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The new UAE Competition Law: Is it arbitrable or is it not arbitrable? – That is the question…

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The vexed question of the arbitrability *vel non* of competition law has now reached the shores of the United Arab Emirates. Readers will, of course, be aware that this question has been answered in the affirmative – and most will agree rightly so – in the world's leading arbitration jurisdictions, in particular in Europe and the US, in the not so distant past: As a result, competition or antitrust arbitrability is now considered a *fait accompli* in all EU Member States and in the individual State jurisdictions of the United States of America. Readers will agree that the ruling of the European Court of Justice in *Eco Swiss* (see Case C-126/97 – *Eco Swiss China Ltd and Benetton International NV*, Judgment of the European Court of Justice of 1 June 1999, [1999] ECR I-3055), which acknowledged the arbitrability of Article 81 EC (now Article 101 TFEU) on restrictive practices and which is often quoted more generally as the *fons origo* of competition arbitrability across the EU, and the US Supreme Court's ruling in *Mitsubishi* (see *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc,* 473 US 614 (1985))which for the first time affirmed that antitrust claims under the Sherman Antitrust Act 1890 (15 U.S.C., 1852) are capable of submission to arbitration, have now stood the test of time.

The question as to whether competition law is arbitrable or not in the UAE has been prompted by the recent adoption of Federal Law No. 4 of 2012 Concerning Regulating Competition, the UAE Competition Law, which entered into force on 13 February 2013. This law is the first ever in the UAE dedicated to the prosecution of anti-competitive behaviour and competition-non-compliant restructuring with a potential impact on the market. Prior to the adoption of the UAE Competition Law, provisions with competition-compliant objectives were scattered across a number of individual laws, such as the UAE Commercial Code and the UAE Consumer Protection Law and Regulations, without however, coming together as a whole in a single piece of legislation with an overall policy objective. The new UAE Competition Law seeks to remedy this lacuna and is aimed at *"the protection and enhancement of competition and the combat of monopoly practices … [in particular through] [k]eeping 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."* (Article 2, Federal Law No. 4 of 2012). Essentially, the new UAE Competition Law is modeled on the EU competition law regime and as such proscribes:

- Restrictive agreements between undertakings with the subject or objective to prejudice, limit or prevent competition (including any forms of collusion or cartelistic arrangement, such as bid-

rigging, systematic refusals to supply, resale price maintenance schemes, the geographic market-sharing practices etc) (Article 5, Federal Law No. 4 of 2012);

- the abuse of a dominant position that prejudices, limits or prevents competition (Article 6, Federal Law No. 4 of 2012); and
- economic concentrations that result in the creation or strengthening of a dominant position with a distortive effect on competition in the relevant UAE market (Article 9, Federal Law No. 4 of 2012).

At first glance, it is not entirely clear to what extent the new Law aims to put in place a public or private enforcement regime. It is arguable, however, that actual practice will eventually combine both, subject to the adoption of relevant implementing regulations by the competent governmental authorities. Taking a closer look, the new Law would appear to be based on a notification and individual exemption regime, whereby the UAE Ministry of the Economy acting through its Competition Regulation Committee will examine notified practices and proposed concentrations with a view to either (i) granting an individual exemption or (ii) clearance (provided that the concerned practices or the proposed concentration does not raise any competition concerns or produces certain pro-competitive effects on the relevant markets concerned) or (iii) pronouncing a prohibition decision (Articles 7, 8 and 11, Federal Law No. 4 of 2012). The exemption of certain practices or clearance of a proposed concentration may be *conditional* upon compliance by the notifying undertakings with a number of *"conditions and obligations"* to ensure the intended pro-competitive effects of the notified practices or transactions. Non-compliance is criminalized (Article 26, Federal Law No. 4 of 2012) and will entail the imposition of public fines by the competent UAE courts. Up to this point, the new UAE competition regime would appear to be predicted on public enforcement.

This being said, Article 23(2) of Federal Law No. 4 of 2012 pertinently provides in unambiguous terms that *"[t]he infliction of the penalties stipulated in 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."* This provision seemingly attributes competence to the local courts to hear private enforcement actions brought by affected (third) parties in relation to damages caused by the various competition law infringements outlined above. Read in context with the remaining provisions of the new Law, this provision appears to lay the basis for follow-on damages actions before the local courts following a finding of liability by the competent governmental authority under the new Law. Importantly, the text of Article 23(2) would appear sufficiently wide to encompass a reference to arbitration – as an alternative to the courts – for the hearing of follow-on damages actions: To say the least, Article 23(2) of Federal Law No. 4 of 2012 does not contain any mandatory wording to the effect of attributing exclusive jurisdiction for follow-on damages actions to the UAE courts.

In this context, it should be recalled that the concept of arbitrability in the UAE is relatively wide and in essence coincides with the concept of "reconcilability" within the meaning of Article 733 of the UAE Civil Transactions Law read together with Article 203(4) of the UAE Civil Procedures Code (*"Arbitration shall not be permissible in matters which are not capable of being reconciled."*). By way of reminder, Article 733 essentially excludes from the area of reconciliation and hence arbitration matters that pertain to the Islamic Sharia'h. These matters are ultimately few and far between and do – to the best of this commentator's knowledge – not include issues of competition law in their archetypical form. Also, this commentator is presently not aware of any jurisprudence of the UAE courts to the contrary. In other words, in light of the non-exclusive

wording of Article 23(2) and the wide definition of the concept of arbitrability under UAE law, there is no reason to believe that follow-on damages actions within the meaning of that Article are not capable of being arbitrated. Arbitrating follow-on damages actions is, of course, compelling in the field of competition law to keep a cloak of privacy and confidentiality around competition disputes that may otherwise – i.e. if exposed to undue publicity – result in undesirable distortive trading patterns.

