

The UAE Competition Committee has become operational and therefore mergers and acquisitions may be subject to review in the near future

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The UAE Competition Committee held its first meeting of the year last month (on 26 March 2018) in which it discussed the development of guidelines and standards related to the implementation of UAE competition rules, including the UAE merger control regime.^[1] The UAE Competition Committee also recently joined the International Competition Network (ICN) and is likely to ramp up its competition law enforcement and review of mergers, both locally and vis-à-vis foreign companies and their international deals.

The UAE Competition Committee is open for business

In the UAE, the competent authority for competition law enforcement is the Ministry of Economy through its Competition Department, which is supported by the UAE Competition Committee. The Committee is chaired by the UAE Undersecretary of Economic Matters in the Ministry of Economy, H.E. Mohammed bin Abdul Aziz Al Shehhi.

At its March meeting, the UAE Competition Committee discussed credit card company fees for retail transactions and a market study in the film industry, thus demonstrating its move towards regular enforcement of the country's competition rules.^[2]

A delegation from the UAE Competition Committee also participated at the ICN's annual meeting in New Delhi earlier this year. In particular, the Committees' Director, Secretary and Consumer Disputes Manager were in attendance. The ICN brings together over 130 competition agencies from around the world and provides a specialized venue for maintaining regular contacts and addressing practical competition concerns (through telephone, teleseminars and webinars as well as via live meetings with dedicated workshops and an annual meeting).

Participation in the ICN's activities provides the UAE Competition Committee the opportunity to discuss working group projects and their implications for enforcement (and, in turn, to adopt ICN recommendations or best practices arising out of these projects). In particular, the UAE Competition Committee will be able to participate in the ICN's merger working group a very active forum for agencies to exchange experiences and best practice regarding the review of mergers and acquisitions.

The UAE merger control regime

The UAE's merger control regime has technically been in force for a few years now. However, Cabinet Decision No. 13 of 2016 established the jurisdictional threshold triggering a mandatory notification requirement thereby dealing with an omission in Federal Law No. 4 of 2012 concerning the Regulation of Competition.^[3]

A merger or acquisition must be notified if the overall market share of the involved parties in the relevant market exceeds 40% and the concentration may affect competition. It depends on the definition of the relevant market whether the relevant threshold is met (for example whether both online and offline sales should be considered as belonging to the relevant market).

Potentially qualifying mergers are referred to by the Competition Law as "economic concentrations", covering transactions such as mergers, acquisitions of assets, proprietary rights, usufruct or shares (whether directly or indirectly), joint ventures and possibly minority shareholdings.

Where the threshold is met, a notification is technically required and the parties appear to have a deadline within which the notification must be filed.^[4] Notification is also suspensory meaning the parties, following notification, must not carry out any action or procedure to complete the deal before the concentration has been formally cleared (i.e., avoid "gun-jumping"). Failure to comply with these requirements may lead to fines of up to 5% of annual sales in the UAE in the preceding year.

In its substantive assessment, the Ministry will focus on the level of competition in the relevant market, barriers to entry, the impact on prices, the possible creation of a dominant position, the creation of national champions and the impact on consumer interests.

As of today, it is unclear whether the UAE Competition Committee is prepared to consider merger control notifications as it has not released the relevant forms, nor has it published any decisions. The Competition Law states that a notification must be made "according to the form prescribed for this purpose". However, in its last meeting the Committee also discussed the development of guidelines and standards related to the implementation of the UAE Competition Law, including in relation to mergers and acquisitions.^[5]

Importantly, foreign investment rules in the UAE are likely to create a far higher burden than is the case in most other jurisdictions. In particular, the UAE contains specific regulations regarding certain industries. As such, early legal advice should be sought to determine whether competition or other sector-specific rules are applicable in industries such as telecommunications, financial services, cultural activities, oil and gas, pharmaceutical, postal, electricity, water, sewage, and transport services. Possible exemptions also apply to businesses that are at least 50% owned by federal or Emirate governments as well as certain small and medium-sized businesses.

Other merger regimes in the Gulf region

There are other competition law and merger control regimes in the Gulf Cooperation Council (GCC).

In particular the Council of Competition in the Kingdom of Saudi Arabia^[6] has been operational since 2014, reviewing local and foreign-to-foreign mergers and acquisitions. The Saudi Council of Competition is active internationally through the ICN and social media (including by subtitled in English their competition law compliance videos on a YouTube channel).

The following regional countries also have competition regimes and their competition agencies are members of the ICN: the Kuwait Competition Protection Authority,^[7] the Qatar Committee for the Protection of Competition and Prohibition of Monopolistic Practice,^[8] the Yemen Public Administration to Promote Competition and Prevent Monopoly and Commercial Fraud,^[9] The Oman Public Authority for Consumer Protection is not a member of the ICN but its competition law contains provisions similar to those in Kuwait.^[10]

Conclusion

While there are some similarities with other foreign merger regimes, overall the UAE merger regime is different. The Competition Committee operates within the Government ministry and the applicable substantive rules often include public interest aspects. In particular, the UAE will look at how the deal can "contribute to investment promotion, export promotion or supporting the capacity of national establishments to compete on an international level".

Going forward, companies doing deals (regionally or internationally) that may affect the UAE (and that result in significant market shares) will need to consider carefully whether to make a notification to the UAE Competition Committee. Careful and coordinated cross-practice and locally-aware advice will be pivotal for determining whether the competition rules and/or other sector-specific rules apply.

[1] See the UAE Ministry of Economy's calendar, available here.

[2] See press articles in Arabic, available here, here and here.

[3] The UAE Competition Law is available here.

[4] It is unclear whether there is a deadline for notification. Under the 2012 Competition Law, a concentration must be notified to the Ministry a minimum of 30 days before the date of completion. However, the Cabinet Decision No. 37 of 2014 provides that a relevant concentration must be notified at least 30 days from the date of concluding the draft contract.

[5] See press article in Arabic, available here, which translates as follows: "... The Committee has confirmed that it will continue its efforts ... to clarify the dominant position, economic concentration, merger, and other subjects related to competition ...".

[6] The Saudi Council of Competition website is available here.

[7] In Kuwait, a competition law was introduced in 2007. A merger filing is required where a market share of more than 35% is acquired or strengthened.

[8] The Qatar Competition Protection and Anti-Monopoly Committee has an active website, and is at the Ministry of Economy and Commerce. The competition law was introduced in 2006. For merger filings, the Law says that companies should request a decision from the Committee when a corporate deal occurs "in such a way as to control or dominate the market".

[9] The Yemen competition law is available here.

[10] The Oman Public Authority for Consumer Protection has an active website here. The competition law was introduced in 2014. A filing is required if an entity has a possibility to control or influence 35% or more of a relevant market.

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