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Cartel Anti-Competitive Agreements in the UAE Law
"A Comparative Study"

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Abstract:

A key aspect of competition law is managing anti-competitive agreements. An increasing number of airlines are integrating and engaging in agreements for horizontal and vertical cooperation. Competition is generally hampered by collaboration among competitors, and concerns increase when some parties control a sizable portion of the market, and the remaining competitors are powerless to check their dominance. Cartel agreements are a clear illustration of this kind of cooperation.

The European Union has its own Competition Law and regulations that regulate the aviation sector, as does Australia, which has the Competition and Consumer Act of 2010. The United Arab Emirates, on the other hand, has a Federal Law No.4 of 2012 on the Regulation of Competition, which clearly states in the appendix that this law does not apply to the air transport sector, and the paper issue will begin with the UAE Federal Competition

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Law, and it will end up establishing the rules that will govern the Aviation Sector competition in the UAE. This article will analyze the anti-competitive agreements that are covered by the EU Competition Law, notably Article 101, the Australian Competition and Consumer Law, specifically Part IV of the law, and Article 5 of the UAE Competition Law.

Keywords: Competition Law, Cartel agreement, Horizontal agreements, Vertical agreements, Anti-Competitive.

1. Introduction

Controlling anti-competitive agreements is a crucial component of competition law. Many airlines are entering into Horizontal and Vertical Cooperation agreements and integration, including Price Fixing, Market Sharing, and any contract involving a conflict between two parties, such as resale price-fixing, production distribution, market or customer sharing, and anti-competitive actions against other competitors. These airlines do this to reduce market competition and raise prices or profits, which may violate antitrust laws. Cartel agreements are an obvious example of such collusion. Furthermore, cartels are agreements or concerted practices among rivals to harmonize their competitiveness or even sustain a competitive advantage via practices like predatory pricing and perhaps other restrictive trade practices, to limit competition and increase their prices or profitability. Cartels are almost always found to be harmful to competition, and they have no countervailing benefits that would justify an exemption to it.

Moreover, 'cartels are punishable by fines of up to 10% of the group's global turnover'(Council Regulation,2002), and cartel victims may sue in national courts for damages (within and outside the EU). Cartels can also be a criminal offense in certain EU Countries – for example, France, Denmark, Romania and Ireland, as well as in non-EU countries like Australia, the United States, Japan, the Kingdom of Saudi Arabia, and the United Arab Emirates.

Furthermore, competition laws which include specific rules are in place to protect consumers and small businesses from anti-competitive practices. The EU competition law, specifically Article 101, contains provisions concerning anti-competitive agreements. In addition, the fundamental

clauses of the Australian competition and consumer law, specifically Part IV of the law, prohibit cartels and other anti-competitive agreements. Moreover, Article 5 of the UAE competition law provides rules that regulate and forbid anti-competitive arrangements and practices between enterprises.

This article aims to evaluate the UAE's anti-competitive provisions and compare them to similar provisions in EU and Australian competition law.

2. Research Problem

Cartels are the most significant kind of anti-competitive activity among organizations. A cartel is an informal cooperation or agreement between two or more competing organizations.

According to the EU Commission, a cartel is a collection of related, autonomous enterprises that collaborate to share markets or customers, control prices, or limit production (EU Directive, 2014). Price fixing, collusive tendering, production limitations, and market-sharing are examples of "hardcore" competition law restrictions used by cartels (Milligan, 2017). Moreover, they will almost definitely be determined to be harmful to competition with no countervailing benefits.

The legal framework for anti-cartel regulations in the European Union, Article 101 (1) of the Treaty on the Functioning of the European Union states (TFEU) that any agreements or concerted practices between enterprises that aim to prevent, restrict, or distort competition are forbidden. The examples in Article 101 (1) (a) - (e) are merely illustrative and include 'price-fixing, share markets, anti-competitive conditions, and unfair complementary obligations', among other things. Agreements that fall under the purview

of Article 101 (1) are declared null and unenforceable by Article 101 (2) except if they fulfill the exemption requirements in Article 101 (3).

In the same vein, the Australian Competition and Consumer Act (CCA) of 2010, previously recognized as the Trade Practices Act 1974, prohibits both civil and criminal cartel behavior. According to Section 45AD (Articles 45AA - 45AU), Division 1 of Part IV of the CCA, examples of cartel activity include price-fixing, market segmentation, production restriction, and bid-rigging. This conduct is forbidden if it is made or carried out as part of a "contract, arrangement, or understanding" between at least two parties who agreed to cooperate rather than compete. These arrangements are aimed at boosting cartel members' revenues while retaining the illusion of competition.

However, in the United Arab Emirates, there are no regulations or laws governing the competition in the air sector, although there is Federal Law No.4 of 2012 Concerning Competition Regulation that governs competition in other sectors in the UAE. The UAE competition law does not define cartels; instead, in Article 1 of the law, the term "agreement" is defined broadly to cover "agreements, contracts, arrangements, joint ventures, or practices between two or more organizations, or any cooperation among organizations, or decisions made by a syndicate of organizations, whether orally or in writing, expressly or implicitly, secretly or publicly."

Furthermore, restrictive agreements are defined in Article 5 (1) as those that "have as their subject or objective to create bias against certain businesses, infringe, restrict, or prevent competition." The UAE government recognizes that these agreements are used to conceal cartels. Additionally, Article 5 (1, 2) defines restrictive agreements as price-

fixing agreements, bid rigging or auctions, restricting, or limiting output, development, allocation, marketing, or other investments, boycotting other undertakings, restricting the free flow of products or services in a relevant market, allotting markets or clients, or prohibiting market entry. Article 5 (2), for example, prohibits any attempts to divide market sectors among businesses and through geographic lines to the exclusion of other market players. However, corporations are barred from forming alliances in order to stop rivals from entering the same market.

