COMPETITION & ANTITRUST - UNITED ARAB EMIRATES

Merger control in United Arab Emirates

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Introduction

The UAE competition law regime became relatively more developed when its central regulation – Federal Law 4/2012 on the Regulation of Competition – came into effect in 2013. The law comprises restrictions on anti-competitive practices and imposes merger control measures, such as restrictions on the formation of monopolies and other market-dominating structures. The procedure for approving market practices, mergers and cooperation is governed by Executive Resolution 37/2014. The application of the law and related regulations is overseen by the Competition Regulation Committee, which is under the authority of the Ministry of Economy.

Restrictions

The competition law regime established by Federal Law 4/2012 and Resolution 37/2014 has been criticised – in particular, for being ambiguous in relation to merger control, making the law unenforceable in practice. Most notably, the regime lacked defined thresholds for the application of merger control provisions. These issues were recently addressed by the legislature through two cabinet resolutions: Resolutions 13/2016 and Resolution 22/2016. Under the newly amended competition law regime, the following practices are prohibited:

- Restrictive agreements – Federal Law 4/2012 prohibits restrictive agreements, such as those specifying prices for goods and services or dividing a market based on geographic areas. However, agreements which have little effect are exempt from this restriction. In accordance with Resolution 13/2016, a restrictive agreement will be deemed to have only a minor effect where the total market share of the parties involved does not exceed 10% of the total transactions in the relevant market.
- Dominant position – establishments dominant in a specific market are prohibited from taking advantage of their dominant position to breach, minimise or exclude competition – for example, by undertaking practices such as price fixing. Resolution 13/2016 now specifies that an establishment is dominant if its market share exceeds 40% of the total transactions in the relevant market.
- Economic concentrations – where a proposed economic concentration may affect competition in a specific market, particularly where the concentration would create or enhance a dominant position, an application for approval should be submitted to the committee before concluding the relevant contract. Under Resolution 13/2016, an application must be made where the market share of the parties involved exceeds 40% of the total transactions undertaken in the relevant market.

The regulation of restrictive agreements and the conduct of establishments in dominant market positions will be relevant mostly in commercial transactions. However, the restrictions on economic concentration directly affect M&A transactions. This update focuses on the merger control measures

imposed by Federal Law 4/2012 and Resolution 37/2014 and their amendment by the 2016 resolutions to provide an overview of the implications for M&A transactions involving the United Arab Emirates.

Notifiable transactions

Federal Law 4/2012 is not limited to share deals, but also covers transfers of assets and liabilities. These transactions fall within the competition law regime where they enable a person or group of persons to exercise control over another person or group of persons. These will be deemed 'economic concentrations' within the meaning of the competition law regime. Until recently, no thresholds for when economic concentrations required committee approval existed. Now, Resolution 13/2016 provides that approval is mandatory where:

- the proposed economic concentration would consolidate a share in a specific market – be it a market defined by geography, product or otherwise – that exceeds 40% of the total transactions in the relevant market; and
- the proposed economic concentration would potentially affect the level of competition in the relevant market or create or enhance a dominant position therein.

Where these conditions are met in respect of a UAE market, approval is required regardless of whether the underlying M&A transactions are domestic (eg, the merger of companies registered in the United Arab Emirates) or international (eg, the consolidation of holding entities incorporated outside the United Arab Emirates).

Approval procedure

The parties involved must apply to the committee for merger approval. Once the committee receives the application, it has 90 days – which may be extended by an additional 45 days – to review the transaction and make its decision. The committee has discretion to outright approve or reject the proposed transaction or grant conditional approval, subject to the parties to the transaction complying with conditions set by the committee. The committee will base its decision on the effect that the proposed transaction may have on the UAE economy.

If the committee does not decide within the review period, the proposed transaction is deemed approved. During the review period, the parties may not carry out actions to execute the proposed transaction.

Failure to comply with the approval requirements may be penalised by fines of 2% to 5% of the annual revenue generated by the merging establishments over the past year in the United Arab Emirates.

