition in the UAE. [Online] 2013. Available from: <http://www.tamimi.com/en/magazine/law-update/section-5/january-2/new-competition-law-in-the-uae.html> [Accessed: 28 May 2013].

continuing their business<sup>711</sup>. This act is known as ‘predatory pricing’. Usually, such prohibited practices are conducted through lowering the prices of the undertakings that enjoy the dominant position below the cost. This will lead other existing rivals, who are usually small or new, to withdraw from the market.

Another type of abuse of dominant position that is prohibited under the law is the discrimination between clients in relation to the contract conditions of selling or buying or product prices.<sup>712</sup> This article prevents any undertaking that benefits from a dominant position from abusing its position by discrimination against its clients in similar contracts through imposing different prices or conditions in the contracts. Moreover, the law prohibits the undertaking from imposing any condition on any client not to deal with any other competitor<sup>713</sup>, so it would lead to that rival losing and eventually leaving the market. This is called ‘tie-in’, which would put the rival in a weak position.

In addition, the law prohibits the refusal of an undertaking to deal with other competitors, whether that refusal was total or partial.<sup>714</sup> This behaviour is known as ‘refusal of supply.’ In addition, Article 6 (f) prohibits ‘unjustified’ refusal to deal with other competitors “through buying or selling or limiting or hindering such dealing that may lead to imposing an unreal price thereof.”<sup>715</sup> Furthermore, Article 6 (g) prevents the imposition of a condition of accepting dealing obligations concerning other products, which are not related to the original contract, in order to conclude the original agreement.

The law goes further with the preventions as it prohibits publishing, knowingly, incorrect information about products or prices. This behaviour might harm other competitors and accordingly harm the market.<sup>716</sup> The law prohibits the establishments that enjoy a dominant position from abusing their position through increasing or decreasing the supply of products to create an artificial scarcity or abundance of the commodity.<sup>717</sup>

As has previously been mentioned, the competition law gives the UAE Cabinet the power to set the threshold for the percentage of the market share, which would constitute the establishment of a dominant position.<sup>718</sup> As such, the threshold is bound to change from

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711 Article 6 (1)(b), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

712 Article 6 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

713 Article 6 (1)(d), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

714 Article 6 (1)(e), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

715 Article 6 (1)(f), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

716 Article 6 (1)(h), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

717 Article 6 (1)(i), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

718 Article 6 (2), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

time to time depending on the prevailing economic situation in the country and upon a proposition by the Minister of Economy.

#### **4.3.2.4.2 Exemption**

Companies can be allowed to abuse their dominant position under certain circumstances even though they are prohibited. Companies and investors should be advised that some degree of abuse of dominance can be exempted from the application of Article 6 of the Competition Law upon application to the minister. Articles 7 and 8 are the basis of this exemption just like the exemptions provided to the anti-competitive agreements. However, the exemption will depend on whether such practice will enhance economic growth and competition in the long run.

The understanding of abuse of dominance under the competition law is similar to that contained in Article 102 of the TFEU. This part of the treaty prohibits the abuse of a dominant position.<sup>719</sup> If a practice deemed as constituting an abuse of a dominant position is discovered by the EU Commission, then it will be declared incompatible with the internal market. Unlike the UAE threshold for determining dominance, which is much more flexible and liable to adjustment by the UAE Cabinet, the EU Competition rules provide that dominance will be deemed to exist if an establishment consistently holds a 40 per cent market share.<sup>720</sup> In addition, the EU competition law is much stricter than the UAE's competition law. It does not provide any exemptions to the abuse of dominant position like in the UAE.

#### **4.4 Conclusion**

After everything has been given due consideration, it is possible to conclude that the cooperation arrangements between companies may give rise to restriction or distortion of the competition in the internal market. With regard to the EU Competition Law, Article 101 determines what kinds of cooperation agreement are prohibited. Such business practices as price fixing, limitation of production, allocation of markets and customers, and resale price fixing are prohibited under Article 101 of the TFEU and relate to such phenomena as cartels. The conducted analysis has unfolded the types of aforementioned

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<sup>719</sup> Nazzini, R. *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*. Oxford: Oxford University Press, 2011, p. 5.

<sup>720</sup> Arezzo, E. Is There a Role for Market Definition and Dominance in an Effects-Based Approach? In: Mackenrodt, M., Gallego B. & Enchaëlmaier, S. *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Berlin: Springer-Verlag, 2008, p. 26.

practices that are usually conducted in the framework of cartels. Also, it has been ascertained that secret agreements play a crucial role in facilitating the concerted violations of Article 101 of the TFEU by European business entities.

In order to fall under the prohibition, a cooperation agreement or arrangement should first meet at least two conditions: (1) it should have an impact on trade between the member states; (2) it should aim at or lead to restriction or distortion of competition. The types of arrangement exemplified in Article 101, thus, can be held to be illegal only if they meet the two conditions. Thus, price fixing is only illegal if it has an impact on the trade between member states and restricts or distorts the competition. The same concerns market sharing, resale price fixing and limitation of production.

Also, it should be generalised that the abuses of a dominant position are prohibited under Article 102 of the TFEU. It has been ascertained that the TFEU provides only general regulation of a dominant position, while the criteria for the assessment of dominance are established through the case law of the European Commission and the European Court of Justice.

Dominant position refers to a position in the market that allows the company to influence the market substantially and, to a certain extent, disregard the competitors. There can be an individual or a collective dominant position. The examples of dominant position are: limitation of production and technical progress, imposing unfair sale prices, applying dissimilar conditions for the equivalent transactions, making conclusions of contract subject to acceptance by other parties of restrictive obligations. The prohibition of abuse of a dominant position is strict and does not foresee any exemptions.

With regard to the UAE's competition law, it has been obvious that the UAE applies an open economic policy based on the principle of supply and demand, and the prohibition of anti-competitive agreements that the UAE competition law includes is to safeguard the market. Article 5 of the competition law provides for the prohibition of anti-competitive agreements that aim to distort, limit or eliminate competition in the market.

The non-exhaustive list under Article 5 (1) and (2) is merely a collection of examples. It includes prohibitions on price fixing, bid-rigging, refusal of supply, limitation of production or unlawful storing, and applying conditions on buying, selling or performing of services. In addition, it includes market sharing, preventing undertakings from entering

or existing the market, or its entering or existing agreements or coalitions. However, this Article, excluding Para 1/A and 2/A, does not apply to anti-competitive agreements if the impact on the economy is deemed to be weak.

One can notice that the non-exhaustive list has many issues. The prohibitions under Article 5 consist of the prohibition of horizontal agreements. However, the prohibition regarding vertical agreements was not mentioned under this Article. Another issue that can be noticed is that, although the law aims to prevent any restriction on market entrance or exiting from it, there are many barriers to entering the UAE market, such as government policies.

It should be noted that the Committee should be independent in order to enforce the non-exhaustive list. However, the Committee lacks that authority. Moreover, the guidelines on how the non-exhaustive list will be applied, and whether there are other examples to be added in addition to the non-exhaustive list, are still unclear. This is because the implementing regulation has still not been issued.

It is still unclear which approach the UAE authority will apply to anti-competitive conduct. However, based on the experiences from other legislation, the *per se* approach could be applied to bid-rigging, predatory prices, price fixing and entry or exit barriers, since it is the most appropriate approach to deal with such anti-competitive behaviour. The approach of the rule of reason has been applied in the EU to the market sharing concept; however, it is not clear whether the authorities in the UAE would follow such an approach. It will only become clear once the implementing regulation is out.

One of the drawbacks in Article 5 is that it did not include any provisions regarding the association of undertakings, unlike the EU law. Moreover, the provision regarding the control of anti-competitive agreements does not include any provision regarding concerted practices.

In addition, the law does not specify the method that the Committee or the Ministry of Economy would follow to assess anti-competitive agreement rules in practice. Also, unlike the EU law where the anti-competitive contracts are automatically void, the UAE law does not provide any similar provision.

With regard to the exemptions, there are two conditions for undertakings to be granted such exemption. First, an undertaking has to apply in writing with supporting

documents to the Ministry of Economy. Second, the undertaking has to prove that its anti-competitive agreement would benefit the economy, the consumers, advance the distribution or production system, or improve its performance and competitive ability. However, critics argue that the minister's authority could be problematic in the end as was discussed earlier leading to create a backlog of applications in his office.

One can notice that the prohibitions under Article 101 of the TFEU are broad to capture all kinds of undertakings' arrangements that aim to limit or distort competition. In addition, it is apparent that the UAE's competition law deals with anti-competitive agreements in a less strict way than the EU law. The EU law generally outlaws the restrictive agreements unlike the UAE law, which is more concerned with the extent of the restrictive agreements.

On the other hand, the UAE's competition law gives a great deal to the control of dominant position, specifically under Article 6. It should be noted that the law does not prohibit dominant position itself, but abuse of that position. Generally, abuse of dominant position aims to limit, prejudice or prevent competition in the market.

It is worth mentioning that the law has provided a definition of dominant position, and also relevant market. However, the law does not include any definition of the abuse of dominant position. Also, in order that the undertaking is considered to be abusing its dominant position, the percentage of market share is not stated in the law. The Cabinet has the authority to decide such a percentage and has the right to increase or decrease based on the suggestion of the Minister of Economy.

The exemptions that are provided under the law are the same exemptions that are applicable to the anti-competitive agreements. Articles 7 and 8 deal with such exemptions. It should be noted that the EU's competition law is stricter than the UAE's competition law. Unlike the UAE law, the EU law does not provide any exemptions to the abuse of dominant position.

# Chapter five: Control of Mergers and State Aid

## 5.1. Introduction

Another significant element of competition law is mergers control. A firm can gain an advantage from a merger by achieving a position of dominance in the market. Thus, competition law prevents such behaviour in case the merger will result in market dominance that will harm fair competition.<sup>721</sup> Merger control is a policy tool designed to prevent excessive concentration in markets. The rationale behind the merger control is that excessive concentration may result in significant restriction and distortion of competition. It has been claimed that a firm seeking a merger may aim to increase its market power, eliminate other competitors, and enable itself to increase prices through reducing production.<sup>722</sup> The mission of merger control, thus, is to prevent such a situation.

The UAE's competition law has covered this situation through including necessary provisions regarding economic concentration (including mergers and acquisitions) in order to protect the fair competition in the market. Articles 9, 10 and 11 cover the rules of control of mergers and acquisitions.

This chapter is divided into two parts. The first part of this chapter aims to provide an in-depth discussion regarding control of mergers in the UAE competition law with a reference to the EU competition law. First, it will provide a history of merger control in the EU. Second, it will discuss the concept of control of mergers and the definition under the EU law. Third, it will discuss the applications of Merger Regulation in the EU. Fourth, this chapter will discuss and analyse the significant cases in the EU history of mergers control. Later, the situation of economic concentration (mergers and acquisitions) in the UAE will be discussed and analysed.

The second part of this chapter will consider the concept of state aid. State aid is generally understood to be a benefit or advantage given by the government, through state institutions or entities, to certain enterprises.<sup>723</sup> This aid is selective in nature and it is, most of the time, intended to give a competitive edge to the beneficiary. State aid can be in the

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721 For more detailed discussion see Chapter Six 'Anti-competitive Agreements and Abuse of Dominant Position'.

722 Whish, R. *Op. cit.* p. 785.

723 McDermott P. et al., *Private Sector Pay*. [Online] 2013. p. 1. Available from: [http://www.trowers.com/uploads/Files/Publications/2013/Bulletins/State\\_Aid\\_-\\_Private\\_sector\\_pays\\_2.pdf](http://www.trowers.com/uploads/Files/Publications/2013/Bulletins/State_Aid_-_Private_sector_pays_2.pdf) [Accessed: 1 June 2013].

form of a grant, preferential loans, overpayments for goods or services as well as the transfer of land interests below the market value.<sup>724</sup> Most competition jurisdictions in the world, including the EU, prohibit state aid if it has the potential to distort competition in the relevant market. Even though the concept of state aid is not expressly discussed in the UAE competition law, the exemptions contemplated under Article 4 of the competition law prove its existence. Thus, the aim of this part is to give a deep consideration to this concept under the EU and the UAE competition laws to find the reasons for the similarities and differences.

## **5.2 Control of Mergers**

### **5.2.1 Mergers Control in the EU**

#### **5.2.1.1 Introduction**

In the EU, the legal foundation of the merger control is set forth in Articles 101 and 102 of the TFEU. Indeed, merger represents an arrangement between two undertakings. Therefore, it is an agreement. The merger agreement may potentially give a rise to anti-competitive conduct prohibited by Article 101 (1). Furthermore, since the merger implies a greater concentration, it may also give rise to abuse of dominant position prohibited by Article 102. Therefore, by virtue of its nature, mergers are regulated by the anti-trust provisions of the TFEU.

The fact is that Article 102 of the TFEU not only provides the European Commission with the possibility to regulate the conduct of big enterprises which abuse their dominant position in the relevant market, but also grants business entities the possibility of reaching the position within the market structure which enables them to conduct abusive acts in the first place. Thus, the main objective of the current part of the study is to offer an insight into the merger control and acquisitions under the prescriptions of EU competition law.

#### **5.2.1.2 History of merger control**

Currently, the issues of mergers and acquisitions are regulated in the framework of the European Union merger law. The EU merger law is part of the EU competition law. The incentive of the European Union to regulate mergers and acquisitions by means of its competition law is justified with the necessity to control an enormous concentration of

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<sup>724</sup> Ibid.

economic strength in the hands of a negligible number of business entities.

Although before 1990 the Treaty of Rome contained competition provisions, merger control is not explicitly provided. Therefore, in order to exercise merger control, additional legislation was necessary. The establishment of the EU merger law as a well-elaborated pillar of the EU competition law dates back to 1989, when the first Council Regulation 4064/89 on the Control of Concentrations between Undertakings (hereinafter referred to as the 1989 Merger Regulation) was adopted.<sup>725</sup> It was the previous Merger Regulation that created a legal framework for review of mergers, acquisitions and other concentrations.<sup>726</sup> The rationale behind the enactment of the first Merger Regulation was the premise that, with the completion of the internal market and lowering barriers for international trade and investments, the corporation would attempt to reorganise so as to gain competitive advantage. There were concerns that the developments in the market would drive corporations to concentrations, which can be harmful for the internal market competition. Therefore, there was a need for legislation that would prevent anti-competitive concentrations and provide for merger control. At the time of the adoption of the Regulation, then-Competition Commissioner Lord Brittan stated that his task was to detect what kind of mergers harmed competition.<sup>727</sup> He emphasised that the mergers which posed no threat to competition would be upheld.<sup>728</sup>

The 1989 Merger Regulation rested on three main principles. The first principle articulated that the enlargement of the EU would inevitably lead to the proliferation of corporate reorganisations, especially in the form of concentrations.<sup>729</sup> The second principle provided that mergers and other concentrations were welcomed in light of the impositions of dynamic competition. The third principle was that concentration could substantially impede effective competition in the single market and, thus, it was incumbent on the EC to include in Community law prescriptions regulating concentrations.

It is possible to discern four eras of Community Merger Control, starting from the

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725 Kekelekis, M. *The EC Merger Control Regulation: Rights of Defence: a Critical Analysis of DG COMP Practice and Community Courts' Jurisprudence*. Kluwer Law International. 2006, p. 9.

726 Levy, N. Gottlieb Cleary. *EU Merger Control: A Brief History* Gottlieb, Cleary, Steen & Hamilton. [Online] 2004, p. 1. Available from: [http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH\\_CGSH\\_Paper\\_IBC\\_Conference\\_EU\\_Merger\\_Control\\_-\\_A\\_Brief\\_History.pdf](http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH_CGSH_Paper_IBC_Conference_EU_Merger_Control_-_A_Brief_History.pdf) [Accessed: 12 June 2013].

727 Ibid.

728 Ibid.

729 European Council. *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings*. [Online] n.d. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:395:0001:0012:EN:PDF> [Accessed: 9 March 2013].

adoption of the 1989 Merger Regulation. The first era is called the years of discovery (1990-1994). In this period, the European Commission was flexible in the application of the EC merger law. The second era is the years of consolidation (1995-1998). The main specificity of this period was the elimination of certain gaps of the 1989 merger Regulation by the European Commission. For example, the Commission removed the disparity between “concentrative” and “cooperative” joint ventures. The next era was the era of controversy (1999-2001). In this period, the European Commission prohibited a large number of transactions.<sup>730</sup> Also, a wide range of anti-trust theories were employed in practice. Finally, the fourth era is the years of reform and reckoning. This period of time is characterised by the adoption of a Green Paper on the overhaul of the 1989 Merger Regulation and the subsequent elaboration and adoption of the 2004 Merger Regulation.

