

Insights on the new Egyptian merger control regime

On December 29th 2022, Egypt amended its Competition Law No. 3 of 2005 by issuing Law No. 175 of 2022 (together the “**Law**”), with the main purpose of overhauling the post-closing non-suspensory notification regime and introducing a mandatory and suspensory pre-merger control regime. The Law provides the Egyptian Competition Authority (the “**ECA**”), for the first time, with the competency and power to assess economic concentrations that meet certain conditions to ascertain their impact on competition in Egypt. The ECA can therefore upon its review approve (conditionally or unconditionally) or reject a transaction.

For more details about the highlights of the amendments to the Law, please refer to our client alert [here](#).

However, the ECA announced in a press release date January 4th, 2023, that the implementation of the new regime is delayed pending the issuance of amendments to the executive regulations of the Law (the “**ER**”). The business and the legal community had to wait for 18 months before the ER were finally unveiled through the issuance and publication of Prime Minister’s decree No. 1120/2014 (“**Decree**”) on April 7th 2024.

The main purpose of the Decree is to address details concerning the new merger review regime and procedures pertaining thereto, which the Law deferred to the ER.

Key issues addressed by the Decree include, inter alia, clarifications on the calculation of the monetary threshold, material influence and harm tests, inspection fee assessment mechanism and required documents. The Decree also provides for the criteria for approving economic concentrations in certain circumstances such as economic efficiency or national security considerations. It also reaffirms the power of the ECA to decide to review transactions not meeting the monetary thresholds if the ECA suspects it will limit, hinder, or harm competition, within 1 year from the date of execution of the economic concentration and sets out factors to guide the ECA determination in this regard.

So, what are the main takeaways from the Decree and the main features of the new pre-merger review regime?

1. Date of implementation of the pre-merger review regime

The Decree expressly provides for a date of implementation as of 1st of June 2024. It appears that the Government took on board comments from the legal and business community requesting a grace period is provided for in the ER, since the Law itself did not provide for one. As such, transactions closing by 31st of May 2024 will not be caught by the pre-merger review regime and should proceed with closing without having to notify the ECA of the transaction.

2. Post-closing notification regime

The post-closing non-suspensory notification regime that used to exist under the Law has been abolished since 30 December 2022, when amendments to the Law introducing the pre-closing merger review regime were enacted. Provisions of the Law and the ER pertaining to the pre-merger review regime are repealed. This means that transactions closing before the 1st of June 2024 are also not subject to the post-closing notification regime.

3. Notifiable transactions & calculation of turnover

Under the Law and the ER, economic concentrations satisfying certain monetary and control/material influence requirements will need to be notified to the ECA before closing, to allow the ECA to assess its impact on competition in Egypt and determine whether to allow or block such a transaction.

Economic concentrations leading to a change in control or material influence (both of which are defined under the Law), that also meet any of the monetary thresholds (discussed below) must be notified pre-closing to the ECA and shall be subject to the ECA assessment process. Please refer to section 9 of this Alert, for the time trigger for transaction falling under the competency of the Egyptian Financial Regulatory Authority (FRA). Banking sector transactions are excluded from the scope of the Law.

Clarifications on “material influence”

It further provides for instance when such material influence will be considered to exist, **as follows:**

- In case of leading to an ownership of 25% or more of the total voting rights, shares or equity shares of another person, or
- In case of leading an ownership of less than 25% of the total voting rights, shares or equity shares of another person, if accompanied by other factors that influence the policies or commercial goals of a person, especially in case of: (a) the percentage of the voting right that enables influencing the policy and commercial goals of the person, (b) provisions in any agreement granting the acquirer privileges such as special voting rights or veto rights, (c) the presence of shareholders or portion holders common between the acquirer and the target, and/or (d) having one or more representative of the acquirer in the board of directors of the target.