Application and supporting documents

The documentation that must be submitted with the application is not entirely clear. According to Resolution 37/2014, a draft of the transactional agreement must be filed with the application. Considering the contractual structure usually chosen for transactions in the United Arab Emirates, this requirement in itself is ambiguous.

Any transfer of shares in or merger of companies registered in the United Arab Emirates requires approval from the competent administrative authorities. To obtain approval, the transactional agreements must be notarised by the competent notary public. The notary public will usually be reluctant to notarise extensive agreements and deny approval of a transaction based on comprehensive sale and purchase or merger agreements as they are commonly used for instance in western jurisdictions. Therefore, it is common practice to affect the transfer of shares or mergers based on a simple agreement that comprises only the bare essentials. In addition, the parties to the transaction will conclude a separate agreement, which comprises the full commercial terms of the deal.

Neither Federal Law 4/2012 nor Resolution 37/2014 clearly define which agreements must be submitted to the committee along with the proposed transaction. The committee will likely – in line

with the practice of the notary public – require only the official transfer or merger agreement to be notarised by the notary public. However, the committee has authority to request additional documents, such as the draft of the internal transaction agreements or other documents that the committee may deem relevant (eg, an analysis of the relevant market and the share therein of the parties to the merger, business plans and statements of accounts).

Exemptions

Certain exemptions apply under Federal Law 4/2012, including exemptions for:

- enterprises with government participation;
- enterprises in specific sectors; and
- small and medium-sized enterprises (SMEs).

Sector-specific exemptions

Businesses active in certain sectors are exempt from the general competition law regime. The relevant sectors include telecoms, financial services, oil and gas, pharmaceuticals, electricity and water, transport, post services, cultural activities, and drainage and sanitation. This list is not comprehensive and sector exemptions are subject to change. Further, the fact that certain sectors are exempt from Federal Law 4/2012 does not mean that they are subject to no competition regulations. For certain sectors, specific regulations on competition exist.

Businesses with government participation

Federal Law 4/2012 does not apply to government-owned entities. However, it contains no definition as to what constitutes a 'government-owned entity'. This was addressed in Resolution 13/2016, which now clarifies that any entity in which the federal government or the government of an emirates holds at least 50% is exempt from the law.

SMEs

While Federal Law 4/2012 exempts SMEs from its application, it does not contain a definition of 'SMEs'. Resolution 22/2016 has introduced a unified definition of 'SME', which clarifies the law. This definition distinguishes between enterprises by applying different thresholds for the trading, manufacturing and services sectors. An SME is defined by the number of employees or annual revenues. The thresholds are comparatively high and differ depending on the sector. For example, a business in the manufacturing sector will qualify as a medium-sized enterprise if it has no more than 250 employees or its annual revenues does not exceed Dh250 million. On the other hand, an enterprise offering services will not be considered an SME if it has more than 200 employees or an annual revenue exceeding Dh200 million.

Commercial agencies

Commercial entities registered in the United Arab Emirates are exempt from Federal Law 4/2012. This exemption will likely be of little relevance with respect to merger control with participation involving foreigners. Under UAE law, only citizens of the United Arab Emirates or entities whose ultimate beneficial owners are UAE citizens may be active as commercial agents in the United Arab Emirates.

Remaining issues

The two resolutions passed in 2016 have brought some much-needed clarity to the UAE competition regime. However, considerable uncertainty remains with respect relevant issues.

Definition of relevant market

Whether the merger control provisions will apply depends on the involved establishments' market share in the relevant market. Thus, defining the relevant market is imperative in order to determine whether an economic concentration constitutes a notifiable transaction and requires approval. However, doing so is rarely a straightforward exercise. Typically, competition law regimes determine a relevant market based on two parameters:

- whether the goods and services, based on their characteristics, price and application, can be substituted with another product; and

- whether the geographical area or areas in which market conditions for the relevant goods and services are homogenous and distinguishable from other geographical areas.

Pursuant to Federal Law 4/2012, the relevant market must be defined based on both factors. Aside from this general outline, no further guidance as to how a relevant market will be determined is provided by Federal Law 4/2012 or Resolution 37/2014. This makes the application of Federal Law 4/2012 exceedingly difficult.