It should be noted that the 1989 and 2004 regulations are based on the same principles. However, there is a substantial difference in the legality test. Under the old Merger Regulation a concentration was prohibited if it (1) led to a strengthening of a dominant position and (2) resulted in ‘significant impediment of effective competition.’<sup>731</sup> In a word, strengthening a dominant position alone was not enough to prohibit concentration. The new resolution introduces a slightly different principle: a concentration which significantly impedes competition in the internal market by *inter alia* strengthening the dominant position is incompatible with the internal market. Therefore, there are no two requirements for the illegality of the merger but only one – serious impediment of the internal market competition. By contrast, had these requirements met, there is no case of a prohibited concentration. This view is supported by the Court. Thus, in *Qualcomm v Commission* the Court held that ‘concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it is to be declared compatible with the common market’.<sup>732</sup>

### 5.2.1.3 Concepts and definitions

Article 3 of the 2004 Merger Regulation provides a twofold definition of the concept of concentration. Thus, according to the Regulation, a concentration should be considered

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730 Case No COMP/M.1672 - Volvo/Scania; COMP/M.2187 - CVC/Lenzig.

731 Roller, L. & De La Mano, M. The impact of the new substantive test in European merger control. *European Competition Journal*. 2006. 2.1, pp. 9-28.

732 Case T-48/04 Qualcomm Wireless Business Solutions Europe BV v Commission of the European Communities.

to arise if the change of control takes place either from (1) a merger of two or several previously independent enterprises or parts of business entities, or from (2) the acquisition, by one or more business entities already having control over at least one enterprise, or by one or several business entities, where by way of acquiring of securities or assets, by means of contract or by any other means, “of direct or indirect control of the whole or parts of one or more other undertakings”.<sup>733</sup>

One may observe that the term ‘merger’ is narrower than the term ‘concentration’. The following arrangements are not considered as concentration: (1) temporary holding of securities by credit and financial institutions; (2) acquisition of control by an office-holder in insolvency proceedings, liquidation, winding up, compositions or similar proceedings or cessation of payments; (2) mergers and acquisitions conducted by financial holding companies, whose sole purpose is to acquire holdings and to turn them into profits without involvement in the management of companies.<sup>734</sup>

#### **5.2.1.4 Application of the Merger Regulation**

The Merger Regulation applies to all concentration with a Community dimension.<sup>735</sup> The concentration has a community dimension if:

“(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 250 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”<sup>736</sup>

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733 European Council. *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*. Article 3. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF> [Accessed: 9 March 2013].

734 Control of Concentrations, Subsidiary Legislation 379.08: Control of Concentrations Regulations. [Online] 2003, pp. 1-2 Available from: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10475&l=1>

735 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJL 24, 29.01.2004, pp.1-22.

736 Article 1 (3) Council Regulation (EC) No 139/2004

Thus, the Merger Regulation applies only to those concentrations that meet the aforementioned conditions.

#### 5.2.1.5 Cases (critical discussion)

Despite the fact that the 2004 Merger Regulation, as well as its predecessor, provides general definitions of terms in the domain of the EU merger law, the EU statutory law does not accomplish the regulatory framework of concentrations. Nevertheless, the EU case law is conceived to both construe and extend the statutory provisions of the EU merger law. Thus, the case of *Gencor Ltd v Commission* contains the judicial definition of the term “merger control”. According to the case, the EU Court of First Instance holds that the main objective of merger control is “[...] to avoid the establishment of market structures which may create or augment a dominant position and not need to control directly possible abuses of dominant position.”<sup>737</sup>

The aforesaid judicial legal definition of the term “merger control” helps to give an insight into the nature of the EU merger law in general. Thus, the Court’s conclusions imply that merger control is both the preliminary stage of the law enforcement of abuses of a dominant position and the preventive measure of an indirect treatment of such abuses. It should be explicated that merger control always precedes the enforcement of the EU competition law by the European Commission in respect of those business entities which conduct abuses of a dominant position. Suffice it to say that merger control is a system of preventive measures which are supposed to avert the emergence of an abuser of a dominant position. In this connection, it is possible to agree with the reasoning of the judges in *Gencor Ltd v Commission* that the greater utility lies in the creation of the market structures which could be involved in abuses of a dominant position in the future.

Notwithstanding the judicial logic that prevention is better than treatment, a rational note should be made that some cases establish exceptions to the general principles of merger control. Thus, the anti-competitive conduct of a business entity may be allowed under the banner of “technical and economic progress”.<sup>738</sup> Another exception to the general principles of the EU merger control stems from *Kali und Salz AG v Commission*. In this case, the European Court of Justice ruled that the concentration should not be ceased if the taking over would lead to either the failure or insolvency of the business entity and when

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<sup>737</sup> *Gencor Ltd v Commission*. [1999]. ECR II-753.

<sup>738</sup> European Council. *Council Regulation (EC) No 139/2004*. Article 2.

the cease does not decrease the competitive state in the relevant market.<sup>739</sup>

## **5.2.2 Economic concentration (control of mergers and acquisitions) in the UAE**

### **5.2.2.1 Introduction**

Merger operations are regulated under UAE Federal Law No. 8 of 1984 concerning Commercial Companies (Companies Law), and the Competition Law (2012). In addition, there are other regulations and rules implemented by many federal and domestic authorities, which are administered and enforced by the Securities and Commodities Authority (SCA).<sup>740</sup>

### **5.2.2.2 Merger regulation under the Company Law (1984)**

Articles 276 to 280 of the Company Law deal with merger regulation. According to the law, a merger is defined as "the dissolution of two or more companies and the incorporation of a new company to which all the liabilities of the dissolved companies would be transferred".<sup>741</sup> According to the definition, two merging firms cease to exist to be replaced by a new firm which assumes their rights and obligations. The law also defines an acquisition as "the dissolution of one or more companies and transferring their liabilities to an existing company". This means that the company which was acquired is "deemed to have ceased to exist", and its liabilities and assets are transferred to the acquirer company.<sup>742</sup> It should be noted that a merger or acquisition requires the approval of the SCA "where they concern a publicly listed company".<sup>743</sup>

It is worth mentioning that a new Companies Law is being processed for the stage of finalisation. The draft includes certain amendments to merger and acquisition regulation to complement competition law.

### **5.2.2.3 Merger regulation under the Competition Law.**

The UAE competition law aims to prevent any kind of economic concentration that may harm competition in the market. The economic concentration regulation is covered

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739 *Kali und Salz AG v Commission*. [1975]. ECR 499. [online] Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974CJ0019:EN:PDF> [Accessed: 9 March 2013].

740 Oufi, P. Public mergers and acquisitions in United Arab Emirates: overview. [Online] 2012. Available from: [http://uk.practicallaw.com/8-502-0541?q=\\* &qp=&qo=&qe=#null](http://uk.practicallaw.com/8-502-0541?q=* &qp=&qo=&qe=#null) [Accessed: 18 March 2013].

741 *Ibid.*

742 *Ibid.*

743 *Ibid.*

through Article 9, 10 and 11 of the law. However, the law does not state any definition regarding economic concentration, merger or acquisition.

### **5.2.2.3.1 Merger application Procedures**

Economic concentration is addressed by Article 9 of the UAE Competition Law. Paragraph 1 of this Article provides that firms that carry out economic concentration operations which are likely to create a dominant position should apply to the Ministry of Economy to have their operations approved.<sup>744</sup> This application should be made within 30 days before the completion of such a deal. Economic concentration operations include mergers and acquisitions. As was explained earlier, the competition law does not define the concept of ‘merger’. However, mergers are understood as the “acquisition of assets, proprietary rights, usufruct or shares that enable an enterprise to directly or indirectly control another entity”.<sup>745</sup> Any merger that exceeds the percentage threshold set by the UAE Cabinet has to seek approval from the minister. If the minister has not responded to the application within the time specified by the law (90 days plus the additional 45 days), then the applying entity has the right to assume approval.<sup>746</sup> However, the merging firms cannot start implementing the merger agreement without the minister’s consent within the legally provided time frame. They should wait until the expiry of that time frame so that they can assume the existence of consent from the minister.<sup>747</sup> Failure to notify the ministry on mergers that exceed the percentage of market share set by the Cabinet will attract significant financial penalties.<sup>748</sup> It should be mentioned that the conditions for applying for a merger or acquisition are not set out in the competition law. However, Article 9 (3) states that such conditions and the required documents shall be specified under the implementing regulation.

### **5.2.2.3.2 Minister’s Authority**

Under the competition law the minister of the economy is duty-bound to treat the details of the merger notifications forwarded to him with utmost confidentiality. Therefore, companies should not be worried over the security of the documents they forward to the

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<sup>744</sup> Thomson and Reuters, 6.

<sup>745</sup> King & Spalding, *New Competition Regulation in the United Arab Emirates: Considerations for Commercial Practices and Transactions*. London: Author. 2013, p. 6.

<sup>746</sup> Dentons, *UAE Federal Competition Law: The Dawning of a New Age*. Dubai: Author. 2013, p. 2.

<sup>747</sup> Article 10 (2), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

<sup>748</sup> Mir Z., Scarr, P., Black, S., Scott, Z., and Geurick, K. *The New UAE Federal Competition Law – Federal Law (No. 4) of 2012 Concerning Regulating Competition*. [Online] 2013. Available from: <http://www.lexology.com/library/detail.aspx?g=de938446-ade9-4266-af28-a90bb5b37bbf> [Accessed: 1 June 2013].

minister. Under the merger provisions of this law, the minister can issue three types of decisions for any merger deal. First, he can approve the transaction if it bears no negative effects on competition.<sup>749</sup> Second, if there are competition concerns, the minister can issue a decision approving the transaction but attach a caveat requiring the concerns to be remedied.<sup>750</sup> Some of the likely remedies to be recommended by the minister include requiring merging firms to sell a portion (a part) of what they have acquired or license some of their intellectual property rights to other firms.<sup>751</sup> This helps in meeting the prescribed market threshold. The third type of decision could be considered adverse. Here, the minister can wholly disallow the transaction, especially if it raises competition concerns and there are no solutions that can remedy such concerns.<sup>752</sup> The only solution left to investors affected by the third type of decision is to review their deal or apply for exemption from the application of the competition law.<sup>753</sup> Such an application is made to the same minister and its approval is dependent on whether the applicant's deal will enhance economic growth in spite of the fact that it exceeds the market share percentage threshold approved by the UAE Cabinet. Alternatively, the applicant can seek redress from the UAE federal courts if he feels aggrieved by the minister's decision to disallow the merger. According to Article 11 (2), the minister has the right, through issuing a resolution, to revoke any approval he has made within Article 11 (1), if any of the three situations in Article 8 (7) has occurred.<sup>754</sup>

#### **5.2.2.4 Critical Analysis**

Merger and acquisition conditions in the EU are, to some extent, similar to those spelt out by the new UAE competition law. For example, the EU merger control rules prohibit much the same anti-competitive practices as the UAE competition law. This includes mergers and acquisition deals which are aimed at the creating and strengthening of a dominant position and the subsequent abuse of such a position. It is obvious that the UAE's competition law has just started to take its first steps and therefore its effectiveness cannot be fully assessed at this time. However, it would not be a mistake to judge the contents of this law based on international best practices, especially on mergers and

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749 Article 11 (1)(a), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

750 Article 11 (1)(b), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

751 Z. Mir et al, 4.

752 Article 11 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

753 Article 11 (1)(c), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

754 For further information regarding the three situations see Chapter Six 'Anti-competitive Agreements and Abuse of Dominant Position'.

acquisitions. One of the negatives associated with the provisions of this law could be the time it takes the Minister of Economy to approve or disapprove such transactions. In the EU, it would take the Commission around 5 weeks to scrutinise, approve or disapprove a merger deal.<sup>755</sup> The same task will take 3 to 4 months to complete in the UAE. While the European Commission would extend the aforementioned period of 2 weeks, the UAE Minister of Economy is allowed an extended period of up to 45 days (more than 4 weeks).

While the international practices on merger provide that remedies be availed to non-conforming mergers, the remedies provided by the UAE competition law tend to rely on the wisdom of the Minister of Economy and the federal courts. Through the minister, mergers that exceed the UAE Cabinet's market share threshold but enhance economic growth can be granted the go-ahead to start operating. Through the federal courts, aggrieved parties can seek legal redress.

In contrast, the EU merger control regulation provides for elaborate remedies which can either be structural or behavioural.<sup>756</sup> Structural remedies involve restructuring of the property allocation such other parties could be allowed the access to the merging firms' market turf. For example, if two merging airlines are found to exceed the set market share percentage, they could invite or allow other independent airlines to share in their routes. This would ensure that they have not locked their competitors out of the relevant market. Behavioural remedies could involve a requirement by the European Commission for the merging firms to remove some discriminatory clause in their contract. The EU merger control regulation also allows aggrieved parties to seek legal redress at the ECJ.<sup>757</sup> The UAE competition law does not provide for such remedies. It is, however, hoped that some semblance of these remedies will be availed through the implementing regulations.

In approving or disapproving a merger or acquisition, the minister must assess whether the merger will negatively affect competition in the relevant market. If this is the case then he will not approve the merger. However, the minister has the power to approve a merger that is likely to negatively affect competition but have a positive impact on the economy. The reasoning behind this is that the economic gain far outweighs the negative effects on competition. It thus appears that the substantive test for the assessment of

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755 Davies, S. & Lyons, B. *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition* (Cheltenham: Edward Elgar. 2007, p. 3.

756 Ibid. p. 13.

757 Parisi, J. *A Simple Guide to the EC Merger Regulation*. [Online] 2010. pp. 16-17. Available from: <http://www.ftc.gov/bc/international/docs/ECMergerRegSimpleGuide.pdf> [Accessed: 1 June 2013].

mergers under the UAE competition law is whether a merger will negatively affect competition, and if so, what positive impact that merger has on the economy.<sup>758</sup> This could be interpreted as meaning that a merger that has the potential to create a dominant position and subsequently alter the competition rules will not necessarily be disallowed if it has a positive effect on the economy.

The UAE competition law test on merger assessment differs significantly from that of the European merger control. The EU test on merger assessment was created by the current EU merger regulation (Regulation 139/2004) which came into effect on May 1, 2004.<sup>759</sup> Article 102 of the TFEU prohibits the formation of mergers that are aimed at creating and strengthening dominant positions since such mergers constitute economic concentration, which has the potential to significantly impede competition. The European merger regulation test is known as SIEC (Significant Impediment of Effective Competition).<sup>760</sup> Under the old test (which was replaced by SIEC in 2004), dominance was the acid test of the viability of a merger under the European merger control regime. However, SIEC does not necessarily assess the viability of mergers based on the “dominance test,” though it is important. A good example would be the merger of Air France and KLM in 2004. Though the proposed merger was likely to lower competition in 14 domestic and international routes, the EU Commission gave a nod to the merger because of the travel efficiency and consumer benefits it was expected to bring about in European Airlines.<sup>761</sup> SIEC looks at the significant impediments a merger is likely to have on competition plus the efficiencies such a merger would have on services to consumers. The UAE’s competition law, on the contrary, looks at the positive economic impact a merger is likely to have. This impact should, however, outweigh the negative effect the merger might have on competition.

It is worth pointing out that there is a significant difference in the merger approval/disapproval periods between the UAE competition law and the European merger control regime. It only takes 25 working days for the EU Commission to scrutinise and approve/disapprove a merger deal in Phase 1. This period can only be extended for 10 days.<sup>762</sup> Contrastingly, the UAE competition law allows the Minister of Economy up to 90

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758 Latham & Watkins. *Op. cit.* p. 3.

759 Roller L. & de la Mano, M. *Op. cit.* p. 9.

760 *Ibid.* 14.

761 Weitbrecht, A. EU Merger Control in 2004 – An overview. *European Competition Law Review*, E.C.L.R. 2005.2, p. 70.

762 *Ibid.* 69.

days and an extension of up to 45 days for scrutiny and approval of a merger deal in phase 1.<sup>763</sup> Furthermore, the market share threshold for merger and acquisitions under the EU merger control regime appear to be well defined. Mergers that are likely to control over 40 percent of the relevant market could be prohibited by the Commission.<sup>764</sup> The UAE competition law, on the other hand, leaves the determination of this threshold in the hands of the Cabinet, which would be advised by the minister on this particular matter. However, it is desirable to give some period and test the law and then decide the percentage based on the observation.