Clarifications on calculating the monetary threshold

If the aggregate annual turnover or value of assets, whichever is higher, of the parties in Egypt exceeds EGP 900 million (app. USD 18.9 million) and provided at least two of the parties each drive a turnover in Egypt more than EGP 200 million (app. USD 4.2 million), or

if the aggregate annual global turnover or value of assets, whichever is higher, of the parties exceeds EGP 7.5 billion (app. USD 158 million) and provided that at least one of the parties to the transaction drives turnover in Egypt more than EGP 200 million (app. USD 4.2 million).

The Decree clarifies the method of calculating the combined annual turnover/value of assets by providing that it will be on the basis of the annual turnover and value of assets of the parties concerned with the concentration, based on the last audited financial year.

The calculations will exclude the same of the seller if the seller is exiting the entity subject of the economic concentration.

The exchange rate as announced by the Central Bank on the last day of the financial year of the concerned parties shall be the basis for foreign currency conversions needed to calculate the turnover/value of assets for the purpose of assessing if the monetary threshold is met.

The Decree further defines persons concerned with the economic concentration as “... natural persons, legal entities, economic entities, unions, associations, financial groups, and collectives of persons, regardless of the method of their establishment, participating in the economic concentration, and their associated parties”.

Clarifications on the test for assessing harm to competition

The Decree provides for factors the ECA will consider when assessing an economic concentration, which seem to be provided in an exclusive manner, as follows:

- The structure of the market or the concerned markets, the level of actual or probable competition in Egypt and outside Egypt if it impacts its markets.
- The market status of the parties concerned with the economic concentration including their economic status, their financial capabilities compared to the current and probable investments in the market.
- Substitutions available to the suppliers, customers and consumers and their ability to access production resources or concerned markets, and the pattern of supplying concerned products and their consumption.
- Barriers to entry and expansion in the concerned markets.
- The potential effect of the economic concentration on the consumer, or the existing or potential investments.
- The impact of economic concentration on innovation and development.
- Potential negative effect on the freedom to compete.

Excluded transactions

The Decree reiterates- as provided under the Law- that corporate restructuring not leading to a change of control and temporary acquisition of securities, will not be subject to the notification obligation and the ECA merger control regime.

4. Party bearing the obligation to notify

While the Law did not provide certainty as to the party responsible for notifying an economic concentration to the ECA with the clear presumption being that it is the acquirer, the Decree provides a much-needed clarity in this regard and determines the notifying party depending on the type of the concerned transaction, **as follows:**

1. The acquiring person or persons in acquisitions leading to control or material influence, individually or collectively, over one or more persons.
2. Persons involved in a merger.
3. Persons acquiring control through the acquisition of a person for the purpose of establishing a joint venture.
4. Persons responsible for establishing a joint venture.

5. Notification form and supporting documents

The ER does not include the new notification form, but it lists the required documents and data ask list. The ECA will be publishing the new form and guidelines pertaining thereto within the coming few days to allow the business and legal community to get familiar with the new regime before the implementation date of 1st of June 2024.

In comparison to the previous documents and data ask list, the new list expectedly requires more information/documents.

We note especially the need for a power of attorney issued from the notifying company to the person handling the notification filing, in replacement of the simpler delegation letter that used to be sufficient under the repealed post-closing notification regime.

A notifying party is obliged to inform ECA in writing of any modification or change that occurs in the legal form of economic concentration during the examination period that is punishable by a fine ranging from EGP 50,000 to EGP 1 million (app. USD 1,050 to 21,050).

Documents are only accepted in Arabic or if in another language, must be accompanied by an Arabic translation. It is helpful that the majority of the ask list requires copies of documents rather than originals. It will be interesting to examine with the ECA if electronic submissions will be available now or in the future but the way the Decree is worded shows only physical submission is acceptable.

6. Notification fees and their assessment

The Law caps the filing fees at EGP 100,000 (app. USD 2,103) but deferred to the ER to determine the mechanism for determining such fees. The Decree therefore introduces a tiered notification fees scheme payable to the ECA, ranging from EGP 80,000 to EGP 100,00, depending on the realized annual aggregate turnover/value of assets of the parties concerned with the economic concentration under review.

