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Kuwait

Merger Control

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Kuwait.

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Kuwait: Merger Control

1. Overview

In Kuwait, the merger control issues are governed by Law No 72 of 2020 and its regulations ("**Kuwait Competition Law**"). The Kuwait Competition Law was a significant milestone in the antitrust sector that has since resulted in a substantial increase in activity by the Kuwait Competition Protection Agency ("**Kuwait CPA**").

The Kuwait Competition Law replaced its dormant predecessor, Law No. 10 of 2007, significantly expanding and enhancing the rules governing competition in Kuwait. The Kuwait Competition Law provides significantly greater guidance and regulation surrounding competition. It has particularly impacted most M&A deals in the region and even globally, where the modest statutory thresholds are met. While it is yet to be seen in practice, the Kuwait Competition Law operates within the context of international treaties and agreements existing in Kuwait. Thus, treaties and agreements with the Kuwaiti government supersede any provisions that would otherwise apply under the Kuwait Competition Law.

2. Is notification compulsory or voluntary?

Save as discussed below, any transactions meeting the prescribed thresholds outlined in the Kuwait CPA's Resolution No. 26 of 2021 requires the submittal of an economic concentration application with the Kuwait CPA within at least 60 days from the date of the contract or agreement regarding the transaction.

The Kuwait Competition Law exempts certain activities from being deemed economic concentrations, such as group restructurings, acquisitions resulting from insolvency, default, debt restructuring, or acquisitions by traders intending to re-sell the asset within one year. If an exemption applies, the parties to the concentration are not required to file with the Kuwait CPA so long as they adhere to the regulatory requirements set forth by the Kuwait CPA. It is not uncommon for the parties to the economic concentration to seek confirmation from the Kuwait CPA via a pre-notification process where it is unclear whether an exemption applies to the transaction.

3. Is there a prohibition on completion or closing

prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Parties to a concentration are prohibited from implementing the concentration before obtaining approval from the Kuwait CPA.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The following types of transaction are deemed notifiable subject to the Kuwait Competition Law:

- a. The merger of two or more persons by amalgamation or by combination, or merger of parts of persons, resulting in acquiring control or acquiring more control;
- b. The acquisition, by one or more persons, or direct or indirect control over the entire, or parts of another, person or persons, whether by acquisition of any assets, property rights or usufructs, by purchase of shares or liabilities, or by any other means; or
- c. The joint venture of two or more persons, resulting in performing, on a lasting basis, an autonomous economic or commercial activity, regardless of its legal form or the activity to be practiced.

Article 1 of the Kuwait Competition Law defines "control" as "the legal or contractual relationship which, either separately or in combination, results in exercising decisive influence."

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

Notification is not solely based on the percentage of interest acquired but on whether the acquisition grants the buyer "control" over the target (See response 4 above).

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that

apply to particular sectors?

The Kuwait Competition Law applies to acts committed inside or outside Kuwait whenever such actions prevent, restrict, or distort free competition in Kuwait.

The current jurisdictional thresholds are as follows, per Resolution No. 26 of 2021:

- Where one of the parties to the concentration achieve annual sales in Kuwait exceeding KWD 500,000, according to the audited financial statements of the last fiscal year before the concentration
- Where the parties to the concentration collectively achieve aggregate annual sales exceeding KWD 750,000, according to the audited financial statements of the last fiscal year before the concentration
- Where the value of the registered assets of the parties to the concentration in Kuwait exceeds the value of KWD 2.5 million, according to the audited financial statements of the last fiscal year before the concentration

No distinct thresholds apply to specific sectors under the Kuwait Competition Law. It establishes a uniform set of thresholds that are applicable across all industries.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

The thresholds are established based on the audited financial statements of the parties to the economic concentration (i.e., the buyer and the target).

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

The Kuwait Competition Law does not stipulate a specific exchange rate for converting turnover and asset values. However, in cases where parties are considering using the method of paying one-tenth (0.1%) of combined assets as the method of calculating the Kuwait CPA filing fee, the parties to the economic concentration must obtain an official report from an asset evaluator (e.g., an auditing firm) licensed by the Kuwait Capital Markets Authority ("Kuwait CMA").

9. In which circumstances are joint ventures

notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

See response 4 (subparagraph (c)) above.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

The Kuwait Competition Law does not provide for such circumstances. However, if a transaction is structured in stages, each stage may be separately notifiable if it independently meets the notification thresholds. The Kuwait CPA assesses transactions based on change of control, turnover, and local market impact criteria.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

While the Kuwait Competition Law does not provide for a nexus test, the current stance adopted by the Kuwait CPA primarily emphasizes the relevance of the connection with Kuwait. Notification requirements are not required where there is no discernible connection with Kuwait per the CPA's position. See also response 6 above.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

N/A

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

Substantive Test:

When considering an application, the Kuwait CPA considers the following standards:

- maintaining and encouraging effective competition amongst competitors in the market;

- enhancing the interests of consumers
- concerning the quality and price of the relevant products; and
- encouraging, through competition, reducing costs, developing new products, and facilitating the access of new competitors to the market.