The questions that arises are, Are cartel agreements related to air transport exempted, legally or in practice, from the application of the provisions of the UAE Competition Law? And what are the conditions for that?. It's important to mention that the purpose of this paper is to examine the legal framework for the competition in the air transport industry in the United Arab Emirates, the European Union, and Australia.

3. Type of Anti-Competitive Cartel Agreements

Cooperation between competitors, in general, presents challenges for competition, and worries grow when some parties have large market shares, and remaining competitors are unable to regulate these parties' market domination. In addition, if there are significant barriers to market entry, like expensive investment requirements, regulatory restrictions, or the inability to access infrastructures, such as airports or slots, this may result in decreased competition and increased competitor worries. Although cartels are horizontal agreements, they can also be vertical agreements if they are used to restrain competition in the wrong way. Therefour, There are two types of anti-competitive Cartel controls which are Horizontal and Vertical controls, and this section will discuss four main type of agreements related

to the aviation sector, including Price Manipulation, Market Allocation, Resele Price Fixing, and Exclusive Agreements.

Horizontal control refers to 'agreements and alliances between enterprises that produce comparable or homogeneous products in the same market to limit production or set prices. These monopolistic activities may take the form of written, unwritten tacit agreements, import or export cartels, or international cartels' (Maghawry, 2005). Vertical control is 'a monopolistic practice that occurs via agreements between businesses located in different parts of the production and distribution chain, affecting trade by preventing enterprises from accessing distribution channels'(Maghawry, 2005). Therefore, some jurisdictions establish market share thresholds in order to determine whether the company or product has achieved certain benefits, privileges, regulatory requirements, or exceeded legal limits and has become significantly harmful to the rest of the companies or products.

Horizontal agreements, as per EU legislation, are contracts among current or future rivals with a similar level of distribution or production. Furthermore, according to Vertical Block Exemption Regulation (VBER), 'Vertical agreements are agreements between two or more businesses that operate at distinct tiers of the production or distribution network for the contract or concerted practice, attributing toward the terms under which the parties may purchase, sell, or resell certain goods or services, such as resale price-fixing and exclusion'(Vertical Block exemption Regulation, 2022).

In EU, restrictive vertical agreements will have a significant impact on the competition when the parties' combined market shares reach 15% (Commission Notice Guidelines on vertical restraints, 2022)**.** Horizontal agreements must meet a 10% criterion (Slaughter and May 2018). If the

agreement includes "hardcore" restrictions (such as predatory pricing or market allocation), the influence on competition in the market will be substantial, while agreements that offer adequate advantages to overcome the anti-competitive effects are excluded under Article 101(3) of TFEU.

Furthermore, the definitions of horizontal and vertical agreements in Australia are comparable to those in the EU. The market share level of 20%, according to the Australian Competition and Consumer Commission, is known as the "notification threshold." (Guidelines on Mergers (Australia) reflect the Harper reforms, 2017). If a purchase falls short of this criterion, the ACCC is unlikely to pursue it further. Section 45 of CCA will cover both horizontal and vertical agreements that considerably reduce competition, subject to some exceptions and anti-overlap rules.

One of the primary challenges in the UAE's legal framework is the lack of a comprehensive and precise definition of anti-competitive agreements. The Competition Law vaguely defines such agreements, which can lead to confusion and uncertainty for businesses and regulators. Without a clear definition, it becomes challenging to identify and address different forms of anti-competitive conduct effectively. Moreover, in the UAE, the law does not establish the distinction between horizontal and vertical agreements. Nonetheless, the law prohibits any agreements, arrangements, or coordinated practices that restrict competition, including those involving horizontal or vertical collusion. The UAE Competition Law covers both types of cartels, whether they include competitors at the same level of the supply chain (horizontal) or different levels (vertical). The relevant market share thresholds under the Cabinet Resolution No.13 of 2016 for restrictive practices or agreements are deemed to have minimal influence if the parties to such an arrangement collectively account for no more than 10% of all

transactions in the relevant market (The Ratio Decision, Cabinet Decision, 2016).

3-1-Price Fixing

In general, it is illegal to enter into agreements or engage in concerted practices in which competitors cooperate to control the prices of goods they sell or purchase. The selling or purchase price does not have to be specified explicitly or immediately in the agreement. Aside from direct and indirect price fixing, EU law prohibits horizontal and vertical price manipulation. Consequently, price-fixing, like any other kind of anti-competitive behavior, takes place when competitors agree to set their resale or sale prices. Competition seldom results in harm through agreements between competitors on normal commercial terms. They will, however, violate Article 101(1) if they are directly related to pricing, such as agreements not to offer discounts, rebates, or other special terms to customers, or setting uniform rates for overheads such as logistics services or surcharges (Milligan, 2017). In other words, per se liability refers to pricing factors, which are broadly defined as the pricing mechanism (Slot and Johnston, 2006) (Beaton-Wells and Fisse, 2011). Additionally, agreements relating to payment terms, guarantees, and the prohibition of global and long-term contracts have all been considered illegal (EU Commission Decision, 2009). To recap, price-fixing in the EU must: (1) be the outcome of concerted action or arrangements. Taking into consideration that mere price parallelism and announcement are insufficient to establish price-fixing (A. Ahlstrom Oakeyhtio and others v. Commission of the European Communities (1988) EUECJ C-129/85, ECR 5193.); (2) impede or deform competition in the domestic markets, and (3) have an impact on trade among participating countries.