In case more than one category is applicable, the highest fee category will apply.

7. Publication of the notified economic concentration, publication fees and third-party observations.

The ECA will publish a statement regarding the transaction subject of the economic concentration and a summary thereof in a widely circulated daily newspaper or on the official website of the ECA, immediately upon receiving a complete notification file. Third parties will be able to submit observations on the economic concentration to the ECA during this period. The ECA's board may decide to forgo the publication on public interest grounds. Publication fees will be borne by the notifying party subject to guidelines to be issued by the ECA.

8. ECA review timelines

The ECA review timelines for Phase I and Phase II are set under the Law. The review period for Phase I is 30 working days, with an additional 15 working days in case a commitment offer, while Phase II is 30 working days with an additional 15 days in case of a commitment offer. In both cases, if the ECA does not respond by the end of such a period, parties may proceed with closing as its approval will be deemed.

The Decree provides some clarity in this regard, but we hope further clarity is provided in the ECA forthcoming guidelines and consultations, particularly with regards to the criteria for considering a filing to be complete and its impact on the ECA adhering to the review timelines prescribed by the Law and the Decree.

9. Transactions concerning FRA activities

For FRA related transactions, as per the Law, the ECA has a 30-working days timeline, from the date of the ECA receiving the complete file from the FRA, to provide the FRA with the ECA's advisory opinion. However, the Law and the Decree do not provide for the timeline for the FRA's own review and decision process, given it has the exclusive jurisdiction to clear economic concentrations that pertain to the non-banking financial and insurance sector.

The Decree provides that the same set of required documents and data set out in the Decree will be required in case of notifying the FRA with an economic concentration that falls under its competency. However, it is not clear if the FRA will end up developing its own notification form and whether the publication provisions and fees pertaining thereto will also apply.

10. Penalties

Penalty for failure to notify the ECA before consummating notifiable transactions is determined by the Law to be a fine of not less than 1% and not exceeding 10% of the total annual turnover, assets, or value of the transaction for its parties, whichever is higher, according to the latest approved combined financial statements of the transaction parties.

If such a percentage cannot be calculated, the penalty shall be a fine of not less than EGP 30 million (app. USD 631,000) and not exceeding EGP 500 million (app. USD 10.5 million).

Key watch outs

- The merger review regime will apply to qualifying transactions as of 1st of June 2024.
- It is expected that the ECA will be publishing the new notification form and guidelines within the coming few days, as we understand they have been prepared beforehand and ready for dissemination right after the issuance of the ER. The ECA is also expected to utilize the period until 1st of June to familiarize the business and legal community with the new regime through a series of consultations and information sessions.
- Albeit not dealt with expressly in the Law or the Decree, practically, the ECA has broad discretion in considering a filing to be incomplete, therefore effectively extending the review period. Although we expect the ECA will show an extent of flexibility by accepting an incomplete submission and may even commence its review process, pending the submission of the remaining documents, it is unlikely the ECA will officially consider the review clock to have started or issue a decision before ensuring a complete submission was received. Clients are especially advised to consider the length of time needed to procure certified documents from outside Egypt such as a power of attorney as well as for translating documents to Arabic.
- For economic concentrations falling under the competency of the Financial regulatory Authority (FRA), much clarity is still needed on the part of the FRA as well as the ECA to better understand the practicalities of the filing and review procedures. It clear that for such transactions, the notification is triggered before signing. It is however, not clear if the FRA is subject to any timeframes for its own review and decision process (in addition to the FRA's consultation period with the ECA), given it is the recipient of the submission and the competent authority to ultimately decide on an economic concertation from a competition law perspective.
- We look forward to also getting some clarity from the ECA, through the consultations with regards to transactions that will require a mandatory purchase offer.

We love talking about competition – Our Competition team welcomes your questions



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