GETTING THE DEAL THROUGH

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GLOBAL COMPETITION REVIEW

Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

2014

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Egypt

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The overarching competition regulation is promulgated by virtue of Law No. 3 of 2005 (the Competition Law). The Competition Law has since been amended on two occasions: in 2008 and in 2010. The Egyptian Competition Authority (ECA) is entrusted with the task of overseeing the implementation of the Competition Law and is therefore considered as the primary designated regulator of competition in Egypt. Although the ECA administratively follows the Ministry of Trade and Industry, it is actually managed by a board of directors constituted by the minister himself, which includes representatives of various ministries, independent experts and representatives of trade unions and industry associations.

The Competition Law is not the only competition-related regulation in Egypt, nor is the ECA the only regulator. Sectors such as the telecommunications sector and the banking sector are explicitly excluded from the scope of application of the Competition Law. For telecommunications, the National Telecommunications Regulatory Authority (NTRA) applies articles 4 and 24 of Telecommunications Law No. 10 of 2003 to regulate competition and to ensure economic freedom in the sector. In fact, the NTRA controls mergers indirectly through reviewing the licence requirements of any given operator. Although there are no particular provisions in the Telecommunications Law regarding merger control, the NTRA usually assesses and evaluates any merger on the basis of its possible impact on competition. In the absence of specific penalties, the NTRA may simply block any merger by revoking or threatening to revoke the merging entities' licence.

In the banking sector, the Central Bank of Egypt (CBE) acts as the sole regulator of competition. Basing itself on article 12 of the Banking Law No. 101 of 2004, the CBE has the right to review all applications to own more than a 10 per cent stake in a bank or any other percentage that would enable the acquirer to exert control over the management and the decision-making within said bank. The CBE retains all discretion to evaluate said application technically, financially and from a competition impact point of view. According to article 12, applications to own more than 10 per cent (or any controlling stake) must be presented to the CBE along with a long list of required documents (strategic plans, financial statements of the acquirer, credentials in the banking business, etc) 60 days prior to the date on which the acquisition is planned to take place. Historically, the CBE has demonstrated a high level of selectivity by imposing strict qualitative requirements before approving any merger or acquisition in the banking sector.

Finally, it is important to note that public utilities are excluded from the scope of application of the Competition Law either automatically by law if they are managed by a public sector entity or by request if they are managed by private sector companies. If a private sector company runs a public utility, it should file an application with the ECA requesting its exclusion from the application of the Competition Law and the ECA may grant this exclusion on the grounds of public interest alone.

2 What kinds of mergers are caught?

According to article 19-2 of the Competition Law introduced by Law No. 190 of 2008 as an amendment to Law No. 3 of 2005, each party having an annual turnover of more than E£100 million that acquires assets, proprietary rights, usufruct, shares or sets up a union, a merger an amalgamation or a joint management transaction must notify the ECA within 30 days after its date of completion. The scope and extent of applicability of the merger notification requirement is quite vast and may include a very wide range of transactions undertaken or contemplated by medium-sized and large businesses. Although the notification is simple and not disruptive to business, it remains a mandatory endeavour that requires a certain level of disclosure on a probably recurrent basis for active companies on the Egyptian market even if those companies are not geographically located within Egypt – the principle of extraterritoriality of the Egyptian Competition Law. No approval from the ECA is so far required, but this may change in the near future as a new law is expected to be passed shortly.

3 What types of joint ventures are caught?

See question 2.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

From a competition protection perspective, only the Banking Law specifies a threshold of acquired stake above which the approval of the regulator is required. There are, however, in the Capital Market Law No. 95 of 1992 some provisions that oblige the acquirer of a stake exceeding 33 per cent of any listed company to launch a mandatory tender offer to acquire up to 100 per cent of the shares of said company. The requirement is intended for transparency purposes and to provide minority shareholders with an equal opportunity to cash in on their investments at the same level of economic benefit available to majority shareholders. The Capital Market Authority regulates the tender offer process and must grant its approval before any such process is launched. The tender offer approval requirements are listed in article 334 et seq of the Capital Market Law and the full application must be presented to the Capital Market Authority, which must examine and approve, reject or modify the application within two working days.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