Furthermore, Australian courts have adopted a broad interpretation of price fixing, encompassing direct and indirect coordination of prices, as well as agreements on pricing components, so anything that has a purpose or effect on a price, such as discounts, rebates, allowances, and credits, is defined as a price-fixing provision in Australia (Beaton-Wells and Fisse, 2011) . The distinction between Australian and EU laws is that EU law applies per se liability to pricing aspects broadly construed to encompass any term of sale that can be considered as impacting the price. In addition, as described in Section 45AD, the Australian clauses should contain the essential 'purpose or effect' of price-fixing. The provision should play a vital function in the event of other types of conduct. The objective of Section 45AD (3) must be to "1. prevent, restrict, or limit output, capacity, or supply; 2. allocate customers or supplies among any or all of the parties to the agreement (by class or geographic region), or 3. rig bids". As earlier mentioned, Section 45 of the CCA forbids the establishment or implementation of contracts, agreements, or understandings that include a clause with the intention, impact or expected outcome of significantly lessening competition. The Australian competition law broadens the scope of liability for price-fixing to include downstream price-fixing, in which the 'fixing, maintaining, controlling, or providing for 'relates towards the prices where the parties' products or services are being re-supplied (Beaton-Wells and Fisse, 2011).

Article 5 (1)(a) of the UAE competition law, on the other hand, prohibits pricing beyond market levels, selling below cost to frustrate competitors, restricting agreements on the provision of products or services to specific firms, and denying sales to certain enterprises. In other words, the Article forbids any arrangement between businesses that affects the sale or purchase

prices of products and services directly or indirectly by producing a rise, drop or stabilization that undermines competition (Al Badwawi, 2013). Furthermore, Article 5(1) clause (b) of the law forbids any constraints on the purchase, sale, or performance of services. This prohibition is identical to that found in the TFEU's Article 101 (1)(d). Price fixing is considered a hardcore restriction under Article 101, meaning it is presumed to have an appreciable effect on competition and is generally considered illegal. However, the term "hardcore restriction" is not explicitly used to describe price fixing under Australian and UAE law. That being said, price fixing is regarded as a serious contravention of Australia's Competition and Consumer Act 2010 and Federal Law No.4 of 2012 Concerning Competition Regulation in the UAE. In the EU and Australia, price-fixing must be the outcome of concerted practices, arrangements of, or associations of undertakings, whereas the UAE competition law contains no provisions to regulate concerted practices and associations of undertakings. To clarify, any entity engaged in economic activity, such as selling goods and services on the market, is an "undertaking," regardless of its legal status or financial resources. From the scholar's perspective, these concerted practices and associations of undertakings should be prohibited under UAE competition law to cease any behavior that restricts or distorts competition.

3-2-Resale Price Fixing

The fixing of resale prices is forbidden under Article 101 (1) of the TFEU. It alludes to a limitation where the manufacturer determines the final cost that the retailer will charge consumers (Rey and Verge, 2004). In the EU, agreements or practices that involve RPM, where suppliers set minimum resale prices, are generally treated as anti-competitive conduct. The EU has a specific legal framework in place to address vertical agreements, including

RPM, called the Vertical Block Exemption Regulation (Regulation (EU) No 330/2010). Under this regulation, certain types of vertical agreements can benefit from a safe harbor if they meet specific conditions. However, fixed or minimum resale price maintenance is considered a "hardcore restriction" and falls outside the exemption. Such practices are presumed to have an appreciable negative effect on competition.

In Australia, on the other hand, resale price maintenance under Article 48 is outright prohibited, regardless of whether it serves an objective or has the potential to significantly decrease competition. A supplier may, however, exceed the allowable resale price as long as it does not outweigh the actual cost that the seller should sell (OECD, 1997). Furthermore, a supplier may issue a suggested resale price as long as the price is only a suggestion and there's no obligation to comply (The Competition and Consumer Act, 2010).

On the contrary, no provision in UAE competition law prohibits vertical agreements such as resale price-fixing, however, its broader provisions can be applied to address anti-competitive practices, including setting minimum resale prices.

Expressly, Australian and UAE laws prohibit resale price fixing; their legal frameworks may be more relaxed and not detailed compared to the EU law. Australia's Competition and Consumer Act 2010 prohibits RPM but does not provide a particular safe harbor for such practices. Agreements involving RPM are generally treated as anti-competitive unless parties can demonstrate efficiency justifications. Similarly, the UAE's competition law prohibits agreements restricting competition, which could cover RPM, but no specific provisions address resale price fixing or RPM. Therefore, the

EU's approach to resale price maintenance is generally considered stricter and more specific compared to the Australian and UAE legal frameworks.

3-3-Market sharing

Any agreement among rivals to allocate customers, territories/Member States, or product or service categories, thereby ceasing to compete in each other's marketplaces and exposing customers to higher prices, is known as market allocation (Milligan, 2017). In another view, by definition, all horizontal market allocations are invalid. Under EU legislation, market allocations aim to reduce competition by dividing geographic areas, product types, or consumer types. Market allocation is forbidden by Article 101 (1) (c) of the TFEU. Moreover, market allocation mechanisms can take many different forms and sizes. The scholar refers to specific market allocation agreements, such as global distribution systems agreements (GDS), computer reservation systems (CRSS), and code-sharing agreements (CSAs) (EU Regulation, 2009) because this article concentrates on the airline industry. The parties' competitiveness is one of the most important variables in evaluating whether CSAs are competitive. If competing carriers share code, information sharing should be limited to what is absolutely necessary to avoid the risk of market behavior coordination leading to cartels. Code-sharing that is part of a bigger scheme including a cartel or assisting a cartel, for example, will always be prohibited. Consequently, in the SAS/Maersk case, the European Commission concluded that the parties' agreements might go beyond code-sharing (EU Commission Decision, 2001).