The EU merger regulation is broader in the sense that it defines the two types of mergers. That is, *horizontal* and *non-horizontal* mergers. Horizontal mergers refer to mergers between major market competitors. In other words, this is a merger between firms or enterprises that make the same products and sell to the same market.<sup>765</sup> A good example would be a merger between the US aircraft, Boeing, and the European aircraft production giant Airbus. Non-horizontal mergers involve firms or enterprises dealing with different fields of production and serving different market segments. The UAE competition law is silent on such elaborations. However, it is hoped that such elements on mergers and acquisitions will be captured by the yet to be written accompanying executive regulations. After giving a deep insight into mergers control, the next part will discuss the state aid element. It is very important to assess whether the UAE's competition law prohibits the concept of state aid, as is the case with the EU's law, or whether there are any exceptions to this concept.

## 5.3 State Aid

### 5.3.1 State Aid in the EU

In simple terms, state aid can be described as *ad-hoc* support of national businesses. For instance, during the recent financial crisis some of the largest banks were saved by their government. This can be considered state aid. In recent years, there has been growing concern that state aid may significantly distort competition by giving unfair competitive advantages. The state aid-relevant provision were present in the Treaty of Paris and then

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763 Freshfields Bruckhaus Deringer LLP, *United Arab Emirates: New Competition Law*. [Online] 2013, p. 2. Available from: [http://m.freshfields.com/uploadedFiles/SiteWide/Knowledge/UAE\\_new%20competition%20law.pdf](http://m.freshfields.com/uploadedFiles/SiteWide/Knowledge/UAE_new%20competition%20law.pdf) [Accessed: 27 May 2013].

764 Horner, N. Unilateral Effects and the EC Merger Regulation – How the Commission had its Cake and Ate it too. *Hanse Law Review*. 2006. 2. 1, pp. 37-38.

765 Maydell, P. Non-horizontal Mergers Under the EC Merger Regulation, *Stanford-Vienna European Union Law Working Paper No. 3*. [Online] 2012. Available from: [https://www.law.stanford.edu/sites/default/files/child-page/205024/doc/spublic/maydell\\_eulawwp3.pdf](https://www.law.stanford.edu/sites/default/files/child-page/205024/doc/spublic/maydell_eulawwp3.pdf) [Accessed: 27 May 2013].

in the Treaty of Rome. However, the rules began to be actively enforced only in recent decades.

The core provisions of the EU competition law prohibiting state aid originate from Article 107 of the TFEU. Similar to Article 101 of the TFEU, Article 107 prescribes a general rule that the state must not subsidise or aid private business entities to the detriment of free competition, but it is entitled to approve exceptions for particular projects directed at restoration after natural disasters or regional development. The general definition of state aid is provided in Article 107 (1) of the TFEU.

According to Article 107 of the TFEU, granting state aid is prohibited ‘in any form whatsoever’. This broad wording is construed so as to cover all possible methods and forms of aid. In *Belgium v Commission* the Court pointed out that, by virtue of the phrase ‘in any form whatsoever,’ it did not matter if the aid was granted in the form of loans or in the form of subscription to the capital of a company.<sup>766</sup> Also in *Germany v Commission* the Court ruled that Article 107 does not make a distinction between permanent and provisional measures.<sup>767</sup>

At the same time the state aid prohibition is not absolute. Thus, state aid is banned only when there is any support given either by a Member State of the EU or through the state resources of such Member State which threatens or distorts competition by favouring particular business entities or the manufacturing of certain goods, infringes on the trade between Member States and is inconsistent with the principle of the single market.<sup>768</sup>

The above-captioned definition of state aid is comprehensive. Article 107 (1) of the TFEU recognises the following salient features of state aid as a prohibited activity: a) any support which involves a Member State or State resources; b) the aforesaid support distorts or threatens to distort normal competition; c) the aforementioned support favours certain undertakings or manufacture of specific goods; d) the above-mentioned support influences trade relationships between Member States; e) the above support is deemed inconsistent with the internal market.

One may assume that if state aid does not distort or threaten to distort competition in the internal market, such state aid is permissible. Indeed, on many occasions the Court

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<sup>766</sup> Barents, R. *Directory of EC Case Law on State Aids*. Kluwer Law International, 2008, p. 5.

<sup>767</sup> *Ibid.*

<sup>768</sup> The TFEU. *Op. Cit.* Article 107 (1).

ruled that in order to classify aid as state aid, as per Article 107 (1), all the conditions set out in it should be met (*Belgium v Commission (Tumebeuse)*; *Spain v Commission (Hitasa)*, *France v Commission, Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*).<sup>769</sup>

Despite the comprehensiveness of the TFEU's definition of state aid, the above-captioned definition lacks a very important characteristic of state aid – the support is granted to private business entities.

The prohibition of state aid which distorts competition in the internal market allows certain exemptions. Thus, according to Article 107 (2) the following types of aid are considered to be compatible with the internal market: (1) aid of a social character granted to individual consumers unless there is no discrimination as to the origin of the products in question; (2) aid to recover damages caused by outstanding occurrences and natural disasters; (3) aid granted to the economies of certain parts of Germany which were affected by the division of the country.

Furthermore, Article 107 (3) defines the types of aid which are also compatible with the internal market: (1) aid to encourage economic development in areas with unusually low standards of living or in regions which seriously suffer from unemployment; (2) aid to encourage the fulfilment of an important project which is in the common European interest or aid to remedy the serious economic disturbance of a Member State; (3) aid to facilitate the development of certain activities in certain areas provided that such aid does not impede the competition in the region concerned; (4) aid to promote heritage conservation and culture, provided that such aid does not distort competition in the Union and does not affect trade between Member States; (5) other categories of state aid which can be specified by the Council.

### **5.3.2 State Aid in the UAE**

The concept of state aid is not expressly discussed under the UAE's competition law. This does not, however, mean that it does not exist. It can be inferred from the exemptions contemplated under Article 4 of the Competition Law. The full list of the exempted sectors under this law is found in the appendix (Chapter IX).<sup>770</sup>

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<sup>769</sup> Ibid. pp. 9-10.

<sup>770</sup> Thomson and Reuters *Op. cit.* p. 13.

Apart from exempting various public sectors, Article 4 provides for the exclusion of private enterprises which would otherwise be construed as infringing on the market share threshold set by the Cabinet. Some of the state sectors exempted from the application of the competition law include the postal services and telecommunications, gas and petroleum, and the land, sea as well as air transport sector. Furthermore, there are activities exempted under the same provision (Article 4). These include activities that have got something to do with the production and distribution of electricity, cultural activities (written, audio and visual), and activities involving drainage, waste disposal, sanitation as well as other environmental support services.<sup>771</sup> Additionally, the production and distribution of pharmaceuticals is also exempted. Private firms that carry out tasks assigned to them by both the federal government and the governments of the individual emirates are also exempted from the application of the competition law, and so are small and medium-sized enterprises.

### 5.3.3 Critical Analysis

EU member states do not entirely lose their independence by signing the various treaties essential for their membership of the union. In fact, Article 346 (formerly Article 295 of EC Treaty) of the TFEU clearly states that the treaties signed by the Member States shall not in any way be biased against the individual Member State's legal system of property ownership.<sup>772</sup> What this means is that Member States' governments have the right to engage in commercial activities, for example, acquiring and maintaining shareholdings in private firms, creating and managing public companies or nationalising certain sectors of the economy.<sup>773</sup> This part of the TFEU could be said to be the equivalent of Article 121 of the UAE Constitution, which guarantees each emirate the power to enact their own laws and apply them within their territories.<sup>774</sup> As such the individual emirates also possess the right to carry out commercial activities of their choice. It is worth noting that the primary aim of setting up the EU was for the promotion of trade by creating a common market. Since trade was the chief motivation for the formation of the EU, it is only reasonable that it is made fair, hence the enactment of the competition laws. It is these laws that prohibit

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<sup>771</sup> Ibid.

<sup>772</sup> Adamantopoulos, K. State Aid and Public Undertakings with Specific Reference to the Airline Sector. In: Biondi, A., Eeckhout, P. & Flynn A. *The Law of State Aid in the European Union*. Oxford: Oxford University Press. 2004, p. 219.

<sup>773</sup> Ibid. 219.

<sup>774</sup> Al-Mulla, H. *National Commercial Law Assessment Report of UAE* (Beirut: Arab Center for the Development of Rule of Law and Integrity-ACRLI. [Online] n.d. p. 20. Available from: <http://www.arabruleoflaw.org/compendium/Files/MENACLS-NationalReport-UAEEn.pdf> [Accessed: 1 June 2013].

state aid which is likely to affect competition.

Although state aid is not entirely prohibited under the TFEU treaty, it must not affect competition in the internal market.<sup>775</sup> Article 107(1) of the TFEU gives the European Commission powers to declare state aid incompatible with the competition rules if the aid has got the potential to distort competition within the EU. It suffices to mention that, unlike the UAE competition law, the EU control of state aid is quite elaborate. It clearly spells out the activities which the state can aid, including social services, housing, social infrastructure, aid to small and medium-sized enterprises, and research.<sup>776</sup> The European Commission also allows state aid where it is used to correct market failures. Ioannis Lianos points out that Article 107(3) exempts state aid provided to people or businesses situated in historically low potential economic areas. This includes the Member States' overseas economic territories like Guadeloupe, French Guiana, the Canary Islands and parts of Germany affected by the division of that country among other areas.<sup>777</sup> Other than this express exemption, the EU competition law hardly favours any other commercial undertaking by the state. However, the EU Commission is given powers to decide on block exemptions under the direction of the EU Council.

The EU competition rules provide that state aid should focus on activities rather than the firm carrying out those activities. In fact, when assessing the compatibility of any state aid with the EU competition rules, the Commission looks at the effects of the aid rather than the intention of the provider of the aid. There is hardly any mention of state aid control in the UAE competition law. What is clear is the number of sectors and activities exempted from the application of the law. It is important to note the EU rules on state aid control exempt activities, rather than entire sectors, from the stringent rules on state aid. If the Commission establishes that a particular firm or enterprise benefited from state aid that is deemed incompatible with the EU anti-competition laws, then that firm is ordered to return the aid in addition to some interest. Such a rule is nowhere to be found within the UAE competition law. However, investors and other business stakeholders should remain hopeful since this law is still raw and it has not been tested.

Unlike the UAE competition law, the EU competition rules are very clear on what

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<sup>775</sup> Scwalbe, U. Part III: Studies on State Aid. In: Basedow, J. & Vurmnest, W. *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*. Biggleswade: Kluwer Law International. 2011, p. 163.

<sup>776</sup> McDermott, P. et al., *op. cit.* 1.

<sup>777</sup> Lianos, I. *Op. cit.* p. 254.

constitutes state aid to enterprises and how it should be dealt with. Article 107(1) of the TFEU expressly prohibits any aid given by a member state using public resources and which is likely to affect or distort competition by favouring the recipient of the aid over other enterprises. However, state aid is not entirely prohibited under Article 107(1) though it is highly discouraged. State aid can be permitted if it meets particular conditions imposed by the TFEU rules. One of these conditions is the requirement for a member state intending to offer aid to any enterprise to notify the EU Commission which would in turn scrutinise and approve or disallow such aid if it has the potential to distort competition. The EU Commission has at times found itself at loggerheads with member states over the extent to which the latter can aid their health sector. Article 152 (5) of the EC Treaty requires member states to take charge of organising and delivering healthcare to their citizens.<sup>778</sup> Since the involvement of government in the health sector is likely to attract policies such as the provision of subsidies to the various industry players, the likelihood of incompatibility with the EU state aid rules is very high. This has been a major source of legal tussles in the European Court of Justice in the recent past. Perhaps the UAE Cabinet should take the European experience on board as they embark on drafting the various regulations that will accompany the broad provisions of the competition law.

#### **5.4 Conclusion**

Merger control is a relatively recent development in the EU competition law. It dates back to the year 1990, when the first Merger Regulation was adopted. The basic principles set forth by that regulation are still applicable. However, the method of distinguishing legal and illegal concentration has slightly changed. The merger control applies only to the concentrations which may potentially impede competition in the internal market, for instance by strengthening a dominant position. Also, the merger control is confined to concentration which has a Community dimension. Whether a company has a community dimension can be found by calculating relevant turnover amounts.

Exceptions to the general principles of merger control should not be ignored. It is possible to agree with the reasoning of the Court in *Kali und Salz AG v Commission* that it is not always prudent to take over business entities even if they threaten effective competition. The research of the EU merger law shows that merger control is a very

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<sup>778</sup> Van de Gronden, J. Financing Health Care in EU Law: Do the European State Aid Rules Write out an Effective Prescription for Integrating Competition Law with Health Care. *The Competition Law Review*. 2009. 6. 1, p. 5.

complex practice which requires from the European Commission and the European Court of Justice an accurate assessment of all risks and benefits before making a decision on the cease of a concentration.

On the other hand, to some extent the conditions of economic concentration in the UAE are similar to the EU. Both legislations aim to control the mergers and acquisitions deals that aim to create and strengthen their dominant position, which could lead to abuse of such a position. It should be noticed that the UAE law is still in its early stages and has not been tested yet.

However, some critics may draw attention to the negative points concerning the provisions of this law regarding economic concentration. There is the very long period that it takes the Minister of Economy to approve or disapprove, after an examination, a merger or acquisition request. This procedure takes 90 days, which may be extended to another 45 days. In contrast, it takes 5 weeks in Phase I in the EU.

In addition, the EU competition law allows structural and behavioural remedies unlike the UAE competition law, which lacks such remedies. It is hoped that the coming implementing regulation includes such remedies.

One can see that the assessment of merger control in the UAE differs from the EU method. The EU follows the 'dominance test'. According to this test, if a merger or acquisition aims to create or strengthen a dominant position that has the potential to hinder competition in the market then the law shall prohibit the creation of such a formation. On the other hand, the UAE competition law does not consider the negative impact that a merger or acquisition may have on market competitiveness, if the formation has a positive impact on the economy.

While the EU competition law defines two types of mergers, horizontal and non-horizontal, the UAE does not mention anything regarding that. It is hoped that the elements on mergers and acquisitions will be included and explained in upcoming implementing regulation.

Regarding state aid, in the EU it is not illegal *per se*. It is only illegal when it distorts or threatens to distort competition in the internal market. The concept of state aid is very broad and covers any kinds, forms and methods of state aid. At the same time, there is a range of exemptions. The exemptions include the types of legitimate aid such as the

depressed economic regions. As well as mergers, state aid is subject to a notification system. All aid should be notified to the Commission, which has power to review the legality of aid.

On the other hand, the UAE competition law does not expressly discuss the concept of state aid. However, it may be inferred from the exemptions under Article 4 that the concept does indeed exist. The UAE constitution empowers the individual emirates to engage in commercial activities, which is also the case in the EU, allowing the individual states to do the same.

However, EU competition law does not allow state aid, based on the fact that such aid might distort competition in the market leading to negative effects. However, EU competition law does provide exemptions in some cases when they do not hinder competition in the market.

It should be mentioned that, unlike UAE competition law, the EU competition law is quite elaborated since it is very clear in which activities that states can aid, including SMEs, housing and research. Although the EU competition law hardly favours any state commercial activities, other than the expressed exemptions, the EU Commission is empowered to establish block exemptions under the EU Council's direction.

In addition, while the EU competition law provisions on state aid control exempt activities, the UAE competition law exempts certain sectors. This could be seen as a negative point regarding control of state aid. Excluding certain sectors from the application of the law may lead to the creation of anti-competitive behaviour such as dominant position and anti-competitive agreements that would lead to a distortion of competition and the economy in the end.

If a firm that benefits from state aid in the EU is found to be incompatible with the EU competition law, then the state aid must be returned in addition to some interest. However, this is not the case in the UAE, since such rules do not exist in the current competition law.

Generally, it can be said that the UAE competition law is still new compared to the most advanced competition regimes, such as the EU. It will be a matter of time until the law has been tested to prove its effectiveness. Although the law is silent on many competition elements or does not include sufficient explanations, the hope is that the

implementing regulation will clarify such matters when it comes.

