



The Meysan Lighthouse Series Thoughts on Legal Reform

**Aligning Kuwait's Competition Law
with Global Standards**

Competition Protection Agency
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Dear Commissioners:

We extend our warmest greetings to you.

As you may be aware, in March 2022, Meysan commenced the publication of its Lighthouse Series, a series of articles describing various Kuwaiti laws and regulations that are in need of reform. As we said in March, our intention is not to make subjective assessments with which others may disagree. Rather, it is simply to list the facts as they currently exist in a number of leading offshore commercial centers and contrast them with those that exist in Kuwait. Since lip-service is often paid to Kuwait seeking to become a “leading” commercial and financial center, for purposes of our analysis, we choose jurisdictions that are, today, among the global commercial leaders.

Today, we write to you in relation to the Kuwait Competition Protection Authority (the “**CPA**”). In particular, we wish to focus on the threshold requirements in your regulations which trigger the requirement for parties to a transaction to make a competition filing.

The importance of these thresholds cannot be overstated for the following reasons:

- First, the threshold requirements of the Competition Law will 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.
- Second, setting the thresholds too low will create delays and bottlenecks since the CPA will be required to review a higher volume of applications. The risk of this has already been demonstrated to us. On a number of international deals on which we have been involved, the low threshold requirements have significantly delayed closing of such deals. In almost all cases where competition approvals are required from multiple countries, the CPA's approval has been the last approval to be secured by the relevant parties, even where the Kuwaiti investor holds the least number of shares in the target entity or the Kuwaiti component is the smallest aspect of the deal. As a consequence of such delays, there is a growing concern that the relevant parties are more inclined to refrain from seeking CPA approval, particularly where Kuwaiti revenues of the target are small. We believe this undermines the credibility and authority of the CPA.

We applaud the efforts of the CPA to regulate competitive activity in Kuwait. However, through our familiarity with international transactions and the competition thresholds of other countries, we believe we have an obligation to share with you how dramatically lower Kuwait's threshold requirements are.

Background

In 2020, Kuwait's Parliament enacted a 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 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 apply to both business activities conducted in Kuwait and any agreement made outside Kuwait that result in the prevention, restriction, or is harmful to the freedom of competition. Furthermore, 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.

Economic Concentration Application

The parties involved in any agreement¹ that meets any of the three thresholds set forth in the Threshold Resolution must file an Economic Concentration Application with the CPA. The parties must submit all corporate and management documentation, and an asset valuation report (to be prepared by one of the auditing firms accredited by the Capital Markets Authority in Kuwait). A fee is to be paid to the CPA by way of a cashier cheque and calculated as the lesser of: (i) 0.1% of the paid capital of the parties; and (ii) the aggregate value of the assets of the parties in Kuwait, subject to a cap of KWD 100,000 (approximately USD 330,000). Also required are: the audited financial statements for the last two years for the parties involved, a draft of the underlying agreements, a report on the economic impact of the transaction, and a copy of all financial assessments conducted on the underlying transaction.²

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;

1. Article 1 of the Competition Law defines "agreement" as to include all agreements, contracts, decisions, arrangements, business dealings, behavior, coalitions, conduct between two or more people, cooperation between groups, decisions made by groups, whether oral or in writing, express or implied, public or private, or direct or indirect.
2. Economic Concentration Application form issued by the CPA.

- 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.³

Impact of the Merger Review Process

The Competition Regulations provide that the Economic Concentration Applications must be submitted by the parties at least 60 days prior to closing the underlying agreement or transaction. Upon reviewing the application, the CPA may grant one of the following (i) approve the application (ii) conditional approval, or (iii) reject the application. Whilst undergoing a review of the proposed transaction the CPA will consider: the projected impact this may have on the preservation of competition subject to the respective market the parties operate in. Which includes the interest of the consumers (price and quality ratio); and the impact this transaction may have in encouraging reduction of cost, advancement of new products or the entry of new competitors.

The timeframe set by the CPA to review the Economic Concentration Application is lengthy and can be at least 95 days to 185 days.⁴ A decision from the CPA will be issued within this timeframe (from our experience the likely period of response may reach 185 days) depending on when the board of the CPA is able to convene to issue a decision. Even if the competent departments conclude their studies, the final decision must be issued by the board of directors of the CPA which meets usually monthly.

