Kluwer Competition Law Blog

Unveiling Flaws of Egypt's Vaunted New Merger Control Regime

Eslam Soliman (Max Planck Foundation for International Peace and the Rule of Law) · Monday, June 10th, 2024

On 4th of April 2024, Egypt's Prime Minister issued a decree by which the Executive Regulations of Competition Law No. (3) of 2005 was amended to put in detail the changes that had been made to the said Law introducing Egypt's first pre-merger control regime. This blog post sheds light on the role of the International Monetary Fund ("IMF") in reviving the inactive legislative amendments on the merger control regime, then three major flaws of such a regime are analyzed seeking further discussions on the fronts of policy-makers, practitioners, and academia. First, the fragmented merger control between the Egyptian Competition Authority ("ECA") and sectoral regulators is presented; Second, (un)constitutionality concerns arising from the new merger control regime and its legal mandates are analyzed; And third is the institutional challenges facing the implementation of the new regime by the Financial Regulatory Authority ("FRA").

Egypt Promises the IMF to Enforce its Inactive Merger Control

While the legislative amendments on the merger control regime had been ratified in December 2022, turning these inactive rules into an enforceable system by promulgating the discussed decree only took place, seemingly, upon "structural reforms" pushes by the IMF to which Egypt's Central Bank Governor and Minister of Finance sent a letter, in March 2024, promising to issue the Executive Regulations "by end-April 2024." This premise is admittedly supported by the scholarship arguing that the whole Egyptian competition regime is the outcome of "globalized agencification". Equally important is that the said decree defined 1st of June 2024 as the date of enforcement, a rule perceived by practitioners to have been set in order to accommodate the private sector's calls for "a grace period".

ECA v. Sectoral Regulators: Failed Advocacy for the Best Practice

ECA v. CBE

At the level of the reviewing process, the new merger control regime is believed to be fragmented between the ECA and other sectoral regulators, namely, the Central Bank of Egypt ("CBE") and

the FRA (the regulator of non-banking financial services). This power division over Mergers and Acquisitions ("M&As") was fiercely opposed by the ECA, advocating for an exclusive power for the Authority. Back in 2020, when the draft of the then-new Central Bank Law was under discussion before the Economic Affairs Committee of the House of Representatives ("the House"), the ECA submitted a request during the hearings to omit Articles (221) and (222) from the draft. Such articles excluded the banking sector from the Competition Law and established a Special Unit in the CBE to investigate monopolistic and anti-competitive practices in the banking sector. In its memo to the House, the ECA emphasized the need for a uniform competition regime in Egypt under the meticulously detailed rules of the Competition Law and recommended, apparently at worst, to add a provision upon which the CBE shall cooperate with the ECA in enforcing competition rules in the banking sector. Strikingly, the House disregarded the whole content of the memo and submitted the final draft to the President for ratification, keeping both articles without incorporating the "cooperation" rule.

ECA v. FRA

Recurrently, the ECA went through the same struggle for an undivided power during the law-making process of the Law No. (175) of 2022, which amended the Competition Law to add the merger control regime, yet against the FRA this time. In July 2022, the deliberations over the draft law were announced to be adjourned to the next House's session that regularly convenes in October. Days before this announcement, the Chair of the House's Economic Affairs Committee stated to the press that the debates over such amendments were "deadlocked", due to reservations made by the FRA's representatives who asked to exclude the firms regulated by the FRA from the ECA's power to pre-control mergers, calling for equal treatment as the CBE. Again, the House's response resisted the ECA's stance and the Law was issued with Article (19)bis "E" of the Competition Law excluding the concentrations regulated by the FRA from the new merger control regime and limiting the role of the ECA in such concentrations to be only consulted by the FRA before clearance decisions.