As mentioned in question 2, the threshold for the required notification of the merger is the size of the annual turnover of the acquirer or of one of the merging entities irrespective of their nationality and the geographical location of their respective facilities. According to article 19 of the Competition Law, when the annual turnover of the acquirer or merging entity exceeds E£100 million the notification becomes mandatory and failure to make said notification is a criminal offence that is punishable by a fine ranging between E£10,000 and E£100,000 that can be doubled in case of a repeated offence.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification is mandatory by law. It should be served within 30 days of completion. No approval from the ECA is to be sought. At this stage, the notification is mainly intended for informative reasons and to allow the ECA to monitor the market through extensive data gathering; therefore no exceptions are, at this stage, authorised or accepted.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Based on the principle of extraterritoriality of the Competition Law, foreign-to-foreign transactions may fall within the scope of application of the Law if they are considered to be having an impact on the Egyptian market. The wording of the Law is quite far-reaching and general with respect to the notification requirement. It does not state that the annual turnover that triggers the notification requirement must be generated in Egypt; it also does not state otherwise. In practice, the ECA has welcomed notifications in both cases without commenting on the necessity of said notification as the cases differ in this regard. It is advisable to make the notification anyway, since the cost is truly minimal in view of the theoretical risk of being criminally prosecuted and fined for failing to follow a fairly simple notification procedure. Furthermore, the post-closing aspect of the notification makes the sensitive issue of confidentiality of the notified information less relevant for most transactions, although regardless, the ECA and its employees are strictly bound by a legal non-disclosure obligation.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The acquisition of public owned assets or shares in public sector companies by foreign investors (privatisation) is subject to the approval of the Cabinet of Ministers and is usually granted after a thorough set of procedures. The acquisition of assets is generally subject to the Public Tendering Law and may not be authorised through a direct order without a duly publicised bidding process unless in cases where public interest requires so. In practice and especially since the revolution of January 2011, no direct sale has been undertaken by the public sector under any circumstances and this for fear of criminal prosecution for corruption and usurpation of public funds. Mergers between public sector companies and private sector companies are not usually authorised, although joint ventures have occurred in the past most recently in the form of PPP projects.

As mentioned above, mergers and acquisitions in special fields of activity such as telecommunications, banking, public utilities and petroleum are excluded from the scope of application of article 19 of the Competition Law and are regulated by their respective regulations, which usually grant the widest discretion to the various specific regulators to accept or refuse authorisation of any particular transaction in those particular fields.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notifications must be filed within 30 days from closing (post-closing obligation). Failure to make the notification will result in the acquirer or the merging entity being subject to criminal prosecution and they may be fined as a consequence. The prosecution comes in three stages: (i) the ECA notices the infringement and refers the matter to the minister of trade and industry who grants the approval to proceed with the criminal case; (ii) the matter is referred to the public prosecutor who reinvestigates the case and decides whether or not to take it to court; and (iii) the economic court rules on the case and may impose a fine on the infringing party. The accused may settle out of court by agreeing with the ECA on the amount of fine to be paid subject to the authorisation of the minister of trade and industry. To date, and since the promulgation of Law No. 190 of 2008 imposing said fine, no high-profile case has been reported where a party has been fined for failing to comply with the notification obligation. Therefore, to date, the risk of prosecution for breach of the notification obligation remains largely theoretical.

10 Who is responsible for filing and are filing fees required?

The acquirer of assets or shares and the merging entity of a merger process are required to make the notification. In case of joint management or joint venture, any of the parties to the transaction, especially those with an annual turnover exceeding E£100 million are obliged to make the filing. In the latter case, they may opt to undertake the process jointly or each on their own.

No filing fees are required but lawyers' services may be needed to follow up with the ECA and to make sure that the notification process has been duly completed to the satisfaction of the ECA after fulfilling all mandatory requirements and providing all requested information and documents. Partial or incomplete notification may not avert the risk of prosecution.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The notification obligation is post-closing and therefore there is no suspending effect on the transaction itself.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Not applicable. When approvals of special regulators are required, such as the approval of the NTRA or the CBE, the parties attempting to execute the transaction before obtaining the mentioned approvals would be blocked at the share transfer level, which must be undertaken through the stock exchange even if the concerned target is not publicly listed, or they may risk losing their operational licences.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same fines apply to foreign-to-foreign transactions as to local transactions within the scope of the Competition Law.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable.

15 Are there any special merger control rules applicable to public takeover bids?

Other than the requirements stipulated for under the Capital Market Law which are intended to guarantee transparency and equal opportunity for both bidders and sellers, the standard notification requirements apply as far as the ECA are concerned. The approval of the Capital Market Law before the launching of the tender offer is mandatory and no public takeover bid may be launched without the terms of takeovers and all necessary disclosures are approved by the Capital Market Authority and published as part of the invitation to sell shares to the offering buyer.

16 What is the level of detail required in the preparation of a filing?

According to article 44 of the Executive Regulations of the Law No. 3 for 2005, the notification must include the following information:

- the name of the notifying party and their related parties, their respective nationalities, the addresses of their headquarters and their main places of business;
- the details of the transaction along with its date and the legal position it creates;
- the licences and approvals obtained from other regulators; and
- all supporting documents.

17 What is the timetable for clearance and can it be speeded up?

There is no time limit in the law itself but the notification process typically takes up to one week between the date the notification is filed and the date on which the ECA confirms receipt of said notification if no further documents or information are required.