By way of caution, it should be noted that any of the foregoing considerations are without prejudice to the UAE courts' occasional erratic interpretation of public policy within the meaning of Article 3 of the UAE Civil Transactions Code, which has more recently given rise to the Dubai Supreme Court's – in this commentator's view – erroneous finding of the non-arbitrability of issues pertaining to *"the circulation of wealth, personal ownership and freedom of trade"*, the latter being evidently wide enough to encompass competition law issues more specifically (see my blog of 14 October 2012). Irrespective of the UAE courts' ultimate approach to the arbitrability of competition law, it is in any event arguable that follow-on damages actions are not competition law actions in the proper sense of the term, as they do not require any finding on competitive infringements by an arbitration tribunal per se but instead focus on an investigation into causation and the determination of quantum on a case-by-case basis.

In addition, taking account of the terms of the new UAE Competition Law, arbitration may find application for monitoring purposes in relation to the faithful implementation of behavioural commitments adopted to ensure clearance of a proposed concentration or the exemption of an otherwise infringing anti-competitive practice. The use of arbitration commitments in this context is well known and has become established practice under Article 9 commitment decisions within the meaning of EU Regulation 1/2003 (see Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 [now Arts 101 and 102 TFEU] of the Treaty [2003] OJ L 1/1) and EU Commission merger clearance decisions within the meaning of the EU Merger Regulation (see Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, at p. 1)). For the avoidance of doubt, it is arguable that the arbitration of commitments in this context does not involve arbitration of competition law *stricto sensu* given that most commitments will be implemented by way of ordinary commercial agreements between the parties concerned, e.g. the notifying undertaking and a third-party competitor, and that any disputes submitted to arbitration will arise in relation to the performance of those agreements, divorced from the consideration of any competition law issues. This being said, an arbitral forum will, however, have to consider and ensure proper compliance with the underlying Commission commitment or merger clearance decision and to that extent will arguably have to make competition law considerations. For detailed discussions of the EU Commission's *acquis* in practice, the interested reader is referred to this commentator's extensive writings on the subject-matter, in particular Chapters 30 on "International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU" and 46 on "International Arbitration and ADR in Conditional EU Merger Clearance Decisions" in G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer Law International, 2011.

Pending the adoption of the relevant implementation regulations under Law No. 4 of 2012 and the interpretation of Article 23(2) by the UAE courts, it will remain uncertain whether competition law is arbitrable or not under UAE law and whether arbitration can be used as a viable alternative to the courts in follow-on damages actions and for monitoring purposes under the new UAE Competition Law.

In any event, we shall keep report on further developments as and when, so watch this space.

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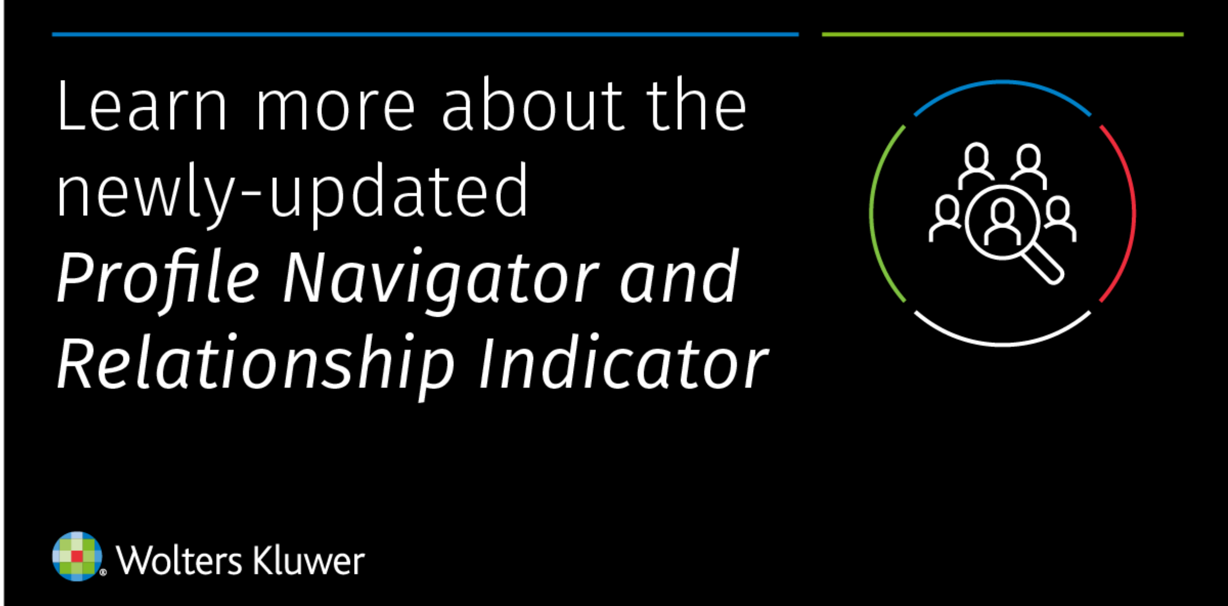

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