THE COMPETITION PROTECTION AND ANTITRUST IN KUWAIT

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From MENA to the WORLD

With Suzan Taha

In 2020, Kuwait implemented a new competition regulatory regime aimed at strengthening competition protections and introducing new merger control regulations.

LegalcommunityMENA sat down with **Abdulwahab Sadeq**, Partner at Meysan Partners, who walked us through the recent changes and their impact on businesses.

What is New on the Competition Protection and Antitrust in Kuwait?

In 2020, the Parliament in Kuwait passed a new competition regulatory regime with the objective of strengthening the competition protections, including new merger control regulations (Law No. 72/2020 for the Protection of Competition) (the "**Competition Law**").

In 2021, the Kuwait Competition Protection Authority (the "**CPA**") issued Resolution 14/2021, adopting the executive bylaws to the Competition Law (the "**Executive Bylaws**"). Subsequently, the CPA issued Resolution 26/2021 on the aggregate and individual thresholds for Economic Concentration Applications (the "**Threshold Resolution**") (the Competition Law, Executive Bylaws and Threshold Resolution are collectively referred to as the "**Competition Regulations**").

The Competition Regulations also require pre-merger applications (the "**Economic Concentration Application**") for all transactions that fall within the thresholds promulgated by the Threshold Resolution.

What are the Filing Thresholds?

An Economic Concentration Application filing is required where the underlying transaction meets any of the following thresholds:

- If any of the parties to the agreement achieves sales in Kuwait that are greater than KWD 500,000 (approximately USD 1,645,000) according to the audited statements from the last financial year;

- If the aggregate sales of the parties to the agreement is greater than KWD 750,000 (approximately USD 2,470,000) according to the audited statements from the last financial year (although the CPA Thresholds Resolution is unclear on this point, based on our reading of the CPA Thresholds Resolution in conjunction with Article 12 of the CPA Law, we are of the opinion that this condition applies to consolidated sales in Kuwait); or

- The value of the registered assets in Kuwait of the parties involved in the agreement exceeds KWD 2.5 million (approximately USD 8,225,000) according to the audited statements from the last financial year.

What is the Merger Review Process? How do you think this new law or amendment will impact current practices or regulations?

The Merger Review Process is a crucial step for companies to undergo in Kuwait before closing an agreement or transaction. The process involves submitting Economic Concentration Applications to the Competition Protection Authority (CPA) at least 60 days before closing. The CPA then reviews the application and can either approve it, conditionally approve it, or reject it. During the review, the CPA considers the impact the transaction will have on competition in the market, including consumer interests and the potential for new competitors to enter the market.

However, the lengthy timeframe for review, which can take at least 95 to 185 days, may discourage companies from proceeding with deals, especially highly sensitive transactions where leaks of sensitive information can be detrimental.

Failure to submit an application can result in penalties, including a fine of up to 10% of the parties' total revenue, legal action, and freezing of the transaction. The CPA Law further states that a settlement may be reached with the CPA allowing the CPA to impose, at its discretion, 50% of any financial penalty as part of a financial settlement where of violation of the CPA Law occurs.

What are the Implications of Low Thresholds on Merger and Acquisition Activity in Kuwait? Are there any potential challenges or difficulties that might arise in implementing this new law?

The filing thresholds are remarkably low in comparison to those of both GCC and other jurisdictions.

There is no clear exclusion for transactions carried with no direct local nexus to Kuwait. As such, it is foreseeable that most of deals conducted will trigger a technical filing requirement in Kuwait although the relative implication this would cause in the Kuwait market is minute. Requiring investors to submit an Economic Concentration Application to the CPA as an additional step in the acquisition process inhibits economic activity because it creates burdensome obligations that would not be required in neighboring jurisdictions for similar transactions. Moreover, the threshold encompasses most acquisitions, which undermines the policy objectives of competition laws that should serve to promote—rather than inhibit—a transparent and active market.

These low thresholds create an unreasonable burden for both the CPA and its employees as they are required to conduct research and exhaust its resources where, for the most part, implications of such transaction on the market are minimal. As such these thresholds are causing significant bottlenecks and delays in transactions' parties securing approvals.

Therefore, the threshold requirements of the Competition Law will invariably have an impact on investment activity in Kuwait over the medium and long-term. The stringency of regulations, and the ease with which investments are facilitated, will shape the attractiveness of Kuwait to both local and international investors, and will have an impact on the level of foreign direct investment which is so sorely needed for the transfer of capital and technological knowledge.

About Abdulwahab Sadeq

Dr. Sadeq is a New York-qualified lawyer with long experience in Capital Markets, advising companies, private equity funds and investment banks on a wide range of corporate and financing transactions. His extensive experience in banking and capital market transactions, both equity and debt.

His expertise includes equity offerings (IPOs, rights issues and block trades), securitisations, convertible and exchangeable bonds offers, debt issues, liability management transactions and regulatory capital and hybrids securities, acting both for financial institutions and issuers. He also specialises in banking transactions, financial sector private M&A and private equity investments.

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