18 What are the typical steps and different phases of the investigation?

If it comes to the knowledge of the ECA, either independently or through a third party's complaint, that a transaction has occurred but not notified in accordance with the Competition Law, the ECA usually establishes this occurrence through various means: media reports, supporting documents, testimonies, inquiries with the relevant authorities, etc. Then the ECA would notify the concerned parties that they are being investigated for breach of article 19 of the Law. The ECA would then obtain the approval of the minister of trade and industry to initiate a criminal procedure against the infringing party. Once the minster's clearance is obtained, the file would be sent to the public prosecutor's office, which would confirm the infringement and would refer the matter to the competent court.

Substantive assessment

19 What is the substantive test for clearance?

Not applicable.

20 Is there a special substantive test for joint ventures?

Not applicable.

21 What are the 'theories of harm' that the authorities will investigate?

Not applicable.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The industrial policy, the public interest, the national security, economic efficiencies, the user/consumer interest and the protection of minority shareholders are all factors considered when clearance and pre-approval are needed in specific sectors such as telecommunications and banking, as previously stated. Other than in those cases, those factors are of consequence from a strict competition law perspective since the approval and the clearance of the ECA is not required nor granted.

23 To what extent does the authority take into account economic efficiencies in the review process?

See question 22.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Not applicable except in certain fields of industry as discussed above. The NTRA and CBE may block the execution of the transaction in the cases where their written authorisation is required to proceed with said execution.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Not applicable. See question 24.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Not applicable. See question 24.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable. See question 24. In the special fields of industry, foreign-to-foreign transactions rarely come to the attention of the regulators since the laws regulating those fields are strictly territorial by essence. However, if the regulators conclude that a foreign-to-foreign transaction would fundamentally affect the strategic ownership and management of the locally based entities subject to their jurisdiction, no action would be directly taken against the foreign entity but the operating licences of the local entities would be revoked or suspended for reasons related to transparency, public interest or national security, for example.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Not applicable.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Not applicable.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Commercially sensitive information is not usually required for the purpose of the notification. Generally, the ECA seems to be reasonable in addressing the notifying parties' concerns regarding sensitive commercial information. Furthermore, according to article 16 of the Competition Law, the ECA and all its employees are bound with a strict confidentiality obligation. Any ECA employee having access to commercial information of a given entity is also prohibited from

working for a competitor of the concerned party for a period of two years from the date said employee gained access to the confidential information.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Generally, yes. To the author's knowledge there are a few protocols of cooperation that have been signed with various regulators in other jurisdictions, the details of which have not been publicised or made publicly available.

Judicial review

32 What are the opportunities for appeal or judicial review?

Since the sanctions are not administrative in nature and may only be imposed through a criminal court order, the means of appeal are those generally available for defendants in criminal law cases. The deadline for filing an appeal of a first degree court ruling is 10 days from the date of the issuance of said ruling.

33 What is the usual time frame for appeal or judicial review?

There is no specific time frame but in criminal law matters procedures are fairly expeditious. Between the first-instance court and final appeal the usual time frame is around 12 to 16 months.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

None noted so far.

35 What are the current enforcement concerns of the authorities?

In the absence of a merger approval requirement, the ECA does not seem very keen on prosecuting entities for breach of the notification obligation. This, however, would differ when it comes to high-profile transactions or transactions with an obvious and remarkable impact on the Egyptian market. The investigation and prosecution of non-major transactions, especially those that are foreign-to-foreign seem to be low on the ECA's priority list as evidenced by the fact that no high-profile procedures have been initiated since the issuance of the Law in 2005. This can be explained by the fact that entities have been encouraged by the simple notification procedure and have been avoiding the risk and exposure of not complying with the Law in this regard. It may also be explained by the limited resources of the ECA, which would rather be utilised in investigating the more serious offences of illicit cartels, monopolies and abuses of dominance. This would certainly have to change once, as expected, a pre-merger clearance process is set in place by virtue of an anticipated amendment of the Law.

36 Are there current proposals to change the legislation?

There have recently been a few suggestions to amend the Competition Law so as to increase the limit of the fines, to put in place a full leniency programme and to provide the ECA with a higher level of autonomy vis-à-vis the executive branch of government. Since the ousting of the Islamist President Mohamed Morsi in early July and the earlier dissolution of the parliament by the constitutional court due to fundamental constitutional irregularities with the electoral law, the author does not anticipate any legislative activity on the competition law front before the upcoming parliamentary elections planned for early 2014. At the time of writing, a liberal left-leaning interim prime minister has been sworn into office with his policy priorities set on improving the deteriorating economy. It is yet to be seen whether adopting a merger control policy would fall within the new cabinet's strategic priorities during its six-month mandate.

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