# Chapter Six: Enforcement of Competition Law

## 6.1 Introduction

It should be noted that competition law enforcement is a very critical matter in the competition system, since it ensures market competitiveness and protection from unfair practices. In order for competition law to be efficient and able to tackle anti-competitive behaviour, it has been claimed that the legal system should be strong enough by way of containing the required elements and provisions for such prohibitions. In addition, in order to enforce the competition law, it must contain the required sanctions and impose them against the violators so as to discourage such behaviour in future. This implies the requirement of intensive observation by the authorities on undertakings and their activities in the market.

This chapter aims to study the enforcement mechanism of the UAE competition law. This chapter will provide a critical assessment of the enforcement system based on the experiences in the EU system. The findings will provide some suggestions on how to overcome the defects, if any, through learning from different experiences.

The first part of this chapter will look at the EU competition law enforcement mechanism. It will give an overview of the current enforcement regulation, the Commission's authorities and judicial review. The second part of the chapter will discuss competition law enforcement in the UAE. The role of the Competition Regulation Committee will be illustrated. Also, the roles of the Ministry of Economy and the Minister of Economy will be discussed. Later in this chapter, the penalties under the competition law will be elaborated.

## 6.2 Enforcement under EU Competition Law

### 6.2.1 Introduction

Elaborating on the enforceability of Article 107 of the TFEU, it might be appropriate to note that it is incumbent on the European Commission, in collaboration with Member States, to constantly overhaul all available systems of aid in relevant Member States.<sup>779</sup>

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<sup>779</sup> The TFEU. *Op. Cit.* Article 108.

It should be reiterated that the decision in *Van Gend en Loos* established the supremacy of the EC competition law over the national competition laws of Member States. In light of this, the decision in *Van Gend en Loos* spurred the European Community to establish a central enforcement authority responsible for ensuring the observance of EC competition law. The role of the central enforcement authority of EC competition law was assumed by the European Commission as the executive body of the European Union. Stine Andersen is disposed to think that the Commission exercises its enforcement obligations in a politically tolerable manner.<sup>780</sup>

Since 1964, the Commission has taken an active part in the enforcement of EC competition law. The first competition-related case which to be settled by the Commission was the case of *Consten & Grundig*.<sup>781</sup> Nowadays, the Commission remains the central player in the field of enforcement of EU competition law. Nevertheless, Regulation 1/2003 has given rise to the decentralised enforcement of Articles 101 and 102 of the TFEU<sup>782</sup> by way of placing the national competition authorities as well as national courts of Member States at the centre of law enforcement.<sup>783</sup>

In addition to the European Commission, the functions of enforcement of the EU competition law are realised through the European Council. Particularly, Article 113 of the TFEU prescribes that the Council guarantees the establishment and functioning of the internal market, as well as ensuring the effectiveness and normal course of competition by way of special legislative procedures and indirect enforcement of the EU competition law. The enforcement of Article 113 of the TFEU is performed particularly through Council Regulation No 659/1999 which lays down detailed rules for the application of Article 93 of the EC Treaty.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty is an instrument implementing the state aid provisions. The regulation introduces the term ‘unlawful’ aid which is granted in violation of the treaty provisions. The regulation provides for a notification system: all aid should be notified to the Commission. Moreover, unless the Commission takes the

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780 Andersen, S. *The Enforcement of EU Law: The Role of the European Commission*. Oxford: Oxford University Press. 2012.

781 Decision de la Commission 64/566/CEE, relative a une procedure au titre de l'article 85 du traite (IV-A/00004-03344 "Grundig-Consten"). 1964. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31964D0566:EN:NOT> [Accessed: 9 March 2013].

782 *Consolidated version of the Treaty on the Functioning of the European Union*. Op. cit.

783 European Council. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. 2003. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT> [Accessed: 9 March 2013].

authorising decision regarding the aid notified, aid cannot be proceeded with.<sup>784</sup> If the Commission is satisfied that the arrangement does not constitute aid or is legitimate aid, it will endorse the arrangement with the respective decision. However, if the Commission finds that arrangements may potentially distort competition, the Commission shall launch investigative proceedings. If the Commission finds that aid is unlawful it may invoke an injunction to suspend the aid.

## **6.2.2 Public Enforcement Under Regulation 1/2003: the Role of the European Commission and National Competition Authorities**

### **6.2.2.1 Overview of Regulation 1/2003**

The Commission has extensive powers to investigate horizontal and vertical agreements that may potentially harm competition. For example, the Commission has the authority to enter company premises without announcement and to explore the company's internal documents.<sup>785</sup> Moreover, the Commission has the power to prosecute any company that fails to comply with EU competition laws and impose fines, which may reach up to ten percent of the company's global turnover.<sup>786</sup>

Regulation 1/2003 is the foundation that modernised anti-trust enforcement rules and procedure in the EU. It started to be applied on May 1, 2004. The 44<sup>th</sup> article of Regulation 1/2003 holds that the Commission, by 1<sup>st</sup> May 2009 - that is, five years after application - shall report to the EU Parliament and the council of its functioning. Regulation 1/2003 was implemented after comprehensive reform of procedures and it sought to enforce Articles 82 and 81 EC since 1962 (now 101 and 102 TFEU). There are some important characteristics of the regulation. First, it abolished the practice of informing of business agreements to the Commission. This effectively allowed the Commission to concentrate its resources on the crucial battle against monopolies and cartels as well as other serious violations of the anti-trust rules. Second, national competition authorities and courts were enabled to effect EC anti-trust guidelines and policies in their entirety.<sup>787</sup> This implies that there are several overseers as well as a broader application of the EC anti-trust rules.

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784 Council Regulation (EC) No 659/1999 of 22 March 1999.

785 Bannerman, E. *Op. cit.*

786 *Ibid*

787 Bassan, F. *Public enforcement by the Commission and the national competition Authorities of the Anti-trust provisions*. [Online] 2012. Available from:

[http://host.uniroma3.it/offline/economia/db/materiali/insegnamenti/562\\_5746.pdf](http://host.uniroma3.it/offline/economia/db/materiali/insegnamenti/562_5746.pdf) [Accessed: 27 May 2013].

The system used to impose competition in the EU, Articles 101 and 102 TFEU, is founded on a number of rules. First, Regulation 17/1962 put in place a system where an arrangement that occurs within Article 81(1) (now 101 (1) TFEU) would only escape through Article 81(3) (now 101 (3) TFEU) when it was exempted. There are two main methods which can be used to get exclusion. The first involves exemption as a block regulation while the second is exemption as an individual from the Commission, otherwise known as notification and exemption procedure.<sup>788</sup> Second, Regulation 17/1962 was replaced by Regulation 1/2003. It renders article 101(3) directly relevant and decentralises the implementation of the anti-trust provisions. The network for European competition (ECN) was also formed by Regulation 1/2003 and it put in place procedures and mechanisms for the teamwork between the National Competition Authorities (NCA) and the Commission.

The practice note takes into consideration the collaboration between the European Commission, the NCA, and each other when it comes to the implementation of Articles 101 and 102 of TFEU under Regulation 1/2003. It covers briefly the cooperation between the EC and competition authorities in third countries. It also covers issues that may arise in case of cooperation between competition authorities later.<sup>789</sup>

### **6.2.2.2 Powers of Enforcement under Regulation 1/2003**

Initiating proceedings is a formal way used by the Commission to show that it aims to accept a decision under Regulation 1/2003. Cseres says that Regulation 773/2004, Article 2 provides that: the Commission has powers of investigating before it can initiate the proceeding.<sup>790</sup> The Commission can also publicise its intention of initiating proceedings after it appropriately informs the parties. These powers are based on Articles 17, 18, 20 and 21 of Regulation 1/2003. Article 18 gives the Commission the powers to request different agents to provide it with information. Article 20 allows inspections to be conducted by the Commission on the premises of different undertakings. Article 21 gives a mandate to the Commission to do inspections on private properties and this is guaranteed in Article 8 of the European Convention for Human Rights in Europe (ECHR). Lastly, Article 17 empowers the Commission to perform general inquiries in the sector economy

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<sup>788</sup> Jones, A & Sufrin, B. *Op. cit.*

<sup>789</sup> Lenaerts, K. Due process in competition cases *Neue Zeitschrift für Kartellrecht - NZKart*, 2013. 1. 5, p. 67.

<sup>790</sup> Cseres, K. Comparing Laws in the Enforcement of EU and National Competition Laws. *European Journal of Legal Studies*. 2010. 3. 1. pp. 7-24.

and to ask NCAs to impose penalties and fines under Articles 23 and 24.<sup>791</sup>

The second power involves taking statements where the Commission conducts interviews with the legal or natural person. According to Article 19, this power can only be exercised after the individual concerned has given consent and collects information relating to the subject matter of the investigation. Third, the Commission is capable of taking the last decision by ordering for the infringement termination of the competition rules.<sup>792</sup> Procedural decisions can also be assumed in the course of its investigations. Article 7 empowers the Commission to carry out interim measures so as to evade irreparable damage which can occur before the final decision can be made. A decision can be taken that binds commitments but without finding infringement, or a positive decision can be taken finding Articles 101 and 102 inapplicable.

Article 8 holds that decisions can be made by the Commission enforcing interim measures in cases of urgency to apply for a short period of time. The Commission may also renew them when it is deemed appropriate and necessary. Article 9 allows the Commission to render undertakings that have been given by the parties binding upon them, even when a final decision will not be made finding an infringement.<sup>793</sup> In certain cases, it may reopen the proceedings by the Commission or upon request by the parties. Lastly, Article 10 allows the Commission to make a positive decision finding Articles 101 and 102 are not applicable to certain practices or agreements.

Fourth, the Commission has the power to impose fines as well as intermittent penalty payments. According to Article 23, the Commission is empowered to impose fines on both substantive and procedural transgressions of the rules of competition. On the other hand, the Commission is empowered by Article 24 to levy intermittent penalty payments so as to compel undertakings to act in the way required by the Commission by penalising defiance.<sup>794</sup>

Lastly, there are various aspects which must be taken into deliberation before Regulations 1/2003 decisions that find an infringement can be undertaken. For instance,

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791 Lane, R. European and National Enforcement of EU Competition Law: Sharing the Sovereignty. *School of Law University of Edinburgh*. [Online] 2009, p. 3. Available from: [http://www.jean-monnet-coe.keio.ac.jp/workingpapers/robert\\_lane\\_01.pdf](http://www.jean-monnet-coe.keio.ac.jp/workingpapers/robert_lane_01.pdf) [Accessed: 27 May 2013].

792 Commission of the European Communities. *Communication from the commission to the European Parliament and the Council: Report of the Functioning of the Regulation*. [Online] 2009, p. 4. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0206:FIN:EN:PDF> [Accessed: 27 May 2013].

793 Van Den Bergh, R.J. & Camesca, *Op. cit.* p. 126.

794 Evans, D. & Padilla, J. *Op. cit.* p. 107.

the Commission can take provisional measures, impose fines or require periodic payments in accordance with Article 27. However, the undertakings concerned must be granted the prospect of being listened to in cases where the Commission has accepted an opposition. It is important to note that the right to be listened to has to be exercised in writing, but Regulation 773/2004, Article 12 provides the concerned parties with the right to be orally heard.

### 6.2.2.3 Regulation 1/2003 in practice

To effectively tackle the challenges associated with the enlargement of the EU in 2004, the European Commission agreed to reconsider the arrangements for the application of Articles 101 and 102 of the TFEU.<sup>795</sup> The main aim was to ensure that competition rules for the EU were effectively supervised and the administration was simplified to the greatest extent possible. Reconsideration by the Commission facilitated the implementation of Regulation 1/2003, also known as the Modernisation regulation, and it was brought into force on May 1, 2004 (*OJ 2004 L1/1*). Various factors were abolished by the Modernisation Regulation. They include the structure for announcement of agreements, the conduct to the EC for a person exemption in Article 101(3) (in Article 101 cases), or for the negative clearance. National courts in collaboration with the national competition authorities were empowered to apply Articles 101 and 102 in their entirety. In the past, only the Commission had the power of granting individual exemptions under Article 101(3).

Under Regulation 1/2003, authorities for national competition were selected by Member States to be the authorities that are responsible for applying Articles 101 and 102 of the TFEU. The Office of Fair Trading (OFT) in the UK is regarded as a NCA. The OFT is assisted by sector regulators which have concurrent powers that are used to enforce Articles 101 and 102 of the TFEU, as well as Chapter 1 and II of the Competition Act.<sup>796</sup> There are also a number of authorities which have been designated as NCAs.

Despite the fact that NCAs under Article 5 of the Modernisation Regulation have the power to use Articles 101 and 102, the ECJ said, in relation to Article 102, that they are not empowered to decide in cases where there are no infringements.<sup>797</sup> When the NCA discovers that the conditions for applying the prohibitions have not been met, the powers

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<sup>795</sup> Lane, R. *Op. cit.*

<sup>796</sup> Mestmacker, J. E. *Op. cit.* p. 417.

<sup>797</sup> Cseres, K.J. The Impact of Regulation 1/2003 in the New Member States. *The Competition Law Review*. 2010. 6. 2, p. 150.

of the NCA will be limited to making a decision that there are no grounds for action. The decision by the ECJ is relevant to the submission of Article 102, but the reasoning appears to be equally applicable to Article 101.

Regulation 1/2003 enforces accountabilities on the Commission, NCAs and national courts to ensure that Articles 101 and 102 are consistently applied by all Member States. The Practice note is concerned with the cooperation between the Commission and NCAs. Cooperation between national courts and the Commission is regarded as the practice note. An obligation was enforced by Art 3 para 1 of Regulation 1/2003 on NCA of all member states to apply Articles 101 and 102 TFEU in line with their national competition rules.<sup>798</sup> This obligation implies that national requirements must comply with EU interpretations of Article 101 and 102 when applying them in line with their national rules. As the European competition law undergoes a decentralising process, the NCA and national courts increasingly play a major role in enforcing and implementing the EU competition rules. The NCA and the commission have established a number of competition authority networks whose obligation is to detect, examine and punish violations of Articles 101 and 102 TFEU.

This implies that the Commission plays a very important role when it comes to the application of competition law. Specifically, the role of the Commission is to advise the parties on how EU rules should be applied and the progress which the decentralised system of European competition law should follow through the steps applied by the Regulation 1/2003.<sup>799</sup> Regulation 1/2003 applies executive competence to NCAs and national courts. It creates a system for parallel application of national competition law and the EU. Europeanisation of competition law has been made possible by the enforcement system that enhances cooperation between NCA and EC. The EC rules are directly applied across the entire Union. Therefore, the national authorities of each country have to comply fully with the Commission since it is not just a requirement but mandatory. The interaction between the EC and NCA is required under Article 11 of Regulation 1/2003. The Commission and the NCAs establish a grid of public authorities whose aim is to work closely together.

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<sup>798</sup> Van Den Bergh & Camesca. *Op. cit.* p. 126.

<sup>799</sup> Evans, D. & Padilla, J. *Op. cit.* p. 110.

#### 6.2.2.4 The Commission's Fines

The Commission has the right to impose fines in case of violations of the competition law. The statistics suggest that the Commission makes extensive use of fines as a method of enforcement of anti-cartel provisions. Thus, in 2012 the Commission imposed fines for cartel arrangements equalling almost €1.9 billion.<sup>800</sup> The highest fine was imposed on Saint Gobain for an illegal cartel in the car glass case with a total of €1.3 billion. Among well-known companies that were fined by the Commission are Philips, LG Electronics, and Siemens AG.<sup>801</sup>

In a recent case, the Commission imposed a fine on Microsoft of a total of €561 million. The Commission's decision was based on the fact that Microsoft has failed to comply with the commitments that it made to offer internet browser users the feature to freely choose their preferred web browser. According to the Vice President of the Commission, Microsoft had abused its dominant position. He asserted that there was a significant role for legally binding commitments in the Commission's enforcement policy. This was because such commitments "allow for rapid solutions to competition problems".<sup>802</sup> However, a strict compliance is necessary with the Commission's decisions and any failure to comply would be considered a very serious violation leading to strict sanctions.<sup>803</sup>

#### 6.2.2.5 Judicial review

Within the European competition network, there are various enforcement mechanisms by the national competition authorities. These mechanisms are integrated in judicial reviews with the aim of ensuring that all agents adhere to the laws and regulations adopted by the European Commission. EU and national competition law (NCL) has a close relationship.<sup>804</sup> National courts and NCAs are required when applying national law that influences trade between countries in the EU to also apply Union law. According to Regulation 1/2003, article 3(1) holds that, when national courts and NCAs apply the law for national competition, they must constitute a decision, agreement or concerted practice that applies Articles 101 and 102. Article 3(2) of the regulation 1/2003 is concerned with

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800 European Commission. *Cartel statistics*. [Online] 2013. Available from: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [Accessed: 10 March 2013].