Depending on how narrow the scope is, the size or volume of a relevant market may differ considerably. For example, a geographical market within the United Arab Emirates may comprise the entire country, one emirate or a specific free zone within the United Arab Emirates. Similarly, a product market may be wide (eg, comprise clothing in general) or restrictive (ie, limited to protective clothing for fire fighters). Thus, depending on how the relevant market is defined in respect of product and geography, mergers of comparatively small enterprises or only extremely large transactions may require committee approval. To aid transactions and the application of Federal Law 4/2012, more specific guidance on how a relevant market will be determined would be appreciated.

Determining total transactions in relevant market

Under the law, an economic concentration – whether by way of merger or acquisition – will require approval by the committee if the market share of the establishments involved exceeds 40% of the total transactions in the relevant market. How this market share will be ascertained is not defined by the law. In particular, it is unclear whether the basis for calculating the total transactions in the relevant market and the market share of the parties merging should be determined with reference to the value (monetary turnover) or the volume (amount of goods or services sold) of the relevant transactions. Further, the law does not specify the timeline within which the relevant transactions must be calculated. Again, further guidance in this regard would be helpful.

In addition to the ambiguity regarding calculating the total transactions in a relevant market and the market share of the establishments therein, the availability of information is an issue. Due to the lack of publicly available official economic data, determining the value or volume of transactions in a relevant market will be extremely difficult. It remains to be seen whether the Federal Competitiveness and Statistics Authority, which was recently set up to compile and publish economic data, will be a useful source of market share information in the future.

SMEs

SMEs are exempt from the application of Federal Law 4/2012. With the statutory definition of 'SMEs' introduced by Resolution 22/2016, this exemption has become somewhat more practicable. Still, it is unclear whether merger control provisions will apply to concentrations of SMEs where the number of SMEs involved is so great that the resulting consortium's market share in the relevant market would exceed the threshold set for committee approval.

Government-owned entities

Another area in which the 2016 resolutions have brought some clarification is the exemption of government-owned entities from the application of Federal Law 4/2012. Pursuant to Resolution 13/2016, an entity will be considered to be government owned within the meaning of the law if the federal government or the government of an emirates owns 50% of the entity. However, it is uncertain whether:

- one single government must hold at least 50% of the shares or different governments may cumulatively hold 50% of the shares; and
- the shares have to be held directly or may be held indirectly through holdings or subsidiaries.

Despite this uncertainty, it is reasonable to assume that it would be sufficient for shares to be held indirectly and for different governments cumulatively to hold at least 50% in the entity.

Further, Resolution 13/2016 does not determine whether the merger control provisions will apply if the merger involves a government-owned entity but the participation of the government or governments in the merged entity is less than 50%.

Status of committee

Pursuant to Federal Law 4/2012, the committee was to be formed by way of a cabinet resolution. While the relevant cabinet resolution has not yet been made publicly available, the committee has been appointed and convened at least four times. To date, it is unclear whether the committee is fully operational and whether it is accepting applications for exemptions or pre-approvals. Further, the fees that the committee may charge for processing applications have not been determined by law or regulation.

Moreover, it remains to be seen whether the committee will make its decisions public or issue them only to the concerned parties. In some jurisdictions, decisions on merger control are published to aid transparency and afford interested parties and their advisers a better understanding of how the competent authorities interpret and apply the relevant laws. Considering the lack of publication of administrative practices in the United Arab Emirates, the committee is unlikely to publish its decisions.

Comment

Despite some clarifications having been provided by Resolutions 13/2016 and 22/2016, considerable ambiguity remains in the interpretation and application of the UAE competition law regime. Therefore, it is difficult for the parties to a transaction to determine whether the envisaged transaction will require committee approval. To ensure that they do not violate the merger regulations, parties should consider involving the committee at an early stage if they suspect that the envisaged transaction may require approval.

Further, the parties to a transaction will also have to consider the possibility of the merger control provisions applying to their transaction in the transaction agreements. In particular, they will be well advised to make committee approval a condition precedent in the transaction.

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