

UAE Merger Control Update: Behold the Threshold(s)

Merger control regime now effective, as per UAE Cabinet resolution setting filing thresholds.

The Federal Cabinet of the United Arab Emirates has recently issued Cabinet Resolution No. 13 of 2016 (the Cabinet Resolution), which sets out the percentages and thresholds related to the implementation of Federal Law No. 4 of 2012 on the Regulation of Competition (the UAE Competition Law), and its implementing regulations which came into force on 27 October 2014 (the UAE Competition Law Implementing Regulations).

Background

The UAE Competition Law came into force on 23 February 2013, (please see previous Latham *Client Alerts* for discussion of the [passage of the law](#) and its [coming into force](#)). The most significant implication of the UAE Competition Law is the requirement that certain merger transactions involving the UAE will now be subject to the prior approval of the Ministry of Economy. The UAE Competition Law also implemented certain prohibitions on agreements restricting competition and on abuses of dominant market positions. The UAE Competition Law contemplated the subsequent promulgation of implementing regulations and cabinet resolutions defining the limits of economic concentration and the threshold percentages that would trigger several conditions, including: (1) giving rise to merger control filing obligations with the Ministry of Economy, under Article 9 of the UAE Competition Law (subject to certain other threshold matters); (2) permitting a restrictive agreement under the “weak impact” exemption from Article 5 of the UAE Competition Law; or (3) deeming a company’s market position to be a “Dominant Position” under Article 6 of the UAE Competition Law.

On 27 October 2014, the UAE Competition Law Implementing Regulations came into force and provided some clarification on merger control filing requirements and the review process. The Cabinet Resolution addresses points (1) to (3) above, in addition to other matters discussed below.

The Cabinet Resolution

Merger Control

The Competition Law provides that an acquirer must notify the Ministry of Economy in writing at least 30 days prior to the completion of a transaction resulting in economic concentration exceeding a particular threshold and which may affect competition in the Relevant Market, particularly a transaction which could create or promote a dominant position.

The regime suspends mergers that constitute economic concentrations subject to the notification requirement until either: (a) a ministerial resolution is issued clearing the transaction; or (b) the expiration

of 90 days from the date of submission of the notification (this 90-day period may be extended by an additional 45 days, for example, if the Ministry of Economy has requested further information).

The Cabinet Resolution has now set the concentration threshold at 40% of overall transactions in the “Relevant Market,” with the Relevant Market defined in the same way it is defined in the UAE Competition Law.

The Ministry of Economy currently stands ready to accept merger control filings as contemplated under the Competition Law.

Restrictive Agreements of Weak Impact

Article 5 of the UAE Competition Law prohibits agreements between establishments that aim to restrict competition excessively. Section 3 of Article 5 provides a limited exemption from this prohibition for “weak agreements” where the overall market share of the contracting parties does not exceed a particular threshold.

The Cabinet Resolution has now set the weak agreements threshold at 10% of the overall transactions in the Relevant Market. Notably, however, the weak agreements exemption does not apply to agreements that aim to restrict competition through either: (1) price manipulation, as set forth in Section 1(a) of Article 5: or (2) the division of markets or allocation of customers based on geographical area, distribution centres, customer type, seasons or periods of time, or any other basis that may adversely affect the competition, as set forth in Section 2(a) of Article 5.

The approach to “weak agreements” appears to draw from the EU Competition Law treatment of *de minimis* agreements.

Dominant Position

Article 6 of the UAE Competition Law prohibits the abuse of a dominant position in a market to restrict competition. Under the UAE Competition Law, actions that can constitute an abuse of dominance include, but are not limited to:

- Imposing resale price terms
- Predatory pricing
- Discriminatory pricing
- Refusing to deal
- Compelling others not to deal
- Restricting supply
- Conditioning the sale of a good or service on the purchase of another good or service
- Disseminating false information about products or prices
- Artificially increasing or decreasing quantities in a market

Neither the UAE Competition Law nor the UAE Competition Law Implementing Regulations had specified a market threshold that would indicate dominance triggering the restrictions of Article 6. The Cabinet Resolution has now set this threshold market share at 40% of the overall transactions in the Relevant Market.

A number of jurisdictions around the world follow the approach of specifying a threshold for dominance. Although under EU Competition Law there is no prescribed threshold and dominance can occur with market shares of less than 40% in some contexts.

Government-Controlled Establishments Exemption

Clause 2 of Article 4 of the UAE Competition Law provides an exemption from the entirety of the UAE Competition Law for establishments owned or controlled by the Federal Government or a local government of an Emirate, and provides that the Cabinet shall set forth a specific definition of “control” under this exemption. The Cabinet Resolution has now clarified the scope of this exemption by providing that it applies to all acts carried out by establishments under the control of the Federal Government or local government of an Emirate if: either (a) an establishment is fully owned by the Federal Government or a local government of an Emirate, or (b) an establishment is not less than 50% owned by the Federal Government or a local government of an Emirate.

Publication and Enforcement

The Cabinet Resolution came into force on 1 August 2016 following its publication in the July 2016 Official Gazette.

Lingering Questions

While the Cabinet Resolution provides much needed clarity with respect to the matters discussed above, the following questions still remain unanswered:

- No clarity has been provided on what constitutes a small and medium sized establishment which would be exempt from the UAE Competition Law under Article 4.
- In relation to a merger control filing, there appears to be a requirement for an unsigned draft sale and purchase agreement to be submitted with an application at least 30 days prior to the date of executing the sale and purchase agreement, rather than a signed sale and purchase agreement with a merger control clearance condition. We understand that once a filing is made, the Ministry of Economy will issue a certificate of initial submission which entitles the parties to execute the sale and purchase agreement with a merger control clearance condition.
- The interaction is unclear between the 30-day period referred to above and the 90-day period that the Minister of Economy has to make a decision (extendable by a further 45 days) on a filing for merger control clearance.

We expect that these and other nuances of the UAE merger control regime will be clarified on a case-by-case basis and that standardized market practices addressing such nuances will emerge over time and with the repeated application of the UAE Competition Law to transactions in the UAE’s increasingly active mergers and acquisitions marketplace.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Chris Lester

chris.lester@lw.com
+971.4.704.6369
Dubai

John Colahan

john.colahan@lw.com
+44.20.7710.1015
London

Eyad Latif

eyad.latif@lw.com
+971.4.704.6321
Dubai

Philipp Gnatzy

philipp.gnatzy@lw.com
+44.20.7710.5847
London

Muhannad AlNajjab

muhannad.alnajjab@lw.com
+971.4.704.6423
Dubai

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