Regulation of Predatory Pricing in the UAE

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The recently issued Executive Regulations to the Competition Law provided clarification on several material and procedural matters. Among these were clarifications introduced regarding regulation of predatory pricing under UAE law. Predatory pricing was introduced as a standalone prohibition with the new UAE Competition Law issued in 2023. The Executive Regulations now clarify that predatory pricing may be caught by the relevant provisions independent of dominance. Furthermore, the Executive Regulations provide greater guidance on how below-cost pricing will be assessed in practice, while preserving the broad scope of the prohibition.

Predatory pricing under the UAE Competition Law

Article 8 Competition Law prohibits an undertaking from offering or applying selling prices that are excessively lower than the costs of production, manufacturing and marketing where the purpose or effect of such pricing is to drive an undertaking, or one of its products, out of the relevant market or to prevent an undertaking or one of its products from entering the market . The prohibition is subject to limited statutory exceptions. General price reductions carried out in accordance with the Consumer Protection Law, liquidation sales, and any other exemptions approved by the Cabinet are excluded from the scope of Article 8 Competition Law. While the UAE Competition Law established the prohibition of predatory pricing as a stand alone prohibition, the Executive Regulations further clarified that it may apply independent of dominance.

Furthermore, Article 3 Executive Regulations introduces a structured framework for assessing predatory pricing and largely resolves the uncertainty surrounding the applicable cost benchmarks. The Executive Regulations distinguish between two principal scenarios:

- prices falling below average variable cost (AVC) or marginal cost are deemed predatory unless the undertaking demonstrates that the pricing is objectively justified by legitimate economic reasons unrelated to eliminating, restricting or preventing competition; and

- when prices remain above AVC or marginal cost but fall below average total cost (ATC), such pricing may be regarded as predatory where there is clear evidence of an anticompetitive plan or intent aimed at excluding competitors, restricting their activities or preventing market entry.

In addition, Article 3 Executive Regulations confirms that the UAE Competition Commission will assess predatory pricing on a case-by-case basis after considering its impact on competition and the relevant market. The Executive Regulations set out a non-exhaustive list of factors that may be considered during this assessment, including:

- whether the undertaking holds a dominant position in the relevant market;

- comparisons between the undertaking's prices, competitors' prices and production, processing, marketing or distribution costs;

- whether the pricing has the purpose or effect of excluding competitors, preventing market entry or disciplining competitors;

- whether the undertaking is likely to increase prices following the exclusion or deterrence of competitors;

- the potential long-term impact on consumers, including the risks of monopolization and reduced consumer choice;

- the duration, geographic scope and targeted application of the pricing conduct; and
- any objective and legitimate commercial justifications put forward by the undertaking.

Importantly, while dominance remains one of the factors that the authorities may consider, it is not a prerequisite for establishing an infringement.

The Executive Regulations also recognize several legitimate commercial justifications that may rebut allegations of predatory pricing. These include introductory promotions for new products or services, seasonal promotions, clearance of obsolete or perishable inventory, legitimate price matching and genuine cost efficiencies.

Key Takeaways

The Executive Regulations significantly improve legal certainty by introducing economic cost benchmarks and identifying the factors that the authorities will consider when assessing alleged predatory pricing. Nevertheless, enforcement will continue to be highly fact-specific. The Competition Commission retains broad discretion to assess predatory pricing on case-by-case basis, considering market conditions, competitive effects, consumer welfare and any objective commercial justifications advanced by the undertaking.

Businesses operating in the UAE should, therefore, carefully assess below-cost pricing strategies, even where they do not consider themselves to hold a dominant market position. Promotional campaigns, aggressive pricing strategies and market-entry pricing should be supported by clear commercial justifications and appropriate internal documentation demonstrating that the conduct is based on legitimate commercial objectives rather than an intention to exclude competitors.

Although the UAE's analytical framework has moved closer to established international competition law principles, particularly those applied within the European Union, it remains broader in one important respect. Predatory pricing may still be prohibited independently of dominance. This distinctive feature reinforces the UAE's increasingly robust competition law regime and underscores the importance for businesses of ensuring that aggressive pricing strategies are carefully assessed from a competition law perspective.

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