Similarly, under Article 45AD (3)(b) of Australian competition law, market sharing is forbidden. Market allocation laws in Australia are identical to those in the EU. A proposal by Cathay Pacific and Qantas (International

Air Services Commission, 2019) to extend their code-share agreement was denied by Australia's International Air Services Commission because it is not in the public interest and may restrict or limit competition.

Under UAE competition law, market sharing is forbidden. Similar to the prohibitions in the EU and Australian competition law, Article 5 (2) (a) forbids contracts between enterprises that split markets or customers based on consumer classification, geographical locations, seasons and time frames, distribution centers, or any additional criteria that could harm competition. In the same vein, Article 5 (2) (b) forbids any limitation on an undertaking's entry into, exit from, or membership of existing agreements or coalitions, allowing for a free market, which is a market that Promotes fair play, self-control, cooperation, and competitiveness. Given that it only requires implicit collaboration between market competitors, which is not prohibited by UAE competition legislation, the civil aviation sector is a prime example of the oligopolistic structure of the UAE market (Al Badwawi, 2013). In contrast to the competition laws of the EU and Australia, which apply to both horizontal and vertical agreements, the UAE's prohibition on market sharing only applies to horizontal agreements.

There are similarities in the general approach to prohibiting market-sharing provisions, it's important to note that there may be differences in the specific provisions, enforcement practices, and penalties in each jurisdiction. These differences can arise from variations in legal frameworks, case law, and enforcement priorities. The EU has a well-developed competition law framework governed by the Treaty on the Functioning of the European Union (TFEU) and further legislation. Australia has its Competition and Consumer Act 2010 (CCA), while the UAE has the Federal Law No. 4 of 2012 concerning the Regulation of Competition. These legal frameworks

have variations in their specific provisions, definitions, and scope of application.

3-4-Exclusive Agreement

Exclusive agreements between businesses could be used to isolate national markets, create trade barriers, and keep pricing disparities between member states alive. Almost all exclusive agreements are prohibited by Article 101(1) TFEU. The vertical restraint guidance highlights the many instances in which exclusivity is provided (Galarza, Dziadyki and Figueroa, 2012); 1. Buyers are required to place orders for a certain service or product with a single supplier (single brand contract). 2. A supplier who promises to sell a product only to the seller for resale in a certain region or to a specific sort of consumer (exclusive sales agreement) (exclusive customer allocation agreement). 3. A supplier is required or compelled to sell the agreed goods solely or mostly to the customer (exclusive or industrial supply contract), usually for a specific reason.

Different types of exclusive dealing were depicted under Article 47 of the ACC Act. It broadly encompasses two classes of anti-competitive vertical trades: (1) conditional sale or buying of products or services; and (2) denial to supply for specific reasons. Legally, exclusive dealing is only prohibited if it severely reduces competition either intentionally or unintentionally. Likewise, Article 5 (1)(d) of the UAE competition law forbids or limits the restriction or freeze of manufacturing operations, distribution, marketing, and other investment aspects. Article 101 (1)(b) of the TFEU contains a similar prohibition. Furthermore, refusal of supply is covered by Article 5 (1)(e) of the UAE competition law. This article seeks to avoid a tactic that could impair a competitor's enterprise by seizing control of their products and services on the market. It is against the law to refuse to purchase from,

supply to, or sell to particular businesses in an effort to cause them harm (Alsawy, 2015), according to the article, since the law does not prohibit such activities, obliterate other enterprises from the marketplace and create a monopoly.

The EU applies a rule of reason analysis to evaluate exclusive agreements' potential benefits and anti-competitive effects; the Australian and UAE competition laws take a different approach. In Australia, exclusive agreements are assessed based on the substantial lessening of competition, while the UAE focuses on preventing anti-competitive practices without explicitly applying a rule of reason analysis.

4. Violation of the cartel provisions and Immunity Programs

Each jurisdiction has its own enforcement agencies responsible for monitoring and enforcing cartel regulations. In the EU, the European Commission is the main authority responsible for investigating and prosecuting cartel cases. In Australia, the Australian Competition and Consumer Commission (ACCC) is the primary agency responsible for enforcing competition law. In the UAE, the competition regulation is overseen by various entities, such as the Ministry of Economy and Competition Regulation Committee.

The National Competition Authority (NCA) or the EU Commission may launch an investigation if it indicates that proposed or already implemented cooperation may contravene EU competition rules, either on its own initiative or in response to a complaint (EU Commission Notice, 2004). If the collaboration falls under Article 101 (1), the partners must show that the conditions for an exception outlined in Article 101 (3) have been met, considering that Regulation 1/2003 grants the Commission

extensive investigative authority over agreements, procedures, and conduct impacting the provision of air transport services across EU and non-EU nations. If the Commission has initiated a formal inquiry in a matter, the NCAs are no longer permitted to take enforcement action on the same matter. Furthermore, the Commission has carried out a leniency program (EU Commission Notice, 2006) since 1996, allowing businesses to admit wrongdoing in exchange for avoiding or decreasing potentially hefty fines for competition violations. Under the Commission's leniency program, companies who provide adequate information about a cartel in which they have participated may be awarded full or partial immunity from sanctions. In Article 101(2) of the TFEU, the law states that 'any agreement or decision that violates the prohibitions will be declared null and void'. Furthermore, there is no criminal penalty for cartel activities under the law. However, under Article 23(2) of Regulation (EC) No 1/2003, the EU Commission is empowered to punish companies that infringe Article 101 intentionally or negligently. The fine for each corporation implicated in the infraction cannot be more than 10% of its previous fiscal year's total turnover. It's worth noting that the EU law is ambiguous on concerted practices in the nullity matter. Meanwhile, in Artisjus v. Commission, the General Court determined that prohibited concerted practices are not subject to the nullity provisions of Article 101(2) TFEU (Case C-32/09 P(R) Artisjus v. Commission (2010) ECR I-107).