ECA v. EDA

Apart from this dispersion of power over M&As engendered by the statutory-based exclusions for both the CBE and the FRA, Egypt's pharmaceutical regulator, established in 2019, known as the Egyptian Drug Authority ("EDA") had claimed, earlier in 2021, a clearance power over the disposal of assets of any pharma manufacturing facility, by virtue of EDA's Decision No. (99) of 2021. Such a role lacks any statutory mandate, given that Article (17) Section (Two) Para. (1) of the Law No. (151) of 2019 establishing the EDA made explicit reference to limit its power over the establishment of these facilities to only grant operating licenses. Notably, the EDA's decision underpinning this control refers to "reviewing any possible negative impact on the availability of the drug" before deciding such a clearance. Under this decision, any disposal of asset uncleared by the EDA shall be null and void. Of significance in this regard is to highlight that the preamble of such a decision did not refer to consulting the ECA regarding this sectoral rule, while Article (11) Para. (6) of the Competition Law, added by the Law No. (56) of 2014, instructs all governmental entities to confer with the ECA on all draft laws and regulations related to competition rules. Moreover, another ministerial decree by Egypt's Minister of Health dated back in 2014 grants the

Ministry of Health a similar power over the same transactions, besides those on private hospitals. While the Law No. (151) of 2019 exclusively mandates the EDA as the new regulator of the pharmaceutical sector replacing the Ministry of Health in all jurisdictions relevant to the production of drugs, the said ministerial decree seems to practically remain into force in the domain of private hospitals. On-ground practice proves, however, integrating the ECA in this decision-making cycle. In December 2022, the ECA reported to the OECD on "informal cooperation" with both the EDA and Ministry of Health, affirming that both request the ECA's opinion for all clearance decisions over economic concentrations in the health sector. Still, it is questionable whether the EDA and the Ministry of Health shall continue to exercise such a power after the new merger control regime enters into force.

Overlooking Global Experience

Whereas analogous debates emerged in other jurisdictions, comparative findings conclude that efficiency and legal certainty are more likely when competition authorities take the lead in the merger review supported by duly considered consultations and shared information with sectoral regulators, compared to the "concurrent model" or "parallel review" where competition authority focuses on maintaining the level playing field and sectoral regulators review sector-specific concerns. This preference against the multi-review model was justified by the risks of inconsistency resulting from duplication of reviews, prolonged review process, and increased regulatory costs. The Egyptian Legislature, as such, has not followed either model when the CBE was granted an exclusive power over banking sector's M&As without consultation mandate for the ECA and leading the merger review process in non-banking financial sector was shifted to the FRA upon consultation with the ECA.

(Un)constitutionality Concerns of the New Merger Regime

Criminal Proceedings v. Administrative Fines

In addition to the divergence from what could be perceived as a best practice, the Egyptian model is seriously believed to pose concerns of (un)constitutionality arising from the unparalleled approaches of public enforcement; that is, the sector in which undertakings infringe merger control rules defines the public enforcement mechanism. To illustrate, under Article (22)bis "D" of Competition Law, added by the new amendment, infringements of merger control regime are criminal acts punishable by fines imposed through criminal proceedings before a court of law. Conversely, as per Article (222) Para. (3) of the CBE Law, non-compliance with the CBE's decisions and orders on competition-related questions, including those on M&As, is confronted with *at least* one measure from a list of administrative sanctions, including financial sanctions (administrative fines), upon the sole discretion of the Board of Directors and without statutory rules on due process guarantees. Article (222) refers to the list of sanctions stipulated for in Article (144). In terms of due process, reference was made only to the principle of proportionality and Article (147) delegated the Board of Directors to set the rules on the calculation of administrative fines and the procedures related thereto. These measures are of course of administrative nature and therefore could be challenged before the 7th Circuit of the Administrative Judiciary Court at the Council of State. Still, no administrative appeal process was provided, nor were the rights of

confrontation and hearing granted in the statutory rules. Besides the Supreme Constitutional Court ("SCC") conservative precedent against administrative fines,[1] this arbitrary classification by the Legislature evokes unjustified form of unequal regulatory burden which rationally raises questions about the constitutional infirmity on a cross-sector level.

Poor Drafting of Public Enforcement on FRA-regulated sectors

Another constitutional concern relates to the public enforcement of the new merger rules on infringements by undertakings regulated by the FRA. Section (One) of the aforementioned Article (22)bis "D" of the Competition Law extends the application of criminal sanctions to FRA-regulated undertakings proceeding with M&As without submitting the notice required. Paradoxically, Article (19)bis "E" reads that: "Provisions of Articles…, and (22)bis "D'" shall not apply on economic concentrations in activities supervised and monitored by the Financial Regulatory Authority". This blatant incongruity of legal provisions falls far below the settled case law of the SCC on the required preciseness, clarity, and accuracy in the legislative drafting on criminalization and penalization.[2] Another practical and unavoidable implication of this distorted model is that such infringements can proceed to the court by the Public Prosecutor only upon the "greenlighting" request of the ECA, as per Article (21) of the Competition Law, as amended by the Law No. (56) of 2014, while in fact all documents related to the infringement investigated in such cases would be at the disposal of the FRA.