The executive director at the Kuwait CPA assigned to an application considers the following elements while reviewing the application.

- Studying the products according to the following: comparing the products subject to the following:
 - transaction with other similar products in the market; and
 - the availability of substitute products to consumers;
- Determining the possibility of competition within a relevant geographic area with the following standards in mind:
 - the ability of the consumer to move from one geographic area to another;
 - the ability of vendors to make changes based on the moving of purchasers between various geographic areas due to the relative change in the prices or other competitive factors;
 - barriers to entering the relevant market;
 - costs of moving between geographic areas; and
 - customs and administrative restrictions at the local and foreign levels;
- The market share of the relevant persons;
- Revenues and assets of relevant persons;
- Actual or possible competitiveness in the relevant market;
- The extent of ease of entry into the relevant market;
- The possible influence on prices of relevant commodities or services;
- The barriers to entry affecting new or potential competitors;
- The possibility that a dominant position in the relevant market is created;
- The possible influence on creativity, innovation, and technological efficiency;
- The extent of the impact on investment or export encouragement; and
- The impact on consumers' interests.

14. Are factors unrelated to competition relevant?

No, factors unrelated to competition are not relevant.

15. Are ancillary restraints covered by the authority's clearance decision?

As of the present date, the Kuwait CPA has not provided specific guidelines or addressed the matter of ancillary restraints within its regulatory framework.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

As mentioned in response 2 above, parties to an economic concentration are obliged to submit an economic concentration application before Kuwait CPA within at least 60 days from the date of the contract or agreement regarding the transaction.

17. What is the earliest time or stage in the transaction at which a notification can be made?

While there is no officially mandated earliest time or specific stage at which a notification must be made, it should occur once there is sufficient certainty that the transaction will proceed, usually when parties have reached an agreement in principle or signed a definitive agreement.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

While pre-notification discussions with the Kuwait CPA are not obligatory, it is worth noting that many parties involved in economic concentrations choose to initiate the process by applying for a meeting before formally submitting their application. This practice is particularly prevalent in complex or high-profile transactions or foreign-to-foreign transactions.

19. What is the basic timetable for the authority's review?

Once an application is submitted, the chairman of the Kuwait CPA must refer the application to the executive director of the Kuwait CPA within 5 days, plus any

additional time in the event additional information is requested from the applicants.

The executive director then has 90 days to study the application and prepare a report to the board of the Kuwait CPA. The board of the Kuwait CPA may extend this 90-day limitation upon request from the executive director of the Kuwait CPA for another 90-days.

The total timeline for a decision to be rendered from the time an application is properly submitted is an estimated 4 months. The actual time, however, may vary depending on follow-up requests for additional information, requests for additional time by the executive director, or objections raised by third parties.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

In the event of any objection by a third party, the period for evaluating and deciding on these objections is not included within the 90-day limit typically imposed on the executive director of the Kuwait CPA during the review phase. The same principle applies when there is a need for additional information or documents.

21. Are there any circumstances in which the review timetable can be shortened?

There is no formal method for expediting or accelerating the procedure of review of an economic concentration application.

22. Which party is responsible for submitting the filing?

The Kuwait CPA filing is a combined submission that involves all concerned parties—Buyer, Target, and Seller. Generally, one party (usually the Buyer), takes the lead in the filing process, but cooperation from all other parties to the concentration is required to ensure their commercial data and input is included.

23. What information is required in the filing form?

The filing form must be submitted in Arabic and should include the following essential information:

A) Information about the concentration parties:

- Names of the parties to the concentration

operation, memoranda of association, articles of association, if any, commercial licenses, and the commercial register.

- The activity of the parties to the concentration operation.
- Addresses, phone numbers, and emails of the parties to the concentration operation.
- Name, title, ID copy, phone number, and email of the liaison officer at the parties of concentration.
- Capital.
- The most important customers and their percentages in the market.
- Volume, value, and percentage of sales in the market.
- A description of competitors and their shares in the market.

B) Data of concentration operation:

- Kind of concentration- merger, acquisition, a joint venture.
- Describing whether concentration relates to all or some parties under concentration.
- A brief explanation of the economic and financial structure of concentration.
- Proposed or expected date for any important procedures relating to the completion of the concentration operation.
- The proposed ownership structure and the decisive influence after the end of the concentration operation.
- Relevant products of concentration, volume and percentage of sale.
- Relevant market and its volume.
- Products in which the concentration applicant deals.
- Positive impacts of concentration.
- Negative impacts of concentration and proposed procedures to reduce such impacts.
- Affected markets because of concentration operation.
- Factors influencing access to the market. Nature of distribution channels.
- Factors affecting price fixation during the past five years.
- The volume of available productive capacity and percentage of usage.
- The volume of demand for products and their structure.
- Alternative products.
- Concentration value in Kuwaiti dinars, provided that it shall include the purchase rate and the value of all relevant assets.