Likewise, since it has the jurisdiction to carry out a cartel investigation, the Australian Competition and Consumer Commission (ACCC) prioritizes investigating and prosecuting cartel activities. After concluding the investigation, the ACCC can launch civil cases in the Federal Court for civil financial fines and other orders. The ACCC may potentially refer the

issue to the Commonwealth Director of Public Prosecutions (CDPP), who will decide whether or not criminal charges should be filed (Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission, 2014). The ACCC has developed a new Immunity and Cooperation Policy for Cartel Conduct in 2019, which replaces the prior policy from 2014. The immunity policy is one of the ACCC's key techniques for discovering and eliminating cartels. Immunity is granted to the first individual who comes forward, but only if they match certain criteria. The ACCC's collaboration policy may also apply to cooperating parties. By submitting an application to the ACCC in line with the immunity policy, cartel members may request combined civil and criminal immunity for cartel behavior. Any request for immunity submitted to the ACCC will be reviewed for both civil and criminal immunity (Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission, 2014); the ACCC grants civil immunity, while the CDPP grants criminal immunity. In Australia, the competition law does not expressly state that any arrangement or action that violates the restrictions shall be void, but it is implied that they constitute criminal offenses. Individuals held liable for cartel activities may incur criminal or civil penalties, such as 10 years in prison, fines of up to $420,000, and a pecuniary penalty of up to $500,000. Moreover, corporations could receive fines or pecuniary penalties of up to $10 million for each criminal cartel offense or civil contravention, or 10% of the yearly revenue from the preceding fiscal year, or three times the total amount of advantages acquired by one or more individuals, and that are substantially related to the offense or contravention if benefits cannot be fully determined.

Effective enforcement of competition law requires robust resources and capabilities. In the UAE, the regulatory authorities responsible for enforcing anti-competitive practices, which are the Ministry of Economy (in the Department of Competition) and the Competition Regulation Committee (Federal Law on the Regulation of Competition, 2012), face challenges due to limited resources and expertise. The shortage of skilled personnel and financial constraints can hamper their ability to investigate and prosecute cases of anti-competitive agreements adequately.

Additionally, leniency programs play a crucial role in encouraging companies involved in anti-competitive agreements to come forward and cooperate with regulatory authorities. By offering reduced penalties or immunity from prosecution, leniency programs incentivize self-reporting and facilitate investigations. However, the UAE's current legal framework lacks a robust leniency program, which may deter potential whistleblowers from reporting anti-competitive conduct. Nevertheless, the UAE Competition Law allows for reduced penalties if a company cooperates during the investigation.

Investigations can be launched on their own initiative by the Ministry of Economy if it believes there are reasonable grounds to believe an entity has engaged in anti-competitive practices or by the Competent Authority (Competition Regulation Committee) after receiving a complaint from any stockholder or organization. After reviewing the complaint, the Competent Authority will notify the complainant, either accepting the complaint based on sufficient reasons to pursue a formal inquiry or rejecting the complaint due to insufficient findings of wrongdoing, based on the information supplied (Federal Law on the Regulation of Competition, 2012). Within 90 days of receiving the report, the Ministry of Economy will consider

the complaint and recommendation made by the Competent Authority and reach a decision (The Council of Ministers' Resolution of The Federal Law on the Regulation of Competition, 2014). Proving the existence and impact of anti-competitive agreements can be challenging to the UAE authorites since the burden of proof lies with the regulatory authorities, which require them to gather sufficient evidence to establish infringement. This burden can be onerous, particularly in complex cases where collusion is subtle or hidden. Strengthening the evidentiary standards and providing authorities with the necessary tools to investigate and gather evidence would enhance the effectiveness of enforcement. In contrast to EU and the Australian competition laws, the UAE's legislation makes no provision for prohibited practices to be declared void (Al Badwawi, 2013). Moreover, the law establishes a civil offense for cartel practices under Article 16 of the competition law, which states that any entity that violates the restrictions of Article 5 will be fined a minimum of 500,000 AED and a maximum of 5,000,000 AED. It also provides criminal offenses only if requested in writing by the minister or his authorized deputy (Federal law on Regulation of Competition, 2012).

Although the UAE Federal Law No.4 clearly states in the appendix that the air transport sector is exempt from the implementation of the Law, it is ambiguous in this regard. It should be noted that there is an an exception to this exception under the Competition Law, which is when the relevant sector's regulator is granted the power to regulate competition for the listed excempted sectors. The Competition Law may also still be applicable to the designated exempt sectors (such as the air transport industry), provided the sector's regulator requests in writing that the Ministry of Economy handle the situation and the Ministry grants the request. Hence, cartel agreements must abide by Articles 1 and 5.

The EU has extraterritorial jurisdiction, which means it can investigate and penalize cartels that have effects on competition within the EU, even if the corporations involved are located outside the EU. Australia also has extraterritorial reach for certain cartel conduct that affects competition in Australia. The UAE primarily focuses on cartel conduct within its borders.