801 Ibid.

802 Ibid.

803 Ibid.

804 European Commission. *Report on the functioning of Regulation 1/2003 {COM (2009)206 final}*. [Online] 2009. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009SC0574:EN:NOT> [Accessed: 27 May 2013].

the relation between national and union law and particularly with the way national authorities apply stricter national laws to conduct or agreement.

Regulation 1/2003 provides expressly the fines that the Commission should impose on associations and undertakings that have infringed the competition rules in the EU that “they shall not be of a criminal law nature”.<sup>805</sup> Therefore, it is not surprising that the General Court of the EU (“EGC”) has argued consistently that the fines imposed for infringement of competition law are not of criminal law by nature. By contrast, the ECJ has failed to address this question more explicitly. For instance, the judgment it held in *Banda* was that three criteria should be applied in determining the type of sanction imposed under Regulation 1/2003.<sup>806</sup> The criteria coincides with the one adopted by the European Court of Human Rights (ECtHR) in *Engel*, which first legally classifies the offence under the law, second the nature of the offence, and third the nature and degree of fine severity the concerned individual will incur.

The ECHR in Europe held that criminal proceedings should be respected in practice. However, the EFTA Court directly addressed the matter of whether imposing fines under competition law fell within the criminal sphere as a principle matter. In *Menarini Diagnostics v Italy*, the ECtHR went a step further by holding that a fine that has been imposed for violating national competition rules was of a criminal nature within the meaning of Article 6(1) of the ECHR.<sup>807</sup> The type of fines for infringing competitions laws in the EU imply that guarantees of title VI of the Charter (Art 47 to 50) can be applied to competition proceedings. However, scholars say that the applicable safeguards in competition law are different from those governing criminal matters.

In *Jussila V Finland*, the judgement by ECtHR argued that the fining procedure in competition cases is different from the hard-core found in criminal law. Therefore, guarantees of criminal-head will not have to apply in accordance to their stringency. However, will the principles of *Jussila v Finland* have to be applied to the proceedings of competition law? This judgement related to fiscal surcharge tax fraud that the tax authorities in Finland imposed. According to the applicant, the administrative court responsible for confirming the surcharge should have held an oral hearing, pursuant to

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805 Lenaerts, K. *Op. cit.* p. 45.

806 Commission of the European Communities. *Op. cit.* p. 5.

807 Lenaerts, K. *Op. cit.* p. 20.

Article 6(1) ECHR<sup>808</sup>. However, the plea was dismissed by the ECtHR through reference to the form of the fiscal surcharge. The court reasoned that it had already established the link with the competition law.

It also held that there are certain forms of criminal cases which fail to contain a significant degree of stigma, implying that these are criminal charges which carry differing weight. Cases of criminal head have gradually broadened and they do not belong strictly to traditional categories of criminal law, like for instance the competition law<sup>809</sup>. The Commission is not a tribunal, according to the settled case-law, particularly within the meaning of Article 47 in the Charter. Nevertheless, this does not prevent the chance of locating an infringement and fines being imposed, as a whole, and being considered as fulfilling the requirements of that provision. An administrative body can impose fines even when it does comply with Article 47 of the Charter; as long as the decision is subjected to additional review by a judicial body that complies with these requirements.

Applicants in competition cases argue that ECJ and EGC proceedings fail to fulfil the requirements under Article 47 of the Charter. EU Courts have been criticised for not conducting a *de-novo* trial and that their own judgments cannot be substituted for those of the Commission. Second, EU Courts have been criticised for not conducting a review of the legality of a decision that is contested, thus giving the Commission a percentage of discretion in economic issues<sup>810</sup>. However, this criticism has been dismissed by the EGC and ECJ. They hold that a system of judicial review on the decisions made by the Commission with regards to the proceedings under Article 101 and 102 TFEU provides the safeguards needed by Article 47 of the Charter. In conclusion, the judicial reviews which the treaties provide are reviewed by the EGC as a matter of both facts and law, and they can be reviewed further by the ECJ when there is an appeal. The EGC is empowered to analyse the evidence, nullify the contested evidence either in part or in whole, and change the amount of the fine. This implies that, when it comes to the amount of a fine, the EGC is allowed to substitute the decision it makes for that of the Commission.

### **6.3 Enforcement under the UAE Competition Law**

In order to understand the enforcement mechanism under the UAE Competition Law,

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808 Mestmacker, J. E. *Op. cit.* p. 418.

809 *Ibid.* p. 417.

810 European Commission. 2009. *Op. cit.*

the role of the Authorities, established according to the law, has to be understood. According to the UAE competition law, there are three authorities that are empowered by different roles in order to implement the law. These authorities are: the Committee, the Ministry of Economy, and the Minister of Economy.

### **6.3.1 Enforcement Authorities and their Roles under the law**

#### **6.3.1.1 The Role of the Competition Regulation Committee**

Article 12 of the UAE Competition Law calls for the formation of a statutory body which will be referred to as the *Competition Regulation Committee* (the Committee). This body will act in an advisory capacity and it shall be headed by the deputy Minister of Economy. The composition of the Committee and the remuneration of its members will be determined by the Cabinet.<sup>811</sup>

Article 13 of the Competition Law spells out the functions of the Committee.<sup>812</sup> One of its major responsibilities is to propose policy and legislation to the Minister of Economy aimed at safeguarding competition in the UAE.<sup>813</sup> Further, the Committee is charged with the monitoring of the implementation of the Competition Law and subsequently making recommendations to the Minister regarding anything to do with the implementation process.<sup>814</sup> The committee is responsible for proposing legislation and procedures related to the protection of competition, and submitting it to the minister.<sup>815</sup> The Committee is further tasked with the review of appeals for reconsideration of the minister's resolutions within 10 days of the date of acknowledging the Resolution<sup>816</sup> as well as performing any other duty related to the protection of competition in the UAE as it may be assigned to it by federal or any other relevant state authorities.<sup>817</sup> Moreover, the committee is assigned to submit recommendations to the minister regarding the exemption of anti-competitive agreements or dominant position practices.<sup>818</sup> Additionally, the Committee is supposed to prepare and submit an annual report to the minister detailing its activities for the ending year.<sup>819</sup>

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811 Thomson and Reuters. *Op. cit.* p. 7.

812 Ibid.

813 Article 13 (1), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

814 Article 13 (2), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

815 Article 13 (3), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

816 Article 13 (4), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

817 Article 13 (7), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

818 Article 13 (5), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

819 Article 13 (6), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

This Committee is similar to the (NCAs) found in each Member State of the EU. However, unlike the Committee which has to answer to the Minister of Economy, the NCAs are independent of any organ of government. The working of the EU is such that national laws of the individual Member States have to conform to those of the EU (Articles 101 and 102 TFEU).<sup>820</sup> As such, the NCAs enforce national competition laws and coordinates with the European Commission which enforces the EU competition law. The UAE competition law, on the other hand, mandates the Ministry of Economy with the supervision of the Committee.

### **6.3.1.2 The Role of the Ministry of Economy**

Implementation of the UAE's competition law rests with the Ministry of Economy (hereinafter referred to as the Ministry). Article 14 of this law enumerates the responsibilities of the Ministry with regards to competition in the country. They include cooperating with other state bodies in implementing competition policies as well as coordinating with the same bodies in eliminating practices that hinder competition.<sup>821</sup> The Ministry is also tasked with preparing notification and application forms as well as a register for notifications and complaints.<sup>822</sup> According to Article 14 paragraph 4, the Ministry will also be required to investigate the information and activities that violate competition by itself or based on a complaint and subsequently make recommendations to the minister for an appropriate resolution.<sup>823</sup> It is the responsibility of the Ministry to carry out studies on the competition situation in the UAE market and issue reports to the public concerning its findings.<sup>824</sup> The Ministry is tasked to receive applications of reconsideration "in relation to Resolutions issued in accordance with this law and take necessary procedures in this respect."<sup>825</sup>

Since notifications on economic concentration aspects - such as restrictive agreements, mergers and dominant position - are made to the Ministry, it is responsible for following up on these notifications, and recommending amendments where necessary.<sup>826</sup> The Ministry is allowed the use of external experts or consultants in order to accomplish any activity which lies under its responsibilities. Paragraph 9 of Article 14 mandates the

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820 Cseres, K. Comparing Laws in the Enforcement of EU and National Competition Laws. *Op. cit.* p. 9.

821 Article 14 (1) and (2), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

822 Article 14 (3), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

823 Thomson and Reuters. *Op. cit.* p. 8.

824 Article 14 (6), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

825 Article 14 (5), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

826 Article 14 (7), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

Ministry to coordinate with state bodies in other states with a view to serving the purposes of the competition law. The Ministry is also tasked with the formulation of measures for the promotion and enhancement of a culture of competition within the UAE.<sup>827</sup> In addition, the Ministry is supposed to conduct the activities of the Committee's Executive Secretariat.<sup>828</sup> Lastly, the Ministry can perform any other task related to competition referred to it by the Cabinet.<sup>829</sup> Article 15 requires the Ministry and the Committee to exercise utmost confidentiality as far as the information provided to them by business firms is concerned.<sup>830</sup> This means they should not disclose any details they may have learned about the firms to any person, body or entity unless they have been authorised to do so.

### **6.3.1.3 The Role of the Minister**

Article 8 grants the Minister of Economy (hereinafter referred to as the minister) various powers and responsibilities.<sup>831</sup> The minister exercises the powers through the issuance of resolutions. The minister issues resolutions approving/disapproving mergers and acquisitions deals in relation to their level of conformity with the competition law (the approval can be issued within 90 to 135 days). It is the same minister who issues resolutions for exemption of merging firms whose mergers exceed the market share percentage approved by the Cabinet.

Conversely, the minister has the power to issue a resolution revoking the approval of merger or acquisition in three particular cases. First, he can revoke the merger upon the discovery of misleading information upon which the approval was issued. Second, the minister can revoke a merger approval if the enterprises concerned are unable to meet the conditions attached to the approval. Finally, the minister will revoke the merger upon the discovery that the circumstances under which the approval was issued no longer exist. Although the percentage of the market share which a merged enterprise may control is set by the Cabinet, the competition law gives the minister the power to recommend to the same Cabinet a decrease or increase of this percentage (Article 5 paragraph 3). The minister's recommendation to the Cabinet for an increase or decrease of the percentage should be based on the country's prevailing economic situation.

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827 Article 14 (10), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

828 Article 14 (12), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition

829 Article 14 (12), UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

830 Thomson and Reuters. *Op. cit.* p. 8.

831 *Ibid.* p. 5.

#### 6.3.1.4 Block Exemptions

Developed and developing countries that have passed competition laws are mindful of the effects such laws would have on certain sectors of their economies. Governments try to mitigate these effects by including exemption clauses in their competition legislation. Exemptions, in the context of competition law policy, are understood to be those industries, activities and sectors of the economy which are excused or freed from the obligations that are imposed on others.<sup>832</sup> It follows, then, that block exemptions can be defined as freeing of large enterprises or group of businesses from obligations imposed by competition laws on other industries or sectors. Most exemption clauses in various competition laws are granted to state-owned or state-controlled enterprises. Certain mergers and acquisition agreements as well as dominant market players can be accorded exemptions if they serve a greater economic purpose or contribute to the enhancement of competition.<sup>833</sup> Exemptions in the EU competition regime are contained in Article 101 (3). There are several regulations passed by the EU with regard to block exemptions, especially on vertical exemptions.<sup>834</sup>

Like any other competition jurisdiction, the UAE's competition law provides for exemptions of certain sectors of the economy. Most of the exempted sectors are state-run and they include the postal services and telecommunications, gas and petroleum, land, sea as well as air transport sector. These could be termed block exemptions because they involve entire industries/sectors. Additionally, Article 4 exempts several activities, which include activities involved with the production and distribution of power/energy, cultural activities (written, audio and visual), drainage, waste disposal and sanitation.<sup>835</sup> Production and distribution of pharmaceuticals are also exempted. It is noteworthy that the exempted sectors are regulated by other laws and regulations. SMEs are also exempted, though what constitutes SMEs is yet to be known.

It could be suggested that unforeseen opening up of the market could prove detrimental to the indigenous players in an economy. Therefore, some might suggest that the exemptions are better to ensure that indigenous market players are not eliminated from the market by international market players. The UAE has learned from the experiences of

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832 Khemani, R. S. *Application of Competition Law: Exemptions and Exceptions*. UNCTAD. 2002, p. 1.

833 *Ibid.* 2.

834 Wijckmans F. & Tuytschaever F., *Agreements in EU Competition Law (2nd Ed.)*. Oxford: Oxford University Press. 2011, p. 4.

835 Thomson and Reuters, *op. Cit.* p. 13.

its neighbours, such as Bahrain which opened up her telecommunications sector only to have international giants edge out home grown telecommunications companies. As the official put it, “ ...Today they have Vodafone...”<sup>836</sup> Therefore, one of the major reasons for the exemptions in the competition law is the protection of home grown companies. For example, exemption of the telecommunications sector in the UAE will allow the country’s communications firm, Etisalat, to grow so that it can withstand competition from global communications giants like *Vodafone*, *Deutsche* or *Orange*. Besides, government – controlled enterprises like Etisalat and the oil companies invest in areas which are high risk in terms of revenue. In other words, they invest in areas which do not guarantee returns, therefore it is only fair that they are excluded from the application of the competition law.<sup>837</sup> A good example would be the order by the government for Etisalat to provide mobile network coverage for the whole of the UAE notwithstanding the areas which are unpopulated. The unpopulated areas do not guarantee any returns for Etisalat. Private communications providers would be reluctant to invest in such areas and that is why they might not be granted exemptions.

#### **6.3.1.5 Penalties**

Business owners as well those who aspire to set up businesses in the UAE must beware of the provisions of UAE competition law and the significant penalties it proposes for violators of these provisions. Article 16 of this Law imposes a fine of no less than United Arab Emirates Dirham (AED) 500,000 and no more than AED 5,000,000 for firms that enter into restrictive agreements and those that abuse their dominant position (as provided for under Articles 5 and 6).<sup>838</sup>

Violation of Article 9 (inappropriate entry into an economic concentration activity like merger and acquisition) will attract fines amounting to a minimum of 2 percent and a maximum of 5 percent of the firms’ annual revenue. This is provided for under Article 17 of the Competition Law.<sup>839</sup> Alternatively, the violators will be forced to pay a fine no less than AED 500,000 and not exceeding AED 5,000,000 if it proves difficult to ascertain the violators’ annual revenue.<sup>840</sup>

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836 Ibid.

837 Ibid.

838 Momany, O. *Op. cit.* p. 2.

839 Thomson and Reuters. *Op. cit.* p. 9.

840 Latham & Watkins. *Op. cit.* p. 5.

Article 10 Paragraph 2 prohibits enterprises from implementing deals involving any economic concentration activity when the same deals are awaiting a resolution by the minister. According to Article 18, establishments implicated in such a violation will face a penalty of a fine no less than AED 50,000 and not exceeding AED 500,000.<sup>841</sup> Further, Article 15 provides for the information provided to the Ministry by business enterprises to be treated with utmost confidentiality. Failure by any person to observe the provisions of this Article will attract a fine of no less than AED 50,000 and no more than AED 200,000 (Article 19).<sup>842</sup> Pursuant to Article 20, anyone found to be in violation of the rest of the provisions of the competition law will be fined no less than AED 10,000 and no more than AED 100,000. Article 21 provides that a repeat offender in the context of the competition law will be fined double the recommended fine.<sup>843</sup> Under Article 22, an enterprise may be ordered to close down by a court for a period of no less than 3 months and not exceeding 6 months. On the other hand, all the laws governing competition in the EU are based on the provisions of Articles 101 and 102 of the TFEU. The ultimate penalty that can be imposed on any violation of the EU competition rules is an outright nullity of the agreements in question.<sup>844</sup>

#### **6.3.1.6 Critical Analysis**

It is obvious that the Committee under UAE competition law deals with competition cases as an advisory body, unlike most of the committees in different countries which function as administrative bodies, such the EU Commission. It is the Ministry of Economy that is entitled to the role of administrative body. However, under this section the role of each authority will be critically analysed.

It should be noted that the Committee is not a completely independent body, whereas the case is different in the EU as the members of the Commission are independent. The UAE competition law empowers the Ministry of Economy with the role of supervision over the Committee. For example, part of the Committee's duties is to refer to the Minister of Economy regarding different matters such as the annual report of its activities.