C) Ownership and decisive influence:

- All persons who have a decisive influence on participants in the concentration operation, whether directly or indirectly, shall be determined, and the nature of such influence and its methods shall be described.
- All persons dealing in any affected market where participants in the concentration operation or any other person enjoy a decisive influence on that market, directly or indirectly. The nature and methods of such influence shall be determined.

24. Which supporting documents, if any, must be filed with the authority?

The following documents shall be attached to the economic concentration application:

- The report of the asset appraiser-, provided that it shall belong to one of the auditing offices approved by Kuwait CMA with the payable fee of one per-mille (0.1%) of the paid-up capital, or of the combined assets of the relevant persons in Kuwait, whichever is less, provided that it is not more than one hundred thousand dinars (only in the case where the parties to the economic concentration choose to calculate the filing fee based on their assets instead of the paid-up capital).
- Receipt of the fee payment.
- Memorandum of association or articles of association- if any – for the persons involved in the concentration operation, the certificate of the commercial register, and the commercial license.
- Name of the company's director, names of the directors of the board or the legal representative of the person.
- Financial statements for the last two fiscal years for all relevant persons in the economic concentration operation and all its branches.
- The draft of the contract or agreement of the economic concentration, and any other public or private offering documents, number of shares or assets that will be acquired.
- A report containing the economic aspects of the concentration application.

25. Is there a filing fee?

Yes, there is a filing fee, and the economic concentration application must be accompanied by a receipt for payment of a fee equal to the lesser of (i) one-tenth (0.1%) of the paid-up capital, (ii) one-tenth (0.1%) of the

combined assets of the relevant persons in Kuwait, or (iii) KWD 100,000.

26. Is there a public announcement that a notification has been filed?

The Kuwait CPA publishes a summary of the economic concentration application on the website of the Kuwait CPA and in the official gazette and two local daily Arabic newspapers for any potential third-party objections.

27. Does the authority seek or invite the views of third parties?

Yes, see response 26 above.

Every interested person is entitled to submit a justified objection to the Kuwait CPA against the economic concentration application within 15 days of notice or publication date. If an objection is filed, the applicant has 15 days from the date of notice of the objection to provide its statements and documents in reply to the objection.

28. What information may be published by the authority or made available to third parties?

As mentioned in response 27 above, the notification of a concentration is disclosed to the public immediately after receiving the application. The Kuwait CPA publishes the names of the undertakings involved and the nature of the concentration.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The Kuwait CPA has the authority to independently initiate research, investigations, evidence collection, and inquiries per the provisions of the Kuwait Competition Law.

The General Authority for Competition in the Kingdom of Saudi Arabia also announced the initiative to prepare a draft of the GCC Competition Law, which envisions fostering cooperation among competition authorities within the GCC.

We consistently collaborate with clients who submit filings across multiple GCC jurisdictions, ensuring a seamless and efficient process in each jurisdiction.

30. What kind of remedies are acceptable to the authority?

From a disciplinary standpoint, there is no formal initiation point for when parties may begin negotiating remedies with the authorities. However, the Kuwait CPA may propose its own remedy but may impose remedies not agreed between the parties that it otherwise has the authority to impose.

31. What procedure applies in the event that remedies are required in order to secure clearance?

See response No. 30 above.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

The Kuwait Competition Law established a disciplinary board tasked with deciding disciplinary actions referred to it by the Kuwait CPA concerning violations of the Kuwait Competition Law and complaints filed by various stakeholders. The disciplinary board may impose financial penalties of no more than 10% of the total revenues earned by the parties to the economic concentration during the previous fiscal year in the event of failure to submit the concentration application or for providing misleading or incorrect information on an application.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

See response No. 32 above.

The Kuwait CPA is entitled to take corrective action for violations of the Kuwait Competition Law. In a recent

case, the Kuwait CPA's disciplinary board fined a company an amount equal to 5% of its total revenues. This penalty was imposed because the company engaged in an economic concentration without submitting the required application to the Kuwait CPA.

34. Can the authority's decision be appealed to a court?

Yes, a final decision by the Kuwait CPA may be appealed to the judicial system in Kuwait by way of a formal writ of summons against the authority. There is a dedicated department within the judicial court system devoted to complaints filed involving governmental authorities.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

As mentioned in response 29 above, the Kuwait CPA can independently launch research, investigations, and evidence gathering in line with Kuwait's Competition Law. While the Kuwait CPA actively engages in these activities, the precise procedures for conducting such investigations have yet to be publicly disclosed.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

We anticipate that the Kuwait CPA will increase the jurisdictional thresholds given the significant number of economic concentration filings submitted to the Kuwait CPA. We expect these potential amendments will address the overwhelming volume of filings and streamline the process, ensuring that only transactions of greater significance are subject to scrutiny and evaluation by the Kuwait CPA. Such adjustments should balance efficient regulation and appropriate oversight of economic concentration activities.

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