As a consequence, companies will likely lose motivation to effect deals due to the lengthy process of the application and timeframe for response. The longer completion of the transaction is delayed by the review process, the more likely sensitive information leaks to the public which creates further barriers for highly sensitive transactions. Given that global economics fluctuate rapidly, delays also impact pricing and currency rates involved which are detrimental to the transaction. As such, investors are less inclined to engage in transactions involving Kuwait. This serves as an obstacle for the growth of the Kuwait economy and hinders healthy competition.

Failure to submit an Economic Concentration Application entitles the CPA to apply a wide array of penalties and measures against the parties to the transaction and/or affecting the transaction. The penalties are as follows:

- A penalty equal to 10% of the total revenues of the transaction parties for the last financial year;
- Legal action engaging the liability of the management of the parties who violated the CPA Law; and

3. CPA resolution 26/2021 on the aggregate and individual thresholds for Economic Concentration Applications

4. Article 58 of the Executive Bylaws

- The CPA may instruct the regulators in Kuwait to freeze the completion 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.

The key concerns arising from this process are (i) the impact on the transaction timeline given the time the CPA may take to approve the transaction, and (ii) the disclosure of the transaction to the public as the process involves the publication of a transaction notice (high level description of the transaction only) in at least two daily newspapers and on the CPA's website. The purpose of the publication is to allow an objection period of 15 days for interested parties who may object to the transaction if valid grounds exist (we note that the 15-day period is excluded from the computation of the 95 days allocated for the CPA to examine the application).

Pre-Notification Application

Parties can submit to the CPA a request for consultation prior to making a full submission of an Economic Concentration Application. The consultation process will require submission of information and documents to the CPA. At the end of the consultation process, the CPA may decide to cause the parties to submit the full application or elect to waive the application submission if they are convinced that the thresholds are not met. The timeline for a consultation process is 5 days according to the Executive Bylaws but it remains at the discretion of the CPA to extend it, which is usually the case.

While the purpose of the consultation is, from a policy objective, to provide transaction parties assurance that an Economic Concentration Application will not be required, in practice, the CPA has never provided any such assurance and, as a matter of custom, requires parties to make such Economic Concentration Application in all cases prior to making any determination. This renders the process for a pre-notification application almost pointless.

Implications of Low Thresholds on Merger and Acquisition Activity in Kuwait

As shown in Annex A, the filing thresholds are remarkably low in comparison to those of both GCC and other jurisdictions.

First, there is no clear exclusion for transactions that have 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. Competition Regulations thus have a widespread effect on business conduct throughout the economy. It is safe to say that most investors implementing an acquisition strategy will likely have achieved at least KWD 500,000 in sales, and thus 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.

Second, it is widely interpreted that “sales”, as referred to in the Thresholds Resolution, encompasses all operational transactions that meet the value mark set out above and trigger the requirement for an Economic Concentration Application. 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. In our experience on transactions over the past year, the duration to obtain approvals in Kuwait have taken approximately four to six months, when other jurisdictions are taking two to three months.

Filing Threshold in Other Jurisdictions

The merger control guidelines in other jurisdictions varies but, as you will see in Annex A, the thresholds in Kuwait are remarkably lower than almost all other jurisdictions around the world.

For example, in Saudi Arabia, the parties of a transaction must apply to the General Authority for Competition 90 days prior to the closing of the transaction if the value of the total annual sales of the parties involved in the transaction exceeds SAR 100,000,000 (one hundred million Saudi Riyals) which is approximately KWD 8,200,000. This threshold is more than ten times larger than the threshold in Kuwait. Likewise, in the United Arab Emirates, the participating parties are required to apply to the Ministry of Economy within 30 days from the date of finalizing the draft of the definitive agreements if the market share of the participating parties, collectively, exceeds 40% of the relevant market, which is an even remarkably higher threshold.