It should be noticed that the Committee is chaired by the Deputy Minister of Economy. It is doubtful that there would be no influence from the Ministry of Economy,

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841 Freshfields Bruckhaus Deringer LLP. *Op. cit.* p. 4.

842 Thomson and Reuters. *Op. cit.* p. 9.

843 *Ibid.* p. 10.

844 Wijckmans F. & Tuytschaever F. *Op. cit.* p. 6.

especially by the minister, on the performance of the Committee regarding its duties. Thus, the Ministry of Economy and the minister have a controlling influence over policy and enforcement of the competition law. It could be proposed that the Committee should be independent from the influence of any party or authority. Having a look at the UAE competition statute one might notice that the Committee is not independent, either financially or administratively. It is expected that the Committee will be located within the Ministry of Economy due to their overlapping duties. Thus one might suggest that it is desirable to grant the Committee its independence.

These factors lead to the suggestion that the Committee should seek to attain actual independence. According to Dabbah, the lack of independence would obstruct the effective power of competition authorities in order to proceed with investigations or make decisions in competition cases.<sup>845</sup> The Committee should also be empowered with the authority to enforce the law, which entitles it to the ability to investigate and make decisions against violators. In my view, not only achieving the independence, but also the Committee should be linked to the Cabinet like other competition committees in the region, such as the Egyptian Committee.<sup>846</sup>

With regard to the Committee's membership, according to law the Committee is headed by the Deputy Minister of Economy. However, the law does not state the number of members or the criteria for selecting such members. It is the Cabinet which is empowered to determine the composition of the Committee (including the number of members), regulation, duration of membership and the member's reward. Some issues should be taken into consideration when forming the Committee. First, the members should be independent from any influence, whether government or private sector. The effectiveness of the Committee could be hindered in cases where there was any influence on the members. The members should be selected from different fields and sectors of the economy (public, private, legal, economist, etc.)

Second, the selection of members should be in accordance with their capability to perform. This means that all members have to have sufficient knowledge and experience in the competition law field and its application in practice. Ignoring that fact could lead to

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845 Dabbah, M. Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing Effective Competition Law regime. *London: Queen May University of London, Legal Studies Research Paper No. 53/2010*. [Online] 2010. p. 18. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1598869](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598869) [Accessed: 25 February 2011].

846 Articles 2 and 11 of the Egyptian Protection of Competition and the Prohibition of Monopolistic Practices Law 205.

inefficiency in the law's implementation, whether by the Committee (as it is suggested) or by the actual enforcing authority (the Ministry).

From the above, it could be said that the Committee has no influence on competition law enforcement, and the authorities should reconsider its duties and responsibilities. Granting it independence and selecting the members in accordance with their capacity to perform would make its work more effective since there would be no influence on the members such as there is now.

According to the law, the Ministry shall undertake the enforcement of this law with the relevant authorities in the country. It is obvious that the Ministry has been entrusted with greater authority than the Committee has. According to Article 14 (11), the Ministry is entitled to act as the Executive Secretariat of the Committee. This clearly shows that the Committee is not an independent authority and shows a lack in the structural and enforcement mechanism.

The law does not state the responsibilities, criteria or the procedures that the Ministry would follow when acting as Committees Executive Secretariat. It might be best to establish a General Secretariat under the authority of the Committee after granting it its independence. This would make the Committee's work easier and more effective, not answering to any other authority, which might hinder its abilities to perform its duties.

Although the Ministry is tasked to enforce the law, the competition law does not mention anything in regards to the enforcement mechanism, nor are there any guidelines issued to clarify this matter. It is hoped that the implementing regulation will include clear guidelines for an effective enforcement mechanism. The absence of such guidelines would lead to biased and unreliable judgments. Such guidelines should include the rules of enforcing the law that comprise all types of prohibition in competition law, such as enforcement, mergers, abuse of dominant position and anti-competitive agreements.

One more issue that could be noticed is the Committee's and Ministry's assessment roles. The law does not state what authority is responsible for assessing Committees' work. However, the Committee has to prepare annual reports on its activities and submit it to the Minister. Also, the Ministry has the role of supervising the Committee. Thus, it is assumed that the Ministry and, consequently, the minister has the role of assessing the Committee. This is another negative point and, as a suggestion, the Committee should be independent

from the Ministry of Economy. Since the Committee is headed by the Deputy Minister of Economy, there are great possibilities that their work will be influenced by the Ministry of Economy and the minister. In addition, the law does not state who would assess the enforcer's (represented in the Ministry) work. However, it is assumed that the Cabinet is entitled such a task, since the Ministry reports to the Cabinet.

Another issue which could be found with the enforcement system is the way that the minister functions under the law. First, there is the very long period (of up to 135 days) to scrutinise, approve or disapprove an application of anti-competitive agreement, or merger or acquisition deal. It normally takes 90 days, which could be extended to another 45 days. As was discussed earlier, this is too much time wasted and undertakings and businesses cannot afford it. It might lead to negative effects on their performance, which might negatively affect the economy. In addition, it is possible that this may lead to the creation of a backlog of applications in the minister's office. Such a mechanism has been tested earlier in the EU, where it did not succeed and proved inefficient.<sup>847</sup>

With regard to block exemptions, it would be desirable not to exclude certain sectors from the application of this law. Instead of exempting sectors, the UAE should learn from the advanced competition systems, such as that of the EU, and follow its method of exemption of certain activities. It could be suggested that anticompetitive behaviours such as monopoly, oligopoly, and abuse of dominant position could legally exist in case of excluding many sector, which will have a harmful effect on the economy. Instead of fighting anti-competitive behaviour, the law would be protecting it.

With regard to penalties, the law only states one type of penalty, which is a financial penalty. The law does not include any imprisonment sanctions. Big corporations aim to dominate the market and eliminate the SMEs so that they can gain the most profit. Adopting harsher sanctions will ensure fair competition and enhance the market.

In addition, it could be desirable to include imprisonment sanctions in the competition law for some cases, such as the violation of Article 15. The violation of Article 15 might lead to serious damage to the commercial interests of business institutions or owners or might be incompatible with public interest. It should be noted that any person who discloses such information might aim to get benefit from that behaviour, thus

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847 Bryceland M. & Singh. M. *Op. cit.*

implementing harsher sanctions would deter them from such conduct.

Some remarks can be made on looking at the penalty system. First, the Ministry has competence in the cases that concern the violation of competition law only and does not apply any criminal sanctions. Second, the penalty system does not include punishments for violating the law, such as cartel arrangements and criminal offences.

It should be noted that private enforcement is stated in the competition law. Article 23 (2) grants any party who has suffered any damaged due to a violation of any provision of this law to seek compensation from the court. This is what is known as ‘private enforcement’. In the UAE’s legal system, compensations by persons may be claimed before the Civil Court, and by any company before the Commercial Court.

Although private enforcement is an important element in competition law, some issues may arise. Firstly, the law does not mention any details regarding the level or type of compensation. Second, the law does not state whether it is mandatory to acquire any evidence from the Ministry (competition law enforcer) before seeking for compensation before the court.

Such issues have been criticised by Dabbah as he states that: such a provision provides for a small window for the actions of private enforcement “to be brought before the courts” seeking compensation in circumstances where a person suffers from damage because of law violation.<sup>848</sup>

## **6.4 Conclusion**

Competition law enforcement is a critical matter. It ensures the protection from anti-competitive practices in the market, not only by having a strong legal system, but also by ensuring that the concerned law includes the necessary provisions and rules for such prohibitions.

The UAE competition law aims to enforce competition rules in the commercial market in order to prevent anti-competitive agreements and establish a competitive market. The Competition Regulation Council was created in order to perform some duties, aiming to fulfil the main object of enforcement. However, the main responsibility of enforcing the law is not entrusted to the Committee but to the Ministry of Economy. The role of the

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848 Dabbah, M. *Competition Law and Policy in the Middle East*. *Op. cit.* p. 205.

Committee is more one of advising the Minister of Economy on the cases of anti-competitive practices and proposing policies and legislation aimed at safeguarding competition in the country.

Moreover, the law states that the Cabinet shall issue a resolution on the formation of the Committee specifying its duration of membership, regulation and members' awards. The Cabinet has not issued any resolution yet although the law states that it must be issued within 6 months of the application of the law.<sup>849</sup> The criteria of members' selection should be clear. It is suggested that the members should be selected according to their capacity to perform. This means that they should have adequate knowledge and experience regarding commercial and legal fields. Also, they should be independent from any influence, whether from the public or private sectors, ensuring the effectiveness of performing their duties.

On the other hand, the Ministry is tasked to enforce the competition law. It should be noted that the Ministry acts as an Executive Secretariat of the Committee. It is the Ministry's responsibility to launch an investigation and seek information regarding any anti-competitive practices, whether by itself or upon a complaint and confront such practices with the authorities. Also, the law grants the minister many powers, such as the approval or disapproval of merger and the acquisition or anti-competitive contracts. One can notice that the Committee has no independence from the Ministry, which might affect its performance. It is believed that the lack of independence may lead to hindering the power of the competition law enforcer's authority to make decisions on anti-competitive cases or proceed with investigations.

The guidelines on enforcing the competition law are not indicated in the law. However, the Implementing Regulation should include such guidelines specifying the power and responsibilities that the Ministry is entitled, such as investigations and evidence collection, whether when initiating or post investigation. Also, the criteria, responsibilities and procedures the Ministry shall follow acting as the Executive Secretariat of the Committee are not stated in the law. Maybe it is better that this role is transferred to the Committee, after granting it the required independence, through establishing a General Secretariat under its authority.

It should be noted that the law does not mention what authority would assess the role

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849 Article 32, UAE Federal Law No. 4 of 2012 Concerning Regulating Competition.

of the Committee or the Ministry. However, from the responsibilities of the Committee, it could be the Ministry of Economy which would assess the Committee's work, since the Committee has to submit an annual report to the minister, and one of the Ministry's responsibilities is supervision over the Committee. In addition, since the Ministry reports to the Cabinet, it is expected that the Cabinet is entrusted with that responsibility.

The time that the minister takes to review and investigate the applications of mergers and restrictive agreements is too long compared to a similar mechanism in the EU. It might negatively affect the performance of the businesses waiting for the decision, and might create a backlog in the minister's office. The Government should learn from the experience of the EU Commission, as it has tested such a method and it proved inefficient.

With regard to the block exemptions, it is preferable that the Government also learn from the EU competition system through reconsidering the block exemptions. Instead of exempting certain sectors, the UAE Government should exempt certain activities, just as the EU does.

With regard to penalties, there is only one type of punishment available in the competition law. The law states financial penalties and disregards criminal sanctions. Including criminal sanctions in some cases would give effectiveness to the enforcement mechanism. In addition, the law is silent regarding the punishments for violations of a criminal nature.

It is suggested that the UAE should adopt a 'leniency programme' which aims at encouraging the violators of the law to submit information to the authorities in regard to their violation. A leniency programme is a method which grants the violators of competition law immunity from imposing fines on them or reducing the amount of fines if they report their anti-competitive practices to the authorities.

# Chapter Seven: Conclusion and Recommendations

## 7.1 Conclusion

This chapter summarises the findings and conclusions shown in the preceding chapters. This chapter concludes with the findings of this research outlining the major contributions of the study and attempts to suggest some implications for reforming competition legislation and enhancing the enforcement mechanisms in the UAE.

Competition law has become a major instrument to regulate competition and prevent anti-competitive practices in the market. The many schools of thought and theories are aimed at establishing a strong method in order to enhance competitive practices. However, different competition regimes with different concepts exist due to the different factors in each country, such as economic factors. Nonetheless, most competition laws address the same issues, such as mergers control, abuse of dominant position and restrictive agreements.

Despite the arguments against the adoption of competition law, many benefits can be achieved through the proper implementation of competition law. Sustainable economic growth can be accomplished through the right implementation of competition law ensuring fairness in competition between undertakings and preventing monopolies and cartels. Enhancing competitiveness in the market through eliminating the harmful practices of international cartels is what competition aims for.

However, to achieve such goals, effective implementation of competition law is necessary, which depends on the capacity of jurisdiction to handle the implementation. The benefits of competition could be drawn from the effective enforcement of competition law, which implies the need for an independent judiciary system.

Since the independence of the UAE, different fields and sectors have witnessed several developments, especially the economic and legal sectors. Such developments require that laws should be adequate and suitable for the whole environment.

The country was facing many challenges from anti-competitive practices in the

economic sector before the adoption of competition law. Even though some legislation included some articles to tackle anti-competitive behaviour, it was inadequate and there was an inadequate enforcement mechanism.

The UAE has adopted its first competition law represented in Federal Law No. 4 of 2012 Concerning Regulation of Competition to be enforced from 23rd February 2013. However, the law allows the concerning parties in the market a period of up to six months to adjust their operations accordingly. The law seems to be fresh and has not been tested yet.

One can notice that Shari'ah principles have influenced the legal system in the UAE but, still, the core law codes are civil ones. However, there was no influence on the implementation of the competition law. Noticeably, Shari'ah principles deal with regulation of competition in the market by prohibiting anti-competitive practices such as monopolies, price fixing, exclusive agreements, and harming other individuals. The ignorance of Shari'ah principles in the process of developing a modern competition law led to legal monopolies by undertakings that abuse their market rights.

On the other hand, regarding the EU's competition law, it is evident that the Ordoliberal approach has deep roots in the origins of the law. However, it is debatable to what extent this approach has influenced the enactment of the law. There is no obligation on the European Courts or the Commission to follow this approach. Besides, the Commission has adopted a more-economic approach not linked to the Ordoliberal approach.

With regard to the scope of the competition law, both the UAE and EU competition laws deal with anti-competitive practices. There are some similarities as both laws cover all commercial entities in and outside their territories. However, there are some differences in the scope. The scope of the EU law is quite a lot broader than the UAE's scope. The UAE law regarding restrictive agreements is very specific. The UAE competition law grants larger exemption than the EU law. Whereas only certain activities are exempted under the EU law, many major sectors and activities are exempted under the UAE law. The UAE law does not grant the authority to issue block exemptions for some types of agreements like the EU law does. Mergers control is regulated differently in the UAE. The merger parties have to submit a merger application before the merger, whereas the case is different in the EU. Where the EU law prohibits state aid, the UAE does not prohibit state

aid since many undertakings are state-owned or run by federal or local authorities.

After examining the UAE competition law and comparing it to the EU law, several issues have been revealed which are divided into the following categories.

### **Anti-competitive Agreements and Abuse of Dominant Position**

Several issues have been revealed in Chapter Six concerning anti-competitive agreements and dominant position, as follows:

A. The UAE's competition law does not regulate the associations of undertakings, whereas the situation is the opposite in the EU. The associations of undertakings are regulated under the rules of the UAE Federation of Chambers of Commerce and Industry. The competition law does not extend its rules for agreements under the rule of the Federation of Chambers.

B. It has been agreed that concerted practices are likely to cause damage to an economy and thus should be banned. While the EU regulates concerted practices under the EU's competition law, such practices are not regulated under the UAE's competition law.

C. While the EU competition law includes guidelines for the criteria of assessing anti-competitive agreements or abuse of dominant position, such guidelines are not provided under the UAE competition law. The absence of such an approach and guidelines underlines the insufficiency and inefficiency in the enforcement policy.

D. Unlike the EU competition law, which stresses the voiding of anti-competitive agreements, the UAE competition law does not include similar rules. This indicates a defect in the law where the undertakings might still benefit from the results of their unfair practices and arrangements.

E. The method that the UAE competition law provides to scrutinise an application of exempting an anti-competitive agreement or abuse of a dominant position has been proven inefficient in other jurisdictions. The period that the minister takes to investigate and decide on an application for exempting an anti-competitive agreement or abuse of dominant position from the application of the law is too long. It is a waste of time and might harm businesses, and create a blockage of applications in his office.

F. The authority of the Ministry to exempt any anti-competitive agreement or abuse of dominant position from the application of the law could lead to a problem. The Ministry could exempt any anti-competitive agreement even if it was expected to eliminate competition in the market.

G. The UAE competition law provides exemptions for “weak-impact agreement” which is not as strong as the EU competition law.

H. Price fixing by cartel arrangement is one of the most harmful violations in the UAE market. However, there is no criminal offence provided under the UAE competition law regarding cartel arrangements.

I. While other jurisdictions follow the *per se* and rule of reason approaches, it is unclear which approach the UAE enforcement authorities will adopt to apply on bid-rigging, predatory prices, price fixing or market sharing.