A Procedural Loophole Threatens the Whole Regime

From the perspective of constitutional framework of drafting regulations, there exists the question of whether the FRA was formally consulted about the draft of the Executive Regulations before its ratification, given that the preamble of the Prime Minister's decree on the Executive Regulations referred to consulting only the ECA. While the consultation drafting instruction is decided for the ECA upon a statutory provision, as previously explained, the FRA, under Article (215) of the Constitution, is among four listed Independent Authorities that shall be consulted for all draft laws and regulations introducing rules related to its mandate. Overlooking a constitutional procedural requirement, including consultations, has proven to be a key ground for unconstitutionality in the SCC's case law.[3]

Scrutinizing FRA's Role in Merger Review

Finally, major institutional challenges are facing the FRA for exercising its new mandate of merger review in the non-banking financial sector starting from 1st of June, 2024. Since this mandate was decided by the ratification of the new legislative amendments in December 2022, the FRA has not, to the date, set up any organizational structure to handle it. It remains unclear which department within this giant regulator the undertakings shall address regarding the review process of M&As. This also raises questions on whether the FRA has staff members with professional and academic background sufficient to perform this role. Conversely, the CBE established the Competition Protection Unit previously refereed to and staffed it with former ECA members, an approach that

was reported to the House by the ECA asking for raising its budget to address this situation. The institutional and human resources challenges facing the FRA are even more complicated since its Human Resources Regulations was struck down by the SCC in July 2023 and the FRA has been waiting for the House's response with a new law to regulate its internal employment rules ever since.[4]

While the ECA could have mitigated the capacity-building concern of the FRA staff by integrating them into its new long-term MoU with George Washington Competition Law Center, it seems that lack of institutional harmonization with the FRA hindered this move. This assumption could be validated with the fact that the FRA is not among the sectoral regulators with which the ECA has formal or informal mechanism of cooperation.

Another caveat on the FRA's role in merger reviews is that, to the date, no guidelines have been issued to explain any sector-specific requirements, procedures, or criteria the undertakings shall consider in the FRA-regulated M&As. Again, the CBE is offering a good practice against the FRA's unjustified silence. In 2nd of May 2024, the CBE published a detailed guideline on the rules of M&As in banking sector.

Conclusion

In brief, Egypt seemingly pushed by calls for structural reforms by the IMF has introduced to the market its first pre-merger control regime. Institutional rivalry has played a significant role in shaping this regime when the CBE was comprehensively exempted from the application of Competition Law rules and the FRA seized a quasi-exclusive power over M&As in the sectors it regulates. Such a dispersion of power in the merger review process is thought to induce practical challenges, but this it yet to be tested. From a constitutional law perspective, the new regime poses questions on the power of administrative fines the CBE was mandated and whether the poor drafting of public enforcement against infringements in the FRA-regulated sector would face judicial scrutiny. Lastly, the FRA is considered to be in a weakened institutional position with its new mandate of merger review given that no designated unit was established and no guidelines were published and considering the question of the qualifications required for the its staff to be capable of performing this role.

**The views expressed herein are the author's own and do not purport to reflect those of his professional affiliations.*

[1] SCC, 'Ruling in the Case No. (72) of Judicial Year 18', Egypt's Official Gazette Issue (33) (14/08/1997)

[2] SCC, 'Ruling in the Case No. (3) of Judicial Year 10', (02/01/1993); SCC, 'Ruling in the Case No. (114) of Judicial Year 21', (02/06/2001); SCC, 'Ruling in the Case No. (146) of Judicial Year 20', (08/02/2004).

[3] SCC, ‘Ruling in the Case No. (31) of Judicial Year 10’, (07/12/1991); SCC, ‘Ruling in the Case No. (36) of Judicial Year 18’, (03/01/1998); SCC, ‘Ruling in the Case No. (15) of Judicial Year 37’, (01/03/2015).

[4] SCC, ‘Ruling in the Case No. (6) of Judicial Year 44’, Egypt’s Official Gazette Issue (27)bis (09/07/2023)

This entry was posted on Monday, June 10th, 2024 at 9:30 am and is filed under Egypt, Legislation, Source: OECD

“>Mergers

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.