5. Exemption from Cartel legal interdiction

5-1-Statory Framework of Cartel Exemptions

Article 101(3) and the Vertical Restraints Block Exception Regulation (VEBR) cover exceptions under EU competition law. Article 101(3) of the TFEU specifies that 'an agreement that falls under the scope of Article 101(1) can be exempted if it meets each of the following criteria; (i) it improves the production or distribution of goods; (ii) it provides a fair share of the benefit to consumers; (iii) the restrictions are necessary to achieve those objectives; and (iv) it does not eliminate competition in a considerable segment of the market'. Furthermore, establishing whether or not an agreement meets the requirements for the Article 101(3) exception will necessitate a thorough examination of the economic restrictions' impacts. Agreements between suppliers, manufacturers, and distributors are exempt from the VEBR if they do not include price-fixing or other substantial restrictions, and these agreements do not exceed 30% market threshold (EU Commission Regulation, 2010) (Safe Harbor Exception). Unlike the EU, Australia does not provide a specific safe harbor for resale price maintenance. As a result, agreements involving Resale price-fixing (RPM) are generally treated as anti-competitive, and the parties must demonstrate efficient justifications to escape enforcement action. As we stated before, the UAE Law does not explicitly mention resale price fixing; however, there may be exceptional cases or specific circumstances where

the authorities may consider justifications or efficiencies that could exempt or mitigate the consequences of such practices. These exceptions typically need to be evaluated on a case-by-case basis. Moreover, the VEBR allows for the resale of price maintenance where market shares are relatively low, and the competition limitation isn't severe (Milligan, 2013). Another exception is the sale of spare parts. For instance, a component supplier to a buyer, such as an original equipment manufacturer (OEM), cannot be prevented from supplying those parts to end users or independent repairers, but can be prevented from supplying them to repairers entrusted by the OEM to service or repair its products, in which case the OEM may require the repairers to purchase the spare parts from it (Milligan, 2017). The Block additionally makes an exception for parties who agree to a non-compete agreement that lasts for five years or less (Whish and Bailey, 2012). An example on non-compete agreement is the agreement on the distribution of air tickets through computer reservation systems and global distribution systems). However, if the non-compete agreement exceeded five years it will not be exempted under the VEBR. Another restriction is the buyer's ability to sell in certain territories, like online or to specific customers.

It's important to note that while the EU provides a framework for individual exemptions if the cartel generates efficiencies that outweigh its anti-competitive effects. The exemption requires demonstrating that the agreement contributes to improving production or distribution, allows consumers to receive a fair share of the resulting benefits, and does not eliminate competition in a substantial part of the market. Also for block exemptions regulations it provide automatic exemptions for certain types of agreements that meet specified conditions. However, cartels are generally not eligible for block exemptions, as these exemptions are typically

intended for less severe forms of cooperation., the Australian and UAE laws generally do not have specific exceptions for cartel conduct. As a result, cartels are regarded as inherently illegal in Australia and the UAE. However, the particular provisions and enforcement practices may vary within each jurisdiction.

The Australian Competition and Consumer Act includes several exceptions to specific restrictions on collusion and other anti-competitive activity under Part IV of the CCA which are similar to the EU Exceptions. Moreover, the parties may seek authorization, therefore immunity from the ACCC for cartel action under Section 88(1) of the CCA. The cartel prohibitions do not prevent a corporation from engaging into or carrying out the conditions of an authorized contract, arrangement, or agreement while it is in effect. Moreover, Section 90(7) implies that the ACCC is not needed to authorize a provision of a suggested cartel agreement unless it is convinced that the conduct might, or be probably to, result in public welfare and that the public welfare would outweigh the potential harm to competition in all circumstances. Furthermore, under Section 93 of the Act, Small enterprises may be granted immunity for exclusive dealing behavior or resale price maintenance through the ACCC notification process. The ACCC can only object to notification if the public benefit does not outweigh the anti-competitive risk, in which case, it will issue a written objection notice to the corporation or parties involved.

In contrast, Article 5(3) of the UAE Federal Competition Law exempts weak effect agreements from Articles 5(1) and 5(2) if the combined market share of the parties to the agreed terms does not exceed 10% of all transactions in the particular market (Federal Law on the Regulation of Competition, 2012). Moreover, similar to Australian competition law,

in certain situations, corporations may be permitted to participate in the following actions even though they are illegal; Articles 7 and 8 establish the foundation for such exclusions. The only thing businesses need to do is make a written request, along with any necessary supporting materials, to be excused from the application of specific competition regulation provisions. The request should be sent to the Minister of the Economy, who can deny or authorize the exemption within 90 days, with a 45-day extension option (The Council of Ministers' Resolution of the Federal Law on the Competition Regulation, 2014). The application is interpreted as implied approval of the restricted agreements if the Minister does not make a decision (The Council of Minister' Resolution of the Federal Law on the Competition Regulation, 2014). The applicant business must show that its operations would promote economic growth, raise competition over time, and ultimately benefit consumers in order to be exempted.

From the scholar's perspective, this last exclusion that the UAE and Australia apply will undoubtedly hurt competition and will be considered a violation of EU competition regulations. According to Article 101 of the TFEU, restrictive agreements are 'any contractual agreement or knowledge between commercial rivals with the aim of preventing or restricting market competition'. These agreements may include those to fix prices, limit output, unlawfully divide markets and customers among themselves, or restrict sources of supply. Furthermore, the UAE Competition Law outlines certain exemptions and exclusions, the framework for obtaining exemptions needs further clarity. Businesses engaged in legitimate agreements that may have anti-competitive effects but provide substantial benefits to consumers or the economy often face uncertainty regarding the process and criteria for seeking exemptions. A more transparent and predictable exemption

framework would help businesses make informed decisions and contribute to overall market efficiency.

5-2-Significant Cases

5-2-1Price Fixing Cartel v. EU Committee

The EU Commission launched an inquiry into various carriers investigating a price-fixing cartel and discovered that 15 groups of freight businesses were participating, following a leniency application by Lufthansa and subsidiaries Swiss and Lufthansa Cargo AG in February 2006. Moreover, the European Commission made a ruling in November 2010 fining 11 air freight businesses 'a net of €799.445.000 for operating a worldwide price-fixing cartel' from December 1999 to February 2006 that impacted cargo services inside the European Economic Area (EEA) (EU Commission Press release, 2010) with fine reductions ranging from 10% to 50% for their participation (EU Commission Guidelines, 2006).