J. While dominant position is not prohibited *per se* under the UAE’s competition law, the abuse of such a position is prohibited. However, the law does not define the meaning of abuse of dominant position.

K. The law provides that the Cabinet is to decide the percentage of market share for an undertaking to be considered abusing its dominant position; however, there are no criteria or guidelines for this.

L. Abuse of dominant position is prohibited under the EU law and it does not grant any exemptions. However, such an anti-competitive practice can be exempted under the UAE competition law. The problem that may arise is that there is no justification provided for such abuse of dominance.

### **Control of Mergers**

Chapter Seven revealed several issues concerning control of mergers and acquisitions, as follows:

A. It takes too long to examine and evaluate the applications of mergers and acquisitions. While the EU Commission takes 5 weeks (could be extended for another 2 weeks), the process takes 3-4 months (might be extended for another 45 days).

B. Unlike the EU competition law, the UAE competition law does not provide any guidelines for remedies (structural or behavioural) granted to non-confirming mergers or acquisitions. It is left solely up to the wisdom of the Minister of Economy.

C. The competition law does allow mergers or acquisitions that would enhance the economy even if they are likely to harm competition. However, the criteria or assessment has not been provided in the law. It only looks at the positive impact on the economy. Allowing such mergers or acquisitions would create a dominant position that is likely to eliminate competition in the market.

D. The EU competition law provides definitions for horizontal and non-horizontal mergers. On the other hand, neither types are covered under the UAE competition law. Elaborating such a type will determine what will be prohibited under the law and thus make the enforcement system more efficient.

### **State Aid**

The following are the issues that were revealed from Chapter Seven regarding state aid.

A. State aid is prohibited under the EU law; however, some exclusions are provided under certain guidelines. On the other hand, the UAE competition law does not prohibit state aid.

B. EU competition law allows for state aid if the reason is to correct market failures. This is not taken into consideration by the UAE competition law since the act itself is not prohibited.

C. The UAE competition law does not provide any rules on what constitutes state aid to undertakings nor the criteria of dealing with such state aid.

### **Enforcement:**

Chapter Eight has elaborated some major issues related to the enforcement system:

A. The Committee does not deal with competition cases as an administrative but as an advisory body. Besides, the Committee is not completely an independent body as the

Ministry of Economy has the power to supervise the Committee. In addition, the Committee is chaired by the Deputy Minister. There might be a negative influence on the performance of the Committee.

B. While the Cabinet is authorised to set up the Committee, the law does not provide the number of Committee members nor criteria for their selection.

C. According to the law, the Ministry should act as the Executive Secretariat of the Committee. The criteria, responsibilities and procedures of such authority are not provided under the law.

D. The criteria and guidelines for the enforcement mechanism are ambiguous and not included under the law, which could lead to unfair and inconsistent judgments.

E. The exemptions that are provided under the law are far too general. It is preferable that the UAE follow the EU model and applies the exemptions to certain activities instead of excluding major sectors.

F. The UAE competition law provides financial punishments for violating the law. However, criminal punishments are not included. Including such punishments would insure that markets are working in fair conditions.

G. Unlike the EU competition law, the UAE law does not provide any leniency programme.

One of the issues that faces the enforcement of competition law is the lack of competition culture among the different market parties, such as firms and consumers. This is one of the issues that faces the enforcement system in the UAE. Normally, firms will tend to avoid taking any legal action against larger corporations, which are mainly owned by the government, or in which the government has a majority share. In addition, consumers assume that the government ought to take action against violators.

## **7.2 Recommendations**

Based on the observations from this research, this research concludes with some recommendations for reform of the UAE competition law. The recommendations are based on a critical examination and evaluation of the UAE competition law and a comparison with the EU competition law. Some of the recommendations have been proposed and discussed in the previous chapters, and are collected and summarised here for convenience. The recommendations are divided into the following categories:

### **Recommendations regarding the general competition policy:**

A. The government should open its market and reduce the entry barriers to a certain extent that would enhance competition. Ignoring this would allow the existing monopolies to continue in the market, which would harm competition and lead to a rise in prices.

B. The competition policy should include the exempted sectors to be regulated under the competition law and instead allow exemptions for certain activities (such as block exemptions in the EU competition law). This will lead to fair competition in the market through opening up the exempted sectors, which will lead to eliminating anti-competitive behaviour.

C. The federal and locally owned undertakings should be regulated under the competition law. Such exemption should be repealed. Doing that would allow fair competition as all commercial entities would be responsible before the law.

### **Anti-competitive Agreements and Abuse of Dominant Position**

A. The UAE's competition law should regulate the practices of associations of undertakings. It is known that associations of undertakings are official trade bodies in which undertakings meet and make agreements. Such agreements, such as price fixing, might harm competition. Thus, regulating such practices will ensure that competition is not hampered in the market.

B. The law should include provisions to regulate concerted practices since they are considered as one of the types of anti-competitive practice. This is a gap in the current law which should be avoided to include provisions and prohibit all anti-competitive practices.

C. The guidelines for assessing anti-competitive agreements and abuse of dominant position are not provided under the competition law. However, this could be managed through including such guidelines in the implementing regulations that are expected to be issued late in 2013, which will enhance the enforcement mechanism.

D. The competition law should follow the advanced competition models (such as the EU) in the voiding of anti-competitive agreements that violate the law. It should clearly state that any anti-competitive agreement that violates Article 5 shall be void. This means that the law will ban the entities from benefiting from the outcomes of their anti-competitive practices or agreements.

E. The competition law should learn from the experiences of the advanced competition policies, such as the EU model. The period that the minister takes to scrutinise applications for anti-competitive agreements and abuse of dominant position exemptions are far too long. Following more advanced models will enhance the competition policy and its enforcement mechanism.

F. Cartels are a very serious violation under the category of anti-competitive agreements. Allowing cartels will allow anti-competitive practices such as price fixing to exist in the market which will harm competition. Imposing criminal offences will deter such violations, which will be a significant enhancement in the law.

G. The law or the upcoming implementing regulations should provide a definition of abuse of dominant position. In addition, the criteria for determining the percentage of market share for an undertaking to be considered abusing its dominant position should be included. Such definition and criteria will enhance the law and its enforcement system.

H. The UAE Government should learn from the experience of other jurisdictions, such as the EU, and not allow any exemptions for abuse of dominant position from the application of competition law provided under Article 6.

### **Control of Mergers**

A. The period of approving or disapproving a merger or acquisition application should be less. The UAE can learn from the EU system for example and follow a similar method in Phase 1. This will accelerate the process and will prevent any backlog in the minister's office.

B. The law allows for mergers and acquisitions that have a positive impact on the economy even if they lessen competition. However, the law does not state the assessment criteria for a positive impact on the economy. The law should spell out the guidelines for assessing this positive impact.

C. The law provides that mergers or acquisitions are not illegal if they have negative effects on the competition process but at the same time enhance the economy. This could be interpreted as allowing for the creation of a dominant position and abuse of that position, which will definitely have a negative impact on competition, in case it leads to improving the economy. This must be modified so that mergers are not allowed to abuse their dominant position, and their operations should be prohibited if they cause significant lessening of competition.

D. The law does not provide any guidelines for remedial actions. The law or its implementing regulations should include such guidelines. For example, the law should state that, in case of refusing an application, the merger should be void and must return to the previous situation. Not explicating this might create an issue as the merging undertakings would take an advantage from the results of their illegal merger.

E. The law should include provisions for horizontal and non-horizontal mergers and provide definitions for both of them. This will allow for determining what type of merger is prohibited under law and at the same time will enhance the enforcement system.

### **State Aid**

A. The law should provide rules on what constitutes state aid to undertakings and provide guidelines for whom and the way that state aid is provided.

B. Commercial state-owned entities should not benefit from state aid. This might have a negative effect on competition through favouring one party over another, which in the end will eliminate the other party. State aid should be regulated and strict to a limit that it does not have negative effects on competition and has a positive impact on the economy.

C. State aid should be allowed in case of correcting market failure. This will have a positive impact on the economy.

## **Enforcement**

A. The Committee should be granted its independence and work as an administrative body and enforce the competition law. It should be authorised to deal with competition cases and take decisions against violators. The Committee should be referred to the Cabinet instead of the Ministry of Economy. This will ensure the effectiveness of the enforcement mechanism and eliminate any negative influence from any entity or individual.

B. The law or its implementing regulation should include the criteria and guidelines for establishing the Committee. For example, the number of members, the period of membership, and the criteria of selecting members. The members should be experts and have qualifications in the field of competition law.

C. Instead of granting the Ministry of Economy the powers of Executive Secretariat, this authority should be transferred to the Committee after granting it its independence. It is best to learn from the experiences of developed competition systems and establish a General Secretariat under the authority of the Committee. This will lead to a faster and more effective enforcement system.

D. The law or its implementing regulations should include clear guidelines for the enforcement mechanism to avoid any unfair and inconsistent judgments.

E. The law should be applicable to all sectors and not exempt any of them. Only certain activities should be excluded through providing clear criteria of exemptions.

F. The penalties mechanism should be modified to include criminal offences for the formation and operation of cartels, such as imprisonment.

G. The law should adopt a leniency programme that will encourage the violators of the law to report their violations to the authorities in order to reduce the fine or exempt them from it.

## **7.3 Further Research**

This research is the first of its kind to address competition law in the UAE. The findings of this research and the lack of research into competition law in the UAE raise many potential avenues for future research. This research has investigated all aspects of the UAE Competition Law and policy: control of anti-competitive agreements, control of

abuse of dominant position, control of mergers and acquisitions, state aid, and enforcement. It is suggested that each aspect can be a subject for further study and be separately examined in depth.

The law is very new and has not been tested yet. Furthermore, there are no cases that deal with violations of competition law. This is one of the limitations of this research. Once the law is implemented, examining cases under the competition law in the future will be another area for further study. Such examination will result in suggestions for strengthening and enhancing the enforcement system.

The implementing regulations have not come out yet. This is another area for further research. Examining the effectiveness and clarity of the guidelines of implementing regulations, once out, would result in further suggestions for the enhancement of the law and its enforcement mechanism.

The comparison of the UAE's competition law with other competition laws is another area for further study. This study has compared the UAE competition law with the EU competition law. However, further research can compare each aspect separately with the EU competition law or other laws. The comparison criteria could be of the laws of similar context such as the competition law of Saudi Arabia, or the laws of different context such as the US anti-trust laws.

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## **Appendices**

### **Federal Law No. (4) of 2012 Concerning Regulating Competition**

**We, Khalifa Bin Zayed Al Nahyan, President of the United Arab Emirates,**

After reviewing the Constitution;

Federal Law No. 1 of 1972 concerning the responsibilities of Ministries and the powers of Ministers, as amended;

Federal Law No. 5 of 1975 concerning the Commercial Register;

Federal Law No. 4 of 1979 concerning the Suppression of Fraud and Deceit in Commercial Transactions;

Federal Law No. 10 of 1980 concerning the Central Bank, Monetary System and the Organisation of Banking Profession, as amended;

Federal Law No. 18 of 1981 concerning the Organisation of Commercial Agencies, as amended;

Federal Law No. 8 of 1984 concerning Commercial Companies, as amended;

Federal Law No. 9 of 1984 concerning Insurance Companies and Agents, as amended;

Civil Transactions Law promulgated by the Federal Law No. 5 of 1985, as amended;

Federal Law No. 6 of 1985 concerning Banks, Financial Institutions and Islamic Investment Companies, as amended;

Penal Code promulgated by Federal Law No. 3 of 1987, as amended;

Law of Evidence in Civil and Commercial Transactions promulgated by federal Law No. 10 of 1992, as amended;

Civil Procedures Law promulgated by Federal Law No. 11 of 1992, as amended;

Criminal Procedures Law promulgated by Federal Law No. 35 of 1992, as amended;

Federal Law No. 37 of 1992 concerning Commercial Trademarks, as amended;

Federal Law No. 9 of 1993 concerning control over trafficking of precious stones and metals and hallmarking them

Commercial Transactions Law promulgated by Federal Law No. 18 of 1993, as amended;

Federal Law No. 1 of the Emirates Securities and Commodities Authority, as amended;

Federal Law No. 28 of 2001 on the Establishment of the Emirates Authority for Standardisation and Metrology;

Federal Law No. 7 of 2002 concerning Author's Copyrights and Neighbouring Rights, as amended;

Federal Law No. 17 of 2002 concerning the Organisation and Protection of the Industrial Ownership of Patents and Industrial Drawings and Designs, as amended;

Federal Decree by Law No. 3 of 2003 concerning the Organisation of the Communication Sector, as amended;

Federal Law No. 8 of 2004 concerning the Financial Free Zones;

Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce;

Federal Law No. 24 of 2006 concerning the Consumer Protection; and

Federal Law No. 6 of 2007 concerning the Establishment of the Insurance Authority and the Organisation of Activities thereof; and

Upon the proposal made by the Minister of Economy;

The approval of the Cabinet and the Federal National Council; and

The ratification by the Federal Supreme Council,

Have issued the following Law:

## **Chapter I**

### **Article 1: Definitions**

In the application of the provisions of this Law, the following words and expressions shall have the meanings set out opposite to each of them, unless the context requires otherwise:

State: United Arab Emirates.

Ministry: Ministry of Economy.

Minister: Minister of Economy.

Concerned Authority: Competent local authority.

Sectoral Regulatory Bodies: The federal or local authorities authorised under the regulation thereof to organise, control or supervise a certain economic sector in the State.

Establishment: Any legal or natural person undertaking an economic activity, any related person or any consortium of such persons regardless of the legal form thereof.

Relevant market: The commodity or service or the number of commodities or services upon whose price, characteristics and usage aspects shall be replaceable by others to meet a certain need of the consumer in a certain geographic area.

Agreements: Agreements, contracts, arrangements, coalitions or practices between two establishments or more or any cooperation among establishments or resolutions issued by establishment consortiums whether they are written or oral, explicit or implicit or public or confidential.

Dominant Position: The position that enables any establishment, by itself or in participation with some other establishments, from dominating or affecting the relevant market.

Economic Concentration: Any behavior from which a total or partial alienation (merger or acquisition) of a property or usufruct of the properties, rights, stocks, shares or liabilities of an establishment to another establishment shall result and that may enable one establishment or a consortium of establishments from controlling, directly or indirectly, another establishment or a consortium of other establishments.

Committee: Competition Regulation Committee formed in accordance with the provisions of this Law.

## **Chapter II: Law Objectives**

### **Article 2**

This Law aims at the protection and enhancement of competition and the combat of monopoly practices through the following:

1. Providing a stimulating environment for establishments in order to enhance efficiency, competitiveness and the interest of consumers and to achieve sustainable development in the State.
2. Keeping a competitive market governed by the market mechanisms in accordance with the economic freedom principle through banning restrictive agreements, banning the business and actions that lead to the abuse of a dominant position, controlling the operations of economic concentration and avoiding all that may prejudice, limit or prevent competition.

## **Chapter III: Law Enforcement**

### **Article 3**

The provisions of this Law shall be enforced on all establishments in relation to the economic activities thereof in the State and on the exploitation of the intellectual property rights in the State and abroad and such provisions shall also be enforced on the economic activities that are practised outside the State and that shall affect competition in the State.

## **Chapter III: Law Enforcement**

### **Article 4**

The following shall be excluded from the execution of the provisions of this Law:

1. Sectors and activities specified in the appendix attached to this Law and the Cabinet may delete or add any sectors or activities to such exclusions.
2. Actions carried out by the Federal Government or any of the Emirates' Governments and actions initiated by establishments upon a Resolution or authorisation of the Federal Government or any of the Emirates' Governments or under the supervision of any thereof, including the actions of the

- establishments owned or controlled by the Federal Government or any of the Emirates' Governments as per the guidelines specified by the cabinet.
3. Small and medium establishments in accordance with the controls specified by the Cabinet.

## **Chapter IV: Anti-competitive Practices**

### **Article 5: Restrictive Agreements**

1. Restrictive agreements between establishments with the subject or objective that shall prejudice, limit or prevent competition shall be prohibited, especially those targeting the following:

- a) Specifying the prices for buying or selling commodities and services, directly or indirectly, by creating the increase, decrease or stabilisation that may affect the competition negatively.
- b) Specifying the conditions of buying, selling or performing of services and the like.
- c) Colluding in tenders or offers in bids, tenders, practices and all supplying offers.
- d) Phasing out of the operations of production, development, distribution or marketing and all other aspects of investment or limiting them.
- e) Colluding to refuse to buy from certain establishment or establishments or to sell to or supply certain establishment or establishments and to halt it or impede it from the practice of its activity.
- f) Limiting the freedom of commodities and services flow to the relevant market or withdrawing them from such market, which may include the concealment or storage thereof unlawfully, abstaining from dealing with such commodities or services or creating a sudden abundance thereof that may lead into the trade with such commodities and services with unreal prices.

