NAVIGATING THE NEW UAE COMPETITION LAW: MOVING TOWARDS EU PRINCIPLES? PART 2—UAE MERGER CONTROL VS. EU MERGER REGULATION

Date: 14 October 2024

UAE Antitrust, Competition, and Trade Regulation Alert

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On the merger control front, the New Competition Law[1] introduced a new turnover threshold, in addition to the existing market share threshold, in the context of regulating economic concentrations (as defined below) between undertakings. The introduction of a turnover threshold is welcome, as it enhances predictability in the assessment of whether a particular company needs to file a notice through the UAE Ministry of Economy (Ministry).

The New Competition Law introduces a mandatory pre-closing filing regime, pursuant to which the parties must notify the Ministry a reportable economic concentration at least 90 days before completing the proposed economic concentration. The Ministry would then review the economic concentration application, within a defined timeline, and issue a reasoned opinion approving the economic concentration (with or without conditions), rejecting the application, or announcing that the notification conditions do not apply to the proposed economic concentration. During the review period, the relevant undertakings are prohibited from performing any acts or procedures to prematurely complete the economic concentration operations.

Just like in the European Union, for a transaction to trigger a filing under the New Competition Law, two sets of conditions must be met. First, the transaction must qualify as an “economic concentration.” This includes any transaction that results in the partial or full transfer of ownership or usufruct of one undertaking's shares, property, assets, or obligations to another and consequently giving one or more undertaking(s) direct or indirect control over one or more other undertaking(s), which would be deemed an “economic concentration.” It is our view that typical mergers and acquisitions transactions, joint venture (whether incorporated or not), asset transfer, or assignment arrangements are examples of economic concentration acts.

Second, the transaction that qualifies as an economic concentration must also satisfy one of the following notification thresholds:

Turnover Threshold

The total annual sales of the concerned undertakings (in the relevant market during the last fiscal year) exceeds an amount to be determined by the UAE Council of Ministers. The applicable turnover threshold is not yet known until the New Competition Law's implementing regulations (Executive Regulations) are published.

Market Share Threshold

The combined market share of the concerned undertakings' transactions, as compared to the total transactions in the relevant market during the last fiscal year, exceeds the percentage to be determined by the Council of

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Ministers. Until the new Executive Regulations are published, the current market share threshold percentage is set at 40% of total transactions in the relevant market.

The European Union also contains a two-prong test in determining whether any particular transaction must be notified. First, the transaction must constitute a notifiable concentration, which in the European Union is defined as the acquisition or change of control. Second, the notifiable concentration must also satisfy certain specific turnover-based thresholds.

- The first set of thresholds in the European Union is determined by reference to the turnover from sales of the undertakings concerned and requires that: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and (ii) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million; unless (iii) each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU member state.
- The second (and alternative) set of turnover thresholds requires that: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion; (ii) in each of at least three EU member states, the combined aggregate turnover of all of the undertakings concerned is more than €100 million; (iii) in each of at least three of these member states, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and (iv) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million; unless (v) each of the undertakings concerned achieves more than two-thirds of its EU-wide turnover within one and the same EU member state.

If the EU thresholds are not met, the transaction may still be notifiable under the national merger control laws of the EU member states. Moreover, under certain circumstances, one or several EU member states, on their own initiative or upon the invitation of the European Commission, may refer the transaction and request the European Commission to examine the transaction under Article 22 EU Merger Regulation.

PENALTIES

Undertakings failing to notify the Ministry of an economic concentration, despite meeting the filing conditions, will be subject to fines of not less than 2% and up to 10% of the total annual sales of the goods or service revenue realized by the violating parties in the United Arab Emirates during the last financial year. As for the premature implementation of notifiable concentrations, such violation is subject to a fine ranging between AED50,000 to AED500,000 (approximately €13,000–€130,000).

In the European Union, the failure to notify or the premature implementation of notifiable concentrations—i.e., a gun jumping violation—can result in the imposition of fines of up to 10% of the undertaking's global annual turnover in the last financial year. The European Commission has been aggressively pursuing gun-jumping violations and has not hesitated to impose hefty fines on the infringing company.

FOOTNOTES

[1] Federal Decree-Law No. 36 of 2023 on the Regulation of Competition.

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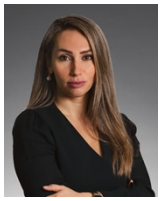
KEY CONTACTS



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