

Merger control reform

Abdus Samad of Afridi & Angell examines the key provisions of the Competition Law and their effect on M&A transactions in the UAE.

For some years now, the UAE has had in place legislation to address anti-competitive behaviour and to regulate competition more generally. The primary piece of legislation on this matter is Federal Law 4 of 2012 on the regulation of competition (the **Competition Law**).

The government body in charge of regulating competition and for accepting notifications, applications and complaints made pursuant to the Competition Law is the federal Ministry of Economy. The Ministry of Economy will also deal with requests for clearance in connection with a notifiable merger or acquisition. Businesses operating in or doing business with the UAE should therefore consider whether transactions they are about to undertake

are notifiable pursuant to the Competition Law.

The first step in considering issues of competition is to understand what the “market” is. There is no official guidance available as to how the market(s) concerned should be defined. For assistance, principles of EU competition law can be considered (though these principles are obviously not of any authoritative value under UAE law).

Broadly, the EU Commission has provided the following guidance on market definition¹:

- » The relevant market combines the product market and the geographic market, defined as follows:
 - a relevant product market comprises all those products and/or services which are regarded as interchangeable or



substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;

- a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

A merger clearance request is triggered (and must be filed) in cases where there is an “economic concentration”, unless an exemption applies.

The concept of an economic concentration is defined as follows in the Competition Law:

“any act resulting in a total or partial transfer (merger or acquisition) of a property, usufruct rights, rights, stocks, shares or obligations from an establishment to another, empowering the establishment or a group of establishments to directly or indirectly control another establishment or another group of establishments.”

The requirement to submit a merger clearance request is accordingly triggered in all cases where there is an economic concentration, irrespective of whether the parties to the concentration have a formal presence in the United Arab Emirates. The test is an effects based test (hence why foreign-to-foreign transactions must also be notified where they otherwise qualify for a filing). This means that to the extent the parties concerned and the proposed transaction would have an effect on competition in the United Arab Emirates, it is irrelevant whether they have a formal presence in the United Arab Emirates. In addition, to trigger a filing request, an economic concentration must satisfy the market share thresholds prescribed by law.

Cabinet Resolution 13 of 2016 (the Ratios Resolution) further stipulates that clearance is required to be sought where the overall market share of the parties to the transaction exceeds 40 per cent of the relevant market.

For the purposes of this analysis, it is not relevant how this threshold is met. In other words, it is not relevant whether the parties to an economic concentration together or separately meet the threshold, so long as together (i.e., after the concentration is complete), they would have a market share of at least 40 per cent in the relevant market.

As mentioned above, there are a number of exemptions from the obligation to file

a notification for an otherwise notifiable concentration. These are listed below.

SECTOR-SPECIFIC EXEMPTIONS

The Competition Law contains an exemption for certain sectors, as follows:

- » Telecommunications;
- » Financial sector;
- » Cultural activities (readable, audible and visual);
- » Oil and gas;
- » Production and delivery of pharmaceutical products;
- » Postal services including the express mail service;
- » Activities relating to production, distribution and transportation of electricity and water;
- » Activities on the treatment of sewerage, garbage disposal, hygiene and the like, in addition to supportive environmental services thereof;
- » Sectors of land, marine or air transport, railway transport and services related thereto.

In addition, there is a carve-out for entities that are owned by the Federal or an Emirate level government and for businesses that qualify as “small and medium sized” pursuant to Federal Cabinet Resolution 22 of 2016.

In conclusion, the UAE merger control regime is now in place and operational. Businesses undertaking transactions that concern the UAE market would be well-advised to assess any filing requirements triggered by the Competition Law. 

1. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l26073&from=EN>



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