2. Subject to the provisions of the foregoing Federal Law No. 18 of 1981, restrictive agreements between establishments that may prejudice, limit or prevent competition shall be banned, especially those targeting the following:

- a) Dividing markets or assigning clients based on geographic areas, distribution centres, quality of clients, seasons and time periods or any other basis that may negatively affect competition.
- b) Taking procedures to hinder the entrance of establishments to the market, to exclude such establishment from the market or to hinder joining existing agreements or coalitions.

3. In exception of paragraph 1/A and paragraph 2/A, the provisions of this Article shall not be enforced on weak-impact agreements in which the total share of establishments party thereto fail to exceed the percentage specified by the Cabinet of the total transactions in the relevant market. The Cabinet may, upon a proposal made by the Minister, increase or decrease such percentage in accordance with the requirements of the economic situation.

## **Chapter IV: Anti-competitive Practices**

### **Article 6: Abuse of Dominant Position**

1. Any establishment of a dominant position in the relevant market or in a main and effective part thereof shall be prohibited from performing any actions that lead into the abuse of such position in order to prejudice, limit or prevent competition, especially such actions of the following subjects or objectives:

- a) Imposing the prices or conditions of reselling of commodities or services directly or indirectly.
- b) Selling a commodity or performing a service with a price less than the actual cost thereof with the aim of hindering competitive establishments from entering the relevant market, excluding them from such market or causing them losses that prevent them from continuing the activities thereof.
- c) Discriminating with no justification among clients in identical contracts in relation to the prices of commodities and services or the conditions of buying and selling contracts.
- d) Obliging a client not to deal with a competitive establishment.
- e) The total or partial rejection to deal in accordance with the usual commercial conditions.

- f) Unjustified abstinence from dealing in commodities and services through buying or selling or limiting or hindering such dealing that may lead into imposing an unreal price thereof.
  - g) Suspending the concluding of a buying or selling contract or agreement of commodities or services by the condition of accepting dealing obligations concerning other commodities or services that shall be, by nature or by commercial use, unrelated to the original location of dealing or to the agreement.
  - h) Purposely publish incorrect information about the commodities or its prices.
  - i) Decrease or increase the available supply of the commodity so as to create an artificial scarcity or abundance of the commodity.
2. Dominant position, referred to in item (1) of this article when the total share of an establishment exceeds the percentage specified by the Cabinet of the total transactions in the relevant market. The Cabinet may, upon a proposal made by the Minister, increase or decrease such percentage in accordance with the requirements of the economic situation.

## **Chapter IV: Anti-competitive Practices**

### **Article 7**

1. Restrictive agreements or practices related to a dominant position may be excluded from the application of the provisions of Articles 5 and 6 by a resolution of the Minister, issued upon the recommendation of the Committee, providing that:
- a) The concerned establishments shall notify the Ministry in advance by the ad hoc form and attaching the documents specified by the Executive Regulation of this Law.
  - b) The concerned establishments shall prove that such restrictive agreements or practices related to a dominant position will lead to the enhancement of economic development, the improvement of the performance of the establishments and the competitive ability thereof, development of production or distribution systems or achievement of certain benefits for the consumer.
  - c) The Ministry shall be notified of any potential amendments to the restrictive agreements or practices related to a dominant position, already exempted, before no less than 30 days of the execution of such amendments.
2. The Executive Regulation of this Law shall specify the controls of notifications and the documents to be attached to the exception application.
3. The Executive Regulation of this Law shall specify the organisational unit concerned with the execution of the provisions of this Law.

## **Chapter IV: Anti-competitive Practices**

### **Article 8: Minister Resolutions**

1. The Minister shall issue the Resolution thereof referred to in paragraph 1 of Article 7 of this Law within 90 days. Such period may be extended for other 45 days of the date of receiving the notification satisfying the required conditions. Failure to issue a Resolution of the Minister within such period shall be deemed as an implicit acceptance of such restrictive agreements or practices related to a dominant position.
2. The Minister may approve temporarily and for a period of no more than 30 days to apply the restrictive agreements or practices related to a dominant position until the final Resolution thereof shall be issued concerning them.
3. Upon finalising the formal examination of the application and the supporting documents thereof, the Ministry shall issue a notification of completing the formal requirements of the application.
4. The Ministry shall examine the application form the evaluation the extent of satisfying the conditions stipulated by paragraphs 1/A-B of Article 7 of this Law by the establishments or agreements.
5. The Minister may specify a period for the exemption issued by this Article or may subject it to periodic revision.
6. The Minister may take a justified Resolution concerning the notifications submitted in accordance with the provisions of Article 7 of this Law as follows:
- a) Approval or rejection of the continuation of enforcing restrictive agreements or practices related to a dominant position and the amendments thereof

- b) Approving on the continuation of enforcing restrictive agreements or practices related to a dominant position and the amendments thereof, providing that the concerned establishments shall undertake to execute the conditions and obligations specified by the Minister for this purpose.
7. The Minister may issue a Resolution on the revocation of the approval in any of the following cases:
- a) If it becomes apparent that the circumstances, under which the approval has been issued, no longer exist.
  - b) If the concerned establishments failed in satisfying the conditions and requirements upon which they were granted the approval.
  - c) If it becomes apparent that the information, under which the approval has been issued, were misleading or incorrect.

## **Chapter V: Economic Concentration**

### **Article 9**

1. The accomplishment of the economic concentration operations wherein the total share of the establishments parties thereto exceeds the percentage specified by the Cabinet of the total transactions which may affect the level of competition in the relevant market, especially the creation or enhancement of a dominant position shall be conditioned by the submission of an application to the Ministry by the relevant establishments before 30 days at least of the accomplishment of such operations according to the ad hoc form and attachment of required documents.
2. The Cabinet, upon a proposal made by the Minister, may increase or decrease the percentage of concentration stipulated by paragraph 1 of this Article in accordance with the requirements of the economic situation.
3. The Executive Regulation of this Law shall specify the controls of applying for economic concentration and the documents to be attached to the application.

## **Chapter V: Economic Concentration**

### **Article 10**

1. The Ministry shall verify the economic concentration operations referred to in Article 9 of this Law in accordance with the procedures specified by the Executive Regulation of this Law.
2. The Minister shall issue the Resolution thereof referred to in Article 9 of this Law within 90 days that may be extended for other 45 days of the date of receiving the application satisfying all the required conditions. Relevant establishments should not perform, within such period, any actions or procedures for the accomplishment of the economic concentration. The failure to issue the Minister Resolution within such a period shall be deemed as an implicit acceptance of the economic concentration operations.
3. The Ministry may require additional information in relation to the operation of economic concentration.

## **Chapter V: Economic Concentration**

### **Article 11**

1. The Minister may take a justified Resolution concerning the applications submitted in accordance with the provisions of Articles 9 and 10 of this Law as follows:
  - a) The approval of the economic concentration operation if it shall not affect competition negatively or if it shall have positive economic impact that exceed any negative impact on competition.
  - b) The approval of the economic concentration operation, providing that the relevant

establishments shall undertake to execute the conditions and obligations specified by the Minister for such purpose.

2. The Minister shall issue a Resolution on the revocation of the approval referred to in paragraph 1 of this Article in case of the realisation of any of the cases referred to in paragraph 7 of Article 8 of this Law.

## **Chapter VI: Competition Regulation Committee**

### **Article 12**

A committee called “Competition Regulation Committee” shall be established in accordance with this Law. The Committee shall be chaired by the Deputy Minister of Economy. A Cabinet Resolution shall be issued forming the Committee and specifying its regulations, duration of membership therein and the member’s rewards.

## **Chapter VI: Competition Regulation Committee**

### **Article 13**

The responsibilities of the Competition Regulation Committee shall be the following:

1. The proposal of the general policy for the protection of competition in the State.
2. The study of issues related to the execution of the provisions of this Law and the submission of recommendations in this respect to the Minister.
3. The proposal of the legislations and procedures related to the protection of competition and the submission thereof to the Minister.
4. The study of reconsideration applications for Resolutions issued by the Minister and submitted thereto within a period of no more than 10 days of the date of acknowledging the Resolution.
5. The submission of recommendations to the Minister concerning the exception of restrictive agreements or practices related to a dominant position.
6. Prepare an annual report on the Committee’s activities to be presented to the Minister.
7. Any other issues related to competition protection referred thereto by the Federal Authorities or relevant authorities of the State.

## **Chapter VII: The Responsibilities of the Ministry in the Domain of Competition**

### **Article 14**

The Ministry shall undertake the following responsibilities related to the competition affairs:

1. The execution of competition policy in cooperation with the relevant authorities in the State.
2. The coordination with the relevant authorities in the State to confront any form of activities or practices in violation of the provisions of this Law.
3. The preparation of forms and applications related to the practice thereof of the tasks thereof and the assignment of a register for notifications and complaints.
4. The investigation of information and such practices which breach competition upon a complaint or by itself and the confrontation of such practices in cooperation with the competent authorities and the submission of recommendations to the Minister concerning the Resolutions to be taken in this regard so that the Minister shall take suitable procedures in this respect.
5. The receipt of reconsideration applications in relation to Resolutions issued in accordance with this law and take necessary procedures in this respect.
6. The conduct of studies related to competition in the markets and the issuance of reports and provision of information to the public.
7. The receipt and following-up of the notifications of restrictive agreements or practices related to a dominant position, the amendments thereof and economic concentration applications.
8. The use of experts and consultants from outside of the Ministry for the achievement of any of the activities falling under the responsibilities thereof.
9. The enhancement of the information exchange with the competition relevant authorities in other states with the aim of serving the purposes of this Law and the execution thereof.
10. Take actions and measures to promote competition culture and free market principles
11. The conduct of the activities of the Executive Secretariat of the Competition Regulation Committee.

12. Any other tasks related to competition referred thereto by the Minister.

## **Chapter VII: The Responsibilities of the Ministry in the Domain of Competition**

### **Article 15**

1. The Ministry shall be committed in undertaking the tasks thereof to the following:
  - a) Take sufficient procedures to ensure the confidentiality of information reviewed by the Ministry or provided thereto by the business institutions which the disclosure thereof may cause serious damage to the commercial interests of such business institutions or owners thereof or such information that contradicts with the public interest.
  - b) Not to disclose any information reviewed by the Ministry unless to the persons concerned or upon the request of the relevant authorities.
2. The Committee shall adhere to the Ministry's tasks indicated in this article.

## **Chapter VIII: Penalties**

### **Article 16**

Whoever violates the provisions of Articles 5 and 6 of this Law shall be penalised by a fine of no less than AED 500,000 (five hundred thousand) and no more than AED 5,000,000 (five million)

## **Chapter VIII: Penalties**

### **Article 17**

Whoever violates the provisions of Article 9 of this Law shall be penalised by a fine of no less than 2% and no more than 5% of the annual total sales of commodities or revenues of services, subject of the violation, realised by the violating establishment in the State within the last lapsed financial year or by a fine of no less than AED 500,000 (five hundred thousand) and no more than AED 5,000,000 (five million) if it shall be impossible to specify the total sales or revenues subject of the violation.

## **Chapter VIII: Penalties**

### **Article 18**

Whoever violates the provisions of paragraphs 2 of Article 10 of this Law shall be penalised by a fine of no less than AED 50,000 (fifty thousand) and no more than AED 500,000 (five hundred thousand).

## **Chapter VIII: Penalties**

### **Article 19**

Whoever violates the provisions of Article 15 of this Law shall be penalised by a fine of no less than AED 50,000 (fifty thousand) and no more than AED 200,000 (two hundred thousand).

## **Chapter VIII: Penalties**

### **Article 20**

Whoever violates any other provision of this Law and the Executive Regulation thereof shall be penalised by a fine of no more than AED 10,000 (ten thousand) and no more than AED 100,000 (one hundred thousand).

**Chapter VIII: Penalties**  
**Article 21**

The penalties prescribed for the crimes stipulated in this Law shall be doubled in case of repetition.

**Chapter VIII: Penalties**  
**Article 22**

The court may, upon the judgment of conviction, order the closing down of the establishment for a period of no less than 3 months and no more than 6 months and the court may rule to publish the verdict thereof once or more in two local newspapers at least at the cost of the violator.

**Chapter VIII: Penalties**  
**Article 23**

1. The infliction of the penalties stipulated by this Law shall not prejudice any other stricter penalties stipulated by another Law.
2. The infliction of the penalties stipulated by this Law shall not prejudice the right of the aggrieved to seek the court for claiming a compensation for the damage resulting from the violation of any of the provisions of this Law.

**Chapter VIII: Penalties**  
**Article 24**

Competition lawsuits shall have urgency capacity and the competent court may issue decisions for the suspension of prevention of any action until the issuance of a final judgment.

**Chapter IX: General and Concluding Provisions**  
**Article 25**

Any concerned person may submit a complaint to the Ministry concerning any violation of the provisions of this Law in accordance with the controls specified by the Executive Regulation of this Law and the Resolutions issued in execution thereof.

**Chapter IX: General and Concluding Provisions**  
**Article 26**

Except for what is specified in article 19 of this, criminal proceeding for the crimes specified in this law shall not commence except by written request of the minister or whomever he may commission.

The minister or the commissioned party may reconcile any of these actions before the criminal case is filed in return for an amount equivalent to no less than the minimum amount of the fine.

The Executive Regulation shall specify the guidelines for reconciliation.

**Chapter IX: General and Concluding Provisions**  
**Article 27**

Resolutions issued by the Minister may be appealed based on the provisions of this Law before the competent court within 60 days of the date of notifying the persons concerned thereof.

**Chapter IX: General and Concluding Provisions**

## **Article 28**

Employees determined by a Resolution of the Minister of Justice in agreement with the Minister and the concerned authority shall have the capacity of judicial officers in proving the violations of the provisions of this Law and the executive regulations and Resolutions thereof within the scope of competency of each one of them.

## **Chapter IX: General and Concluding Provisions**

### **Article 29**

The Ministry shall coordinate with the competent authorities and the Sectoral regulatory bodies for the execution of the provisions of this Law.

## **Chapter IX: General and Concluding Provisions**

### **Article 30**

Existing establishments upon the time of enforcing the provisions of this Law should reconcile the statuses thereof in accordance with the provisions of this Law within a period of no more than 6 months of the date of enforcement thereof.

## **Chapter IX: General and Concluding Provisions**

### **Article 31**

Any provision in conflict or contradiction with the provisions of this Law shall be revoked.

## **Chapter IX: General and Concluding Provisions**

### **Article 32**

The cabinet shall issue the Executive Regulation of this Law and the Resolutions necessary for the execution of the provisions thereof.

## **Chapter IX: General and Concluding Provisions**

### **Article 33**

This Law shall be published in the Official Gazette and shall come into force after four months of the date of publishing thereof.

## **Chapter IX: General and Concluding Provisions**

### **[Signed]**

**Khalifa Bin Zayed Al Nahyan**

**President of the United Arab Emirates**

Issued by us in the Presidential Palace in Abu Dhabi,

On 24/Du Al Keada /1433 Hijri

Corresponding to 10/October /2012

## **Chapter IX: General and Closing Provisions**

### **Appendix of the Sectors and Activities Exempted from the Application of the Provisions of Federal Law No (4) of 2012 concerning Regulating Competition**

Any agreement, practice or business related to a certain commodity or service of which another Law or regulation shall granted the responsibility of organising the competition rules thereof to sectoral regulatory bodies shall be exempted from the application of the provisions of this Law, unless such sectoral regulator

bodies shall request in writing from the Ministry to undertake such issue in whole or in part and if the Ministry approves such request. Such exemptions shall include the following sectors, activities and services:

- a) Telecommunication sector.
- b) Financial sector.
- c) Cultural activities (written, audio, visual).
- d) Gas and petrol sector.
- e) The production and distribution of pharmaceutical products.
- f) Postal services, including express mail services.
- g) Activities related to the production, distribution and transport of electricity and water.
- h) Activities of drainage, garbage disposal, sanitation and similar activities in addition to the supporting environmental services.
- i) Land, sea and air transport sectors and transport by railways and related services.