Many bilateral and multilateral agreements between airlines involving flights to, from, and across the EEA were part of the cartel arrangements. Airline companies that offer air cargo services typically convey cargo for freight brokers who, on behalf of shippers, arrange for the carriage of goods as well as related services and procedures. Several known airlines are among the 11 companies punished, including Air Canada, Air France-KLM, British Airways, Qantas, and others. A 12th cartel member, Lufthansa, and its subsidiary were given total protection from sanctions because they were the first to disclose information about the cartel.

The participant collusion was performed for a single anti-competitive goal which is to harm competition in the EEA air freight Market by harmonizing their pricing behavior. By pricing services differently, they

have destroyed competition and done so in violation of EU competition rules. The repeated encounters over a lengthy period of time demonstrate the parties' intention.

The parties' activities demonstrate a network of contacts that guaranteed market discipline and fuel index rises were applied fully and even in concert, eliminating pricing doubt. This matter expanded to involve security surcharge cost (SSC), where the parties sought to eliminate pricing confusion over the level and application of the surcharge. This was supported by a refusal to pay surcharges commission which helped to keep pricing uncertainty under control.

All airlines, excluding Qantas (EU Commission Press release, 2017), appealed the Commission's 2010 judgment to the EU General Court, therefore the judgment on Qantas became final. The General Court ruled that 'there had been a procedural error' (General Court of the European Union, 2015) and reversed the Commission's decision against the 11 cartel participants who had appealed in December 2015. However, it did not pronounce on the presence of a cartel. The Commission has issued an updated ruling and re-imposed sanctions because it continues to believe that these air freight carriers are involved in a price-fixing cartel. This modified decision maintains the Commission's anti-competitive conduct targets while correcting the General Court's procedural error. It ruled that 'the agreements on surcharges and pricing procedures affected air freight utilities as a "package of services" in the concerned trade lanes and that the Commission was within its rights to calculate the sanction cost on the total cost of these services' (European Commission Press release, 2017). The Commission's ruling emphasizes that cartels will not go unpunished. Cartels are unlawful, and they harm consumers and businesses.

5-2-2Flight Center Ltd v. ACCC

Customers can use the flight center's travel agency services to book international air travel or buy air travel tickets directly from airlines. The ACCC asserted that, in breach of Section 45A, Flight Centre attempted to induce Singapore Airlines, Malaysia Airlines, and Emirates Airlines to engage in commerce, agreement, or arrangement to set, regulate, or control air travel pricing. A string of letters from Flight Centre that sought to address concerns about the prior airlines' direct sales discounting were utilized by the ACCC to support its claim. Flight Centre refuted the allegations, claiming that in 'situations where the provider of air travel stays the same, whether that travel is supplied to a retail customer directly either by airline or via a travel agency such as Flight Centre, there can be no decreasing or likely decreasing of competition' (Flight Centre Limited v. Australian Competition and Consumer Commission (2015) FCAFC 104, Para 22). Furthermore, they assert that they are trying to purchase overseas airfare at the same cost as what the aforementioned airlines charged for such trips when it was marketed directly to consumers.

The Court of First Instance found that the Flight Centre's actions constituted an attempt to cause a violation of Section 45A of the ACC Act. Additionally, the Flight Centre was ordered to pay $11 million in fines for six instances of trying to coerce price fixing (Australian Competition Law Blog, 2016). Flight Centre filed a notice of appeal with the Full Federal Court on April 17, 2014, and on May 8, 2014, the ACCC filed a cross-appeal regarding the penalty. Flight Centre did not compete with airlines in the supposed market, according to the Full Court, which found that there was no independent market for customer reservation and freight forwarding (Australian Competition and Consumer Commission v. Flight

Centre Travel Group Limited (2016) HCA 49 B15/2016). The High Court granted special leave to appeal on March 11, 2016. The judge concluded that the parties competed in a market. Consequently, the condition of Section 45A was met, and the arrangements were considered to have substantially reduced competition in violation of Section 45A ((Australian Competition and Consumer Commission v. Flight Centre Travel Group Limited (2016) HCA 49 B15/2016). The Court awarded fines of $12.5 million (increased from the original $11 million penalties) (Flight Centre Limited v. Australian Competition and Consumer Commission (2015) FCAFC 104, Para 22).

6. Conclusion

A free market economy in the air transport sector needs laws to sustain competition, not absolute competition. Regulating competition entails maintaining the market's economic balance and fixing its flaws. To achieve open and fair competition in the air transport market, national or regional laws and international agreements must monitor airline work and anti-competitive agreements and practices.

This paper sheds light on one of the hidden problems facing the UAE in the aviation sector, as it is not dealt with as a federal state, but rather as a country based on a sectoral basis for each emirate. The aviation sector in Abu Dhabi differs from the aviation sector in the emirate of Dubai, Sharjah, Ras al-Khaimah, and the rest of the Emirates. The absence of a national competition law governing the aviation sector in the UAE made the neighboring country put its interests above the interests of the state. The paper compares cartel provisions in the national competition laws that govern the aviation sector between the United Arab Emirates, the European Union and Australia.

Anti-competitive agreements can have a detrimental impact on market competition, stifling innovation, limiting consumer choice, and driving up prices. To address these concerns, the United Arab Emirates (UAE) has implemented Federal Law No. 4 of 2012 concerning the Regulation of Competition, commonly known as the Competition Law. While the UAE has taken significant steps to regulate anti-competitive practices, there are still several issues and challenges that need to be addressed.

We saw that the UAE Federal Law No.4 added that there is an exception to the exception. It indicates that the air transportation sector is only subject to the Law if the sector's regulator requests the Ministry of Economy in writing to handle the case and the Ministry approves. Therefore, anti-competitive cartel provisions must abide by Articles 1 and 5 of the UAE competition law.

Cartel agreements between airlines are arbitrary monopolistic practices that restrict freedom of competition in the air transport market if they divide markets between the contracting companies by allocating capacity, services, or geographical areas, fixing prices, or imposing indicative fares.

The paper concluded with several findings, the most important of which are:

– Anti-cartel provisions found in Part IV of the Australian Competition and Consumer Act and Article 101 of the TFEU are remarkably comparable to those found in the UAE competition legislation.

– The EU Competition Act is more stringent than those of Australia and the UAE.

– The UAE is mainly concerned with the volume of these agreements,

as opposed to the EU and Australia, which seem to regard all restrictive agreements to be illegal.

– The UAE regulations against anti-competitive agreements do not contain any clauses on concerted practices or the association of businesses, in contrast to the EU and Australian statutes.

– The EU law empowers the European Commission to collaborate with third-party governments to dismantle cartels if their actions have a direct and negative impact on EU competition. It indicates that the Commission can pursue entities operating outside the EU that have engaged in restrictive agreements with EU-based entities. The same rule applies under Australian law as it does under EU law. In comparison to the EU and Australia's stringent regulations on restrictive agreements, the UAE's competition legislation seems to be a little more liberal and it should be reformulated to include aspects of the legal protections of cartel agreements provided by EU and Australian law.

Recommendation for strengthening the regulations pertaining to anti-competitive agreements in the UAE law.:

– Strengthening the Definition of Anti-Competitive Agreements: To provide clarity and guidance, it is crucial to refine the definition of anti-competitive agreements in the UAE law. A precise and comprehensive definition would encompass various forms of collusive behavior, including price-fixing, market allocation, and bid-rigging. This would facilitate better understanding and identification of prohibited practices, ensuring consistent enforcement.

– Increasing Enforcement Resources and Capabilities: Adequate

resources and capabilities are essential for effective enforcement of competition law. The UAE should allocate sufficient funding and personnel to the regulatory authorities responsible for combating anti-competitive agreements. Enhancing the expertise and capacity of these authorities will enable them to conduct thorough investigations, gather evidence, and take enforcement actions against violators more efficiently.

– Enhancing the Exemption Framework: A clear and transparent exemption framework is necessary to balance the objective of promoting competition with legitimate business collaborations. The UAE should provide comprehensive guidelines and criteria for businesses seeking exemptions from anti-competitive agreement regulations. This will enable businesses to assess the compatibility of their agreements with competition law and provide regulatory authorities with a systematic approach to evaluate exemption requests.

– Implementing Leniency Programs: Leniency programs have proven effective in encouraging companies to self-report anti-competitive conduct and cooperate with regulatory authorities. The UAE should introduce a robust leniency program that offers incentives to businesses to come forward with information regarding anti-competitive agreements. This may include reduced penalties or immunity from prosecution, which would enhance the enforcement capabilities and facilitate the detection and prosecution of such agreements.

– Promoting International Cooperation: Collaboration with international competition authorities can greatly benefit the UAE's efforts to combat anti-competitive agreements. The UAE should establish mechanisms for exchanging information, experiences, and best practices

with other jurisdictions. Engaging in international cooperation initiatives, such as mutual assistance agreements and participation in international forums, would provide valuable insights and strengthen the UAE's competition law enforcement framework.

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اتفاقيات الكارتل المناهضة للمنافسة في قانون دولة الإمارات العربية المتحدة «دراسة مقارنة»

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ملخص البحث:

يتمثل أحد الجوانب الرئيسة لقانون المنافسة في إدارة الاتفاقات المانعة للمنافسة. يقوم عدد متزايد من شركات الطيران بدمج اتفاقيات للتعاون الأفقي والرأسي والانخراط فيها. يتم إعاقة المنافسة بشكل عام من خلال التعاون بين المنافسين، وتزداد المخاوف عندما تسيطر بعض الأطراف على جزء كبير من السوق، ويكون المنافسون الباقون عاجزين عن التحقق من هيمنتهم. تعد اتفاقيات الكارتل مثالاً واضحًا على هذا النوع من التعاون

لدى الاتحاد الأوروبي قانون ولوائح المنافسة الخاصة به التي تنظم قطاع الطيران ، كما هو الحال مع أستراليا ، التي لديها قانون المنافسة والمستهلك لعام 2010. من ناحية أخرى ، لدى دولة الإمارات العربية المتحدة قانون اتحادي رقم 4 لعام 2012 بشأن لائحة المنافسة ، التي ينص بوضوح في ملحقه على أن هذا القانون لا ينطبق على قطاع النقل الجوي ، وستبدأ مشكلة هذه المقالة بقانون المنافسة الاتحادي لدولة الإمارات العربية المتحدة، وستنتهي بوضع القواعد التي ستحكم المنافسة في قطاع الطيران في دولة الإمارات العربية المتحدة. ستحلل هذه المقالة الاتفاقيات المناهضة للمنافسة التي يغطيها قانون المنافسة في الاتحاد الأوروبي، ولا سيما المادة 101، وقانون المنافسة والمستهلك الأسترالي، وتحديداً الجزء الرابع من القانون، والمادة 5 من قانون المنافسة الإماراتي.

الكلمات الدالة: قانون المنافسة، اتفاقية كارتل، اتفاقيات أفقية، اتفاقيات عمودية، مضاد للمنافسة

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