On the other hand, in Singapore, notifications to the Competition and Consumer Commission of Singapore are not mandatory. Nevertheless, the participating parties of the economic concentration transaction must conduct a self-valuation of the outcome of the transaction, based on the Guidelines on Merger Procedures 2012 to examine if there is a substantive impact on the competition or not. There are demonstrative thresholds that the Competition and Consumer Commission of Singapore considers when analyzing the economic concentration transaction. These thresholds are (1) if the market share of the target entity exceeds 40% or (2) if the market share of the target entity is in the range of 20-40% and after the economic concentration transaction the combined market share of the three largest companies on the market is not less than 70%.

We believe that Kuwait should be a compelling jurisdiction for foreign direct investment and transactional activities. We have actively advised on foreign investors on the investments into Kuwait, but have almost not routinely faced shock on their part with respect to the cumbersome competition filing thresholds that we have described in this note. This is regrettable.

We believe that, as a small country, Kuwait should aspire to create the “soft” power that comes with having a disproportionately higher economic importance than its size suggests. Not in oil reserves, but in commercial importance. We understand that you have a heavy policy agenda and many competing priorities to address. We would suggest, however, that—in order to create reform—one must start with the basics.

Sincerely,
Meysan Partners

Annex A: Comparison of Competition Filing Thresholds

	Kuwait	Kingdom of Saudi Arabia (KSA)	United Arab Emirates (UAE)	Singapore
Pre-merger notification	The parties involved in any agreement which meets the thresholds must file an Economic Concentration Application with the CPA.	The parties of a transaction must apply to the General Authority for Competition 90 days prior to the closing of the transaction if the threshold is triggered.	The participating parties are required to apply to the Ministry of Economy if the market share of the participating parties, collectively, exceeds 40% of the relevant market.	The participating parties of the economic concentration transaction must conduct a self-valuation of the outcome of the transaction, based on the Guidelines on Merger Procedures 2012 to examine if there is a substantive impact on the competition or not.
Is it mandatory to file the notification?	Mandatory	Mandatory	Mandatory	Voluntary
Timing to submit the notification	60 days prior to the date of drafting the definitive agreements or entering into an agreement.	90 days prior to closing.	30 days from the date of finalizing the draft of the definitive agreements.	There is no deadline for notifications. However, the CCCS might not accept any notifications after the closing of the transaction.
What is the threshold?	<ul style="list-style-type: none"> 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 	The value of the total annual sales of the parties involved in the transaction exceeds SAR 100,000,000 (one hundred million Saudi Riyals) which is approximately KWD 8,200,000.	4% of the relevant market.	<p>There are demonstrative thresholds that the Competition and Consumer Commission of Singapore ("CCCS") considers when analyzing the economic concentration transaction.</p> <p>These thresholds are: (1) if the market share of the target entity exceeds 40% or (2) if the market share</p>

Annex A: Comparison of Competition Filing Thresholds (continued)

	Kuwait	Kingdom of Saudi Arabia (KSA)	United Arab Emirates (UAE)	Singapore
	<p>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</p> <ul style="list-style-type: none"> 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. 			<p>of the target entity is in the range of 20-40% and after the economic concentration transaction the combined market share of the three largest companies on the market is not less than 70%.</p>
Penalties in case of failure to apply	<p>Failure to submit an Economic Concentration Application entitles the CPA to apply a wide array of penalties and measures against the parties to the transaction and/or affecting the transaction. The penalties are as follows:</p> <ul style="list-style-type: none"> A penalty equal to 10% of the total revenues of the transaction parties for the last financial year; Legal action engaging the liability of the management of the parties who violated the CPA Law; and The CPA may instruct the regulators in Kuwait to freeze the completion of the transaction. 	<p>Failure to file a pre-merger notification may cause the parties to be fined up to 10% of the total annual sales value of the products or services subject of the violation.</p> <p>However, the fine may not exceed 10 million riyals in case GAC or the parties could not determine the annual sales.</p>	<p>Penalties are from 2-5% of annual total turnover of goods or services in the relevant market of the participating parties.</p> <p>However, a fine between AED500,000 to AED5 million shall be imposed if the turnover of the participating parties could not be determined.</p>	<p>There are no penalties if the parties do not notify the CCCS. However, the CCCS is entitled to inspect the transaction and impose penalties up to 10% of the turnover of the participating parties for three years or impose directions such as revoking